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**SHELFORD'S**

# **REAL PROPERTY STATUTES,**

**INCLUDING**

**THE PRINCIPAL STATUTES RELATING TO**

**Real Property**

**PASSED IN THE REIGNS OF**

**KING WILLIAM IV. AND QUEEN VICTORIA;**

**WITH**

**NOTES OF DECIDED CASES.**

**EIGHTH EDITION,**

**BY**

**THOMAS H. CARSON, M.A.,**

**OF LINCOLN'S INN, BARRISTER-AT-LAW.**

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## PREFACE TO THE EIGHTH EDITION.

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THE changes which have been made in the present Edition require a few words by way of explanation. It seemed that something might be done to render the matter already contained in the book more available for use ; and the requisite additions, in the shape of cases decided and statutes passed since the publication of the last Edition, were considerable. On the other hand, it was important that the bulk of the Volume should not be materially increased.

It will be found accordingly that the Precedents contained in the last Edition have been omitted. The extracts from the Reports of the Real Property Commissioners and some of the older cases have been abridged or condensed. The matter of the notes has been rearranged, and the number of marginal notes has been increased. A new Table of Contents and Index have been made, and a Table of Statutes, arranged in chronological order, has been added.

Several statutes relating to land have been passed since the publication of the last Edition ; and of these the Editor has only incorporated such as seemed to him to come properly within the scope of the Work. The Land Registry Act and the Declaration of Title Act, 1862, were not incorporated by Mr. Shelford in the last Edition. Since that date the public have not availed themselves to

any large extent of the provisions of these Statutes. The system established by the Land Registry Act was condemned in the Report of the Royal Commission in 1870; and further legislation on this subject is said to be impending. The Editor has not therefore inserted either of these Statutes in the present Edition.

The cases have, by means of the Addenda, been brought down to the end of October, 1873.

THOMAS H. CARSON.

89, CHANCERY LANE,

*Nov.* 1873.



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c. 83, s. 2 ..	.. 567	c. 66, s. 25 ..	.. <i>Add.</i>

## ADDENDA.

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- Page 40, line 36.—*Johnson v. Barnes* is now reported L. R., 7 C. P. 592; and has been affirmed, L. R., 8 C. P. 527.
- „ 51, line 1.—36 & 37 Vict. c. 75, continues the inclosure commission until the 1st August, 1874.
- „ 67, line 44.—As to the remedies for injury caused by obstruction of a highway, see also *M'Carthy v. Metropolitan Board of Works*, L. R., 8 C. P. 191; *Bigg v. Corporation of London*, L. R., 15 Eq. 376.
- „ 79, line 20.—As to *Ackroyd v. Smith*, see *Thorpe v. Brumfitt*, L. R., 8 Ch. 650.
- „ 80, line 53.—As to the right of the public to deviate, where a public way has become impassable, see *Arnold v. Holbrook*, L. R., 8 Q. B. 96.
- „ 90, line 43.—See *Holker v. Poritt*, L. R., 8 Ex. 107.
- „ 92, line 45.—As to the right of eavesdropping, see *Harvey v. Walters*, L. R., 8 C. P. 162.
- „ 108, line 44.—Add a reference to *Pudsey Coal Gas Co. v. Corporation of Bradford*, L. R., 15 Eq. 167.
- „ 113, line 44.—See *Ex parte Tomline*, 21 W. R. 475, as to evidence of the right of lord of manor to seashore.
- „ 122, line 2.—See *Booth v. Alcock*, L. R., 8 Ch. 663.
- „ „ line 39.—See *Robinson v. Grave*, 21 W. R. 569.
- „ 123, line 7.—See *Younge v. Shaper*, 21 W. R. 135.
- „ „ line 34.—See *Dickinson v. Harbottle*, 28 L. T., N. S. 186, as to a claim to an extraordinary amount of light.
- „ 138, line 48.—As to the right of an annuitant to distrain, see also *Sollory v. Leaver*, L. R., 9 Eq. 22.
- „ 202, note (s).—By 36 & 37 Vict. c. 66, s. 25 (2), it is enacted that no claim of a cestui que trust against his trustee for any property held on an express trust, or in respect of any breach of trust, shall be held to be barred by any Statute of Limitations.
- „ „ line 55.—*Locking v. Parker* was reversed on appeal, L. R., 8 Ch. 80; and see p. 205, line 46.
- „ 209, line 58.—*Vane v. Vane* is reported on appeal, L. R., 8 Ch. 883.
- „ 217, line 4.—See *Hemming v. Blanton*, 21 W. R. 636.
- „ 224, line 48.—See *Bryan v. Cowdal*, 21 W. R. 693.
- 225, note (b).—An action of debt now lies for the recovery of a rent-charge in fee. *Thomas v. Sylvester*, L. R., 8 Q. B. 368.

- Page 257, line 6.—A summons in a winding up, claiming interest, is a demand in writing within 3 & 4 Will. 4, c. 42, s. 28.  
*Ex parte Alison*, L. R., 15 Eq. 394.
- „ 267, line 14.—*Knox v. Gye* is reported on appeal, L. R., 5 H. L. 656; where it is laid down that there is no fiduciary relation between a surviving partner and the representatives of his deceased partner; and in taking the account between them the Statutes of Limitation are applicable. See also *Taylor v. Taylor*, 28 L. T., N. S. 189.
- „ 336, note (f).—The office of protector survives. *Bell v. Holtby*, L. R., 15 Eq. 178.
- „ 386, line 48.—In *Ex parte White*, L. R., 8 Ç. P. 106, the commission having been lost, the time was enlarged and a duplicate commission issued.
- „ 400, line 8.—As to estates tail belonging to Irish bankrupts, see now 35 & 36 Vict. c. 58, s. 50.
- „ 405, note (a).—As to the effect of an assignment under this act, see *Re Batchelor*, 21 W. R. 901.
- „ 413, note (d).—See *Reg. v. Carnatic Rail. Co.*, L. R., 8 Q. B. 299.
- „ 504, line 38.—*Noble v. Willock* has been reversed on appeal, 21 W. R. 711.
- „ 514, line 10.—Add a reference to *Cozens v. Crout*, 21 W. R. 781.
- „ 555, note (a).—There is no apportionment under 38 & 34 Vict. c. 35, of dividends on shares specifically bequeathed. *Whitehead v. Whitehead*, 29 L. T., N. S. 289. See, also, as to this act, *Roseingrave v. Burke*, L. R., 7 Eq. 186.
- „ 581, note (h).—A charging order under this section will not be granted by the Judge of the Court for Divorce. *Clarke v. Clarke*, L. R., 3 P. & M. 57.
- „ 604, note (g).—As to the effect of registering a lis pendens, see *Beyfus v. Bullock*, W. N. 1869, p. 36; *Bury v. Gibbons*, L. R., 8 Ch. 747.
- „ 627, note (f).—For form of order, see *Howson v. Trant*, 21 W. R. 781.
- „ 693, note (s).—Add a reference to *Re Strutt*, 21 W. R. 880.
- „ 696, note (c).—See *Re Taddy*, 21 W. R. 863.
- „ 705, note (b).—A discrepancy was disregarded in *Re Hemsley*, L. R., 16 Eq. 103.
- „ 719, line 58.—As to *Bunting v. Marriott*, see *Somdon v. Marriott*, 21 W. R. 808.
- „ 746, note (c).—After "*Higgs v. Dorkis*," add a reference to *Leigh v. Edwards*, 21 W. R. 835.

# STATUTES

RELATING TO

## REAL PROPERTY,

PASSED IN THE REIGNS OF

KING WILLIAM IV. AND QUEEN VICTORIA.

### PRESCRIPTION.

2 & 3 WILLIAM IV. CAP. 71.

*An Act for shortening the Time of Prescription in certain Cases (a).* [1st August, 1832.]

- I. *Time limited for establishing rights of common and other profits à prendre.*
- II. *Ways, easements and watercourses.*
- III. *Light.*
- IV. *How periods of limitation are to be computed.*
- V. *Pleadings.*
- VI. *Period less than that provided by statute not to be allowed.*
- VII. *Saving in favour of persons under disabilities.*
- VIII. *Time excluded in computation of period of forty years.*

#### I. TIME LIMITED FOR ESTABLISHING RIGHTS OF COMMON AND OTHER PROFITS À PRENDRE.

WHEREAS the expression "Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary," is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription (b), or grant, to any right of common (c) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall (d), or of any ecclesiastical or lay

2 & 3 Will. 4,  
c. 71, s. 1.

Claim to right of common and other profits à prendre not to be defeated after thirty years' enjoyment by showing the commencement.

2 & 3 Will. 4,  
c. 71, s. 1.

After sixty years' enjoyment the right to be absolute, unless had by consent or agreement.

This act extended to Ireland.

Subject-matter of the first section.

person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing (e).

(a) By 21 & 22 Vict. c. 42, the provisions of the act 2 & 3 Will. 4, c. 71, shall, after the first day of January, 1859, extend and apply to Ireland.

(b) The reader is referred to note (1) at the end of this act, as to the nature of prescription; the difference between it and custom; what customs are valid; what things may or may not be claimed by prescription; and how a right depending upon it may be lost. (See *post*.)

(c) As to rights of common, see note (2) at the end of this act.

(d) The provisions of this act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property. (23 & 24 Vict. c. 53, s. 2.)

(e) The several decisions upon this statute, although relating to many different subjects, have for the most part a relation to each other; the more convenient course therefore will be to commence with the statute and the several decisions upon it, rather than to distribute them amongst the subjects which are hereafter considered separately.

The first section relates to such claims as may be lawfully made at common law, by custom, prescription, or grant, to any *right of common or other profit or benefit* to be taken or enjoyed from or upon any land. Tithes, rent and services are excepted from this act. The stat. 2 & 3 Will. 4, c. 100, provides the limitation of time with respect to claims of a *modus decimandi*, or exemption from, or discharge of tithes. (See Acts for the Commutation of Tithes and Supplement thereto, by Shelford, 3rd ed.) The stat. 3 & 4 Will. 4, c. 27, *post*, limits the time within which actions and suits must be brought respecting tithes not belonging to a spiritual or eleemosynary corporation sole. The limitation of time for the recovery of tithes is not affected by the Act for the Commutation of Tithes in England and Wales. (See 6 & 7 Will. 4, c. 71, s. 49.)

It must be borne in mind that the first section of this act includes different subjects from those in the second, which distinguishes between easements and common, or profit *à prendre*, and that a different limitation is established for the first and latter cases. (*Bailey v. Appleyard*, 8 Ad. & Ell. 167; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Jones v. Richard*, 5 Ad. & Ell. 418.) The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement, because the property in them remains common; but the right to take "*something out of the soil*" is a profit *à prendre*, and not an easement. (*Manning v. Wasdale*, 5 Ad. & Ell. 764; 1 Nev. & P. 172; *Blewitt v. Tregonning*, 3 Ad. & Ell. 554; 5 Nev. & M. 308; *Bailey v. Appleyard*, 3 Nev. & P. 257; 8 Ad. & Ell. 161.) Prescriptive rights in gross are not within the scope of the statute. (*Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 14 W. R. 13.) This section applies only to profits *à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement. (*Hanmer v. Chanoe*, 84 L. J., Ch. 413; 13 W. R. 556.)



The liberty of fowling has been decided to be a profit *à prendre*. (*Davies' case*, 3 Mod. 246.) The liberty to hunt is one species of *aucupium*, and the taking of birds by hawks seems to follow the same rule. The liberty of fishing appears to be of the same nature; it implies that the person who takes the fish, takes for his own benefit; it is common of fishing. (*Anon.*, Hardr. 407.) The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it should exercise the right, it has been considered that an interest, or profit *à prendre*, was intended to be granted. (*Per Parke, B., Wickham v. Hawker*, 7 Mees. & W. 78, 79.) The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil, and he may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit *à prendre*. Substantially it may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a regrant of the right by the alienee of the fee simple to the alienor. (*Ewart v. Graham*, 7 H. L. 344, 345, *per Lord Campbell*.) A right to cut down and carry away trees growing in a close (*Bailey v. Stevens*, 12 C. B., N. S. 91) and a right to take stones and sand from the seashore (*Constable v. Nicholson*, 14 C. B., N. S. 230) have been held to be profits *à prendre*.

2 & 3 Will. 4,  
c. 71, s. 1.  
Profits à prendre.

It is an elementary rule of law that a profit *à prendre* in another's soil cannot be claimed by custom, for this among other reasons that a man's soil might thus be subject to the most grievous burdens in favour of successive multitudes of persons like the inhabitants of a parish or other district who could not release the right. The claim of free miners to subvert the soil and carry away the substratum of stone without stint or limit of any kind cannot be supported either on the ground of custom, prescription or lost grant. A claim which is vicious and bad in itself cannot be substantiated by an user however long. (*Per Byles, J., Att.-Gen. v. Matthias*, 4 Kay & J. 591; *Constable v. Nicholson*, 14 C. B., N. S. 230; *Johnson v. Barnes*, 27 L. T., N. S. 152.) To a declaration for breaking and entering the plaintiff's close and taking his fish, a custom pleaded for all the inhabitants of a parish to angle and catch fish in the *locus in quo* was held to be bad, as this was a profit *à prendre*, and might lead to the destruction of the subject-matter to which the alleged custom applied. (*Bland v. Lipscombe*, 4 Ell. & Bl. 713, n. (c).) A right, claimed by the inhabitants of a township, to enter upon the land of a private person and take water from a well therein for domestic purposes, is an easement and not a profit *à prendre*, and may therefore properly be claimed by custom. (*Race v. Ward*, 4 Ell. & Bl. 702; 24 Law J., Q. B. 153; 1 Jur., N. S. 704.) The court held an alleged custom to be bad for all the inhabitants occupying lands in a district to enter a close and take therefrom reasonable quantities of sand, which had drifted thereupon, for the purpose of manuring their lands. The reason was, that the drifted sand had become part of the soil, so that the claim was to take a profit *in alieno solo*. (*Blewitt v. Tregonning*, 3 Ad. & Ell. 554, cited in *Race v. Ward*, 4 Ell. & Bl. 712.)

Profit à prendre  
in another's soil  
cannot be claimed  
by custom.

Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now the burden of establishing an immemorial right is withdrawn, and the proof is limited to thirty years. But the party prescribing must prove his right for that whole period, and no presumption will be drawn from evidence as to part of that period. (See 8 Ad. & Ell. 167.) The plaintiff prescribed under this statute, first, for a right of pasture

Proof of enjoyment under the statute.

2 & 3 Will. 4,  
c. 71, s. 1.

thirty years next before the commencement of the action; and, secondly, for a right of simply turning on cattle for twenty years. No evidence was given of acts of depasturing at a period commencing more than thirty years before the commencement of the suit; but that more than twenty-eight years before the suit (in 1809) a rail was erected, so as to prevent the enjoyment of pasture, and that afterwards, the rail having been removed, the plaintiff depastured for twenty-eight years; it was held, that the defendant was not bound to prove that the rail was erected adversely to the plaintiff's right, but that the *onus* lay on the plaintiff to prove affirmatively his actual enjoyment of pasture for thirty years, and that no presumption could be admitted in his favour on proof of enjoyment for a less period. (*Bailey v. Appleyard*, 8 Ad. & Ell. 161, and note explanatory of case, *ib.* p. 1; 3 Nev. & Per. 257, note on case; 2 P. & Dav. 1; 2 Jurist, 872.) It was also held, that proof of his enjoyment of pasture for twenty-eight years did not include proof of the right of turning on for twenty years, the latter right being an easement only, a right of a quite different nature, and of which no evidence was given. (*Ib.*)

The plaintiff claimed a right of common by prescription in respect of a *que* estate in land, and also by thirty and sixty years' enjoyment by the occupier of the land. The defendant offered evidence that a tenant then deceased, while tenant of the land for years, had declared that he had no such right in respect of the land: it was held, that the declaration was not admissible, inasmuch as it was in derogation of the title of the reversioner. (*Papendick v. Bridgwater*, 5 Ell. & Bl. 166; 1 Jur., N. S. 657; 24 L. J., Q. B. 289.) Lord Campbell, C. J., observed, "it would be very mischievous if it were in the power of a tenant to destroy a profit *à prendre* belonging to the land which he occupies, or to impose a servitude upon it. There is no difference in this respect between destroying an easement and creating one. If the tenant might say that the land enjoyed no right of way, he might also say that it was liable to an easement for taking water, profit *à prendre* by turbary or other common. It would come to this: that by the tenant's acknowledgment of a servitude, like that in *Scholes v. Chadwick*, 2 Moo. & R. 507, or for cutting turves or taking away sand, the tenant might create a servitude against the reversioner. That would be very inconvenient, and it is upon the view of the balance of general convenience that the English laws of evidence are founded. In *Daniel v. North*, 11 East, 372, it was decided that the acquiescence of the tenant cannot prejudice the landlord, and if so, I think, *à fortiori*, that his declaration cannot." (*Papendick v. Bridgwater*, 5 Ell. & Bl. 177; see *Scholes v. Chadwick*, 2 Moo. & R. 507; *Reg. v. Bliss*, 7 Ad. & E. 550.)

The turning of cattle upon alluvium by the proprietor of land not separated from it by any boundary, although without interruption, was held not to be an assertion of right so acquiesced in as to raise a presumption of title. Lord Chelmsford, L. C., observed, "the effect of acts of ownership must depend partly upon the nature of the property upon which they are exercised. If cattle be turned upon inclosed pasture ground, and be placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected from intrusion, and if it could it would not be worth the trouble of preventing it, there mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition." (*Att.-Gen. v. Chambers*, 4 De G. & J. 55; see pp. 65, 66. See *In re Hainault Forest Act*, 1858, 9 C. B., N. S. 648.)

Nature of requisite enjoyment.

This section of the act does not prevent a claim to a right of common, &c. from being defeated after thirty years' enjoyment, by showing that such right was first enjoyed at a time when it could not have originated legally. A claim to a right of common over a Crown forest, in respect of a certain tenement being vested on thirty years' uninterrupted enjoyment under this section may be defeated by showing that the tenement has been inclosed from the waste of a manor only forty years, and that the grant of any right over the forest was made absolutely void by a statute passed

previously to the inclosure. It was questioned whether this act has any application to the case in which the establishment of a right by means of this statute would be a violation of the express terms of statutes prohibiting the granting of such a right. (*Mill v. New Forest Commissioners*, 18 C. B. 60; 2 Jur., N. S. 520; 25 L. J., C. P. 212.)

In replevin for taking the plaintiff's cattle, to an avowry damage feasant the plaintiff pleaded in bar under this statute an user for thirty years as of right, and also for sixty years as of right of common of pasture over the *locus in quo*. At the trial the fact of user by the plaintiff and by other occupiers of his farm was proved; but it appeared that S., from whom the plaintiff and the defendant derived their title, was for more than sixty years before and until within thirty years seised in fee of the plaintiff's farm, and during the same period had an estate for life in the land over which the right of common was claimed, but never had actual possession of the dominant tenement, except by the tenant. More than thirty years before action, he joined with a remainder-man in making a conveyance of the servient tenement for making a tenant to the *præcipe* for the purpose of suffering a recovery, in order to raise money on mortgage; but no recovery was suffered, and S. continued possessed until twenty-eight years before the action, when the property was sold, and all community of title had ceased: it was held, that, although there was no unity of seisin to extinguish an easement or to prevent its existence, the facts precluded an enjoyment as of right within the meaning of this act. The title to the tenements was such that there could not, in point of law, have been an enjoyment of the right of common for the period of sixty years as of right, for S. being owner in fee of the farm, and also tenant for life and occupier of the common, the rights of the tenants over the common were derived from him, and as he could not have an enjoyment as of right against himself within the meaning of the statute, so neither could his tenants. (*Warburton v. Parke*, 2 H. & N. 64; 26 L. J., Exch. 298.)

Where there had been actual and uninterrupted enjoyment of a right to cut turf for sixty years, but the enjoyment appeared to be referable during the whole period to an agreement in writing made by a tenant for life of the servient tenement, and acquiesced in and acted on by the successive owners of that tenement; it was held that although the tenant for life who made the agreement and the next succeeding tenant in tail had both died before the sixty years began to run, no prescriptive right had been gained under this section. (*Lowry v. Crothers*, I. R., 5 C. L. 98.)

As to the nature of the enjoyment requisite to support a claim under the act, see further the note to sect. 2, *post*.

The 1st section requires in the case of a right of common or a profit à *prendre*, enjoyment "without interruption for the full period of thirty years;" the most undoubted exercise of enjoyment for twenty-nine years and three-quarters will not be sufficient. (*Bailey v. Appleyard*, 8 Ad. & Ell. 164. See *Flight v. Thomas*, 11 Ad. & Ell. 688, *post*.) Taking the first, fourth and fifth sections together, it has been decided that the period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question, and that an allegation of an enjoyment for thirty years next before the times when the trespasses to which the plea relates were committed is insufficient. (*Richards v. Fry*, 3 Nev. & P. 67; 7 Ad. & Ell. 698; *Wright v. Williams*, 1 Mees. & W. 77.) See further the note to sect. 4, *post*.

If the statute be relied on it ought to be pleaded. (*Welcome v. Upton*, 6 M. & W. 401.) Plea of enjoyment of a right of common for thirty years before the commencement of the suit was held sufficient, without saying thirty years *next* before. (*Jones v. Price*, 3 Bing. N. C. 52.) The proper mode of pleading a profit to be taken out of land is the enjoyment of the right for the periods mentioned in the first section. (*Welcome v. Upton*, 5 Mees. & W. 398; 7 Dowl. P. C. 475.)

2 & 3 Will. 4,  
c. 71, s. 1.

Period of enjoyment.

Pleading.

2 & 3 Will. 4,  
c. 71, s. 2.

In claims of right  
of way or other  
easement the  
periods to be  
twenty years and  
forty years.

## II. WAYS, EASEMENTS, AND WATERCOURSES.

2. No claim which may be lawfully made at the common law (*f*), by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing (*g*).

Modes of claiming  
easements.

(*f*) As to the modes of claiming an easement by prescription at common law, and by non-existing grant, which were used before the passing of this act, see note (3) at the end of the act. The act has provided an additional mode of claiming easements, but has not abolished the former modes. As to the law of ways, see note (4); and as to watercourses, see note (5). As to the right to a pew, which is an easement, see note (6) at the end of the act.

(*g*) This section relates to claims to any way or other *easement*, or to any watercourse, or the use of any water to be enjoyed or derived upon, over, or from any land or water.

Definition and  
nature of easements.

Easement is the general term for several species of liberties which one man may have in the soil of another without obtaining any interest in the land itself. (Cro. Car. 419.) Rights of accommodation in another's land, as distinguished from those which are directly profitable, are properly called *easements*. An easement (from the French word *aïse*, i. e. *commoditas*) is defined to be a privilege that one neighbour hath of another by writing or prescription without profit, as a way, or a sink through his land, or such like. (Kitch. 103; Cow. Law Dict. Terms of the Law, tit. "Easement;" 5 B. & C. 229. See the remarks of *Martin*, B., in *Mounsey v. Ismay*, 8 H. & C. 497; 13 W. R. 521.) "A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor." (Code Civil, Art. 637.) Easements are incorporeal rights (*Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783) imposed upon corporeal property, and not upon the owner of it, so that on the change of the owner of the servient tenement the right to the easement is still retained by the owner of the dominant tenement.

Servient and  
dominant  
tenements.

"There can be no easement, properly so called, unless there be both a servient and a dominant tenement." (*Per Lord Cairns, Rangeley v. Midland R. Co.*, L. R., 3 Ch. 310.) The *servient* tenement is that over which a right claimed by custom, prescription or grant is exercised, and the *dominant* tenement is that to which such right is attached. It is essential that the two tenements should belong to different owners; for upon both becoming absolutely vested in the same person the inferior right of easement is merged in the superior title of ownership. (*Holmes v. Goring*, 2 Bing. 83; 9 Moore, 166.) Where there is an unity of seisin of the land and of the way over the land in one person, the right of way is

either extinguished or suspended, according to the duration of the respective estates in the land and the way. (*James v. Plant*, 4 Ad. & Ell. 761.) An easement must be connected with the enjoyment of the dominant tenement (*Ackroyd v. Smith*, 10 C. B. 164), and must be an incident of a known and usual kind. (*Hill v. Tupper*, 2 H. & C. 121; 11 W. R. 784.)

2 & 3 Will. 4,  
c. 71, s. 2.

Rent cannot issue out of a mere easement (*Buzzard v. Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344); but a payment in respect of an easement may be secured by a covenant or agreement.

Public rights of way, liability to repair highways, rights of way, watercourses, and rights of water and other *easements* are not to be deemed incumbrances within the meaning of the Act for the Transfer of Land (25 & 26 Vict. c. 53, s. 27); nor to be affected by a declaration of title. (25 & 26 Vict. c. 67, s. 29.)

There are an infinite number and variety of easements. The following may be enumerated:—Rights of way. Right to hang clothes on lines passing over the neighbouring soil. (*Drenell v. Towler*, 3 B. & Ad. 735.) The right of landing nets on another man's ground. (*Gray v. Bond*, 2 Brod. & B. 667.) Right to make spoil banks upon the surface in working mines. (*Rogers v. Taylor*, 1 H. & N. 706.) The right to use a close for the purpose of mixing muck and preparing manure thereon for an adjoining farm. (*Pye v. Mumford*, 11 Q. B. 666.) A right to place a pile in the soil of a river for the enjoyment of a wharf. (*Lancaster v. Eve*, 5 C. B., N. S. 717; 7 W. R. 260; *Cory v. Churchwardens of Greenwich*, 27 L. T., N. S. 150.) A right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient use of his messuage, is a mere easement, and not a profit *à prendre* in the soil of another. Such a right may be claimed by reason of the occupation of an ancient messuage, without any limitation as to the quantity of water to be taken. (*Manning v. Wasdale*, 1 Nev. & Per. 172; 5 Ad. & Ell. 758. See *Fitch v. Rawling*, 2 H. Bl. 395.) The right to go on a neighbour's close and to draw water from a spring there (*Race v. Ward*, 4 El. & Bl. 702); or from a pump. (*Polden v. Bastard*, L. R., 1 Q. B. 156.) The right to go on the soil of another to clear a mill stream and repair its banks. (*Beeston v. Weate*, 5 E. & B. 996.) The right to conduct water across a neighbour's close by an artificial watercourse. (*Ib.*) Right to discharge a stream of water, either in its natural state, or changed in quantity or quality. (*Wright v. Williams*, 1 M. & W. 77.) Right to discharge rain-water by spout or projecting eaves. Right to receive light and air by ancient windows. Right to carry on an offensive trade.

Instances of  
easements.

A person may prescribe to an easement in the freehold of another as belonging to some ancient house, or to land, &c. And a way over the land of another, a gateway, watercourse, or washing-place in another's ground, may be claimed by prescription as easements; but a multitude of persons cannot prescribe, though for an easement they may plead custom. (Cro. Jac. 170; 3 Leon. 254; 3 Mod. 294.) In *Goodday v. Michell*, Cro. Eliz. 441, a way to a common fountain is mentioned as an easement claimable for parishioners by custom. The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the land through which it passes. (9 B. & C. 109; *Hollis v. Goldfinch*, 1 B. & C. 205.) The licence to make a vault in a parish church, and to have the sole and exclusive use of it, is an easement which cannot be effectually granted without a deed or a faculty, although the incumbent of a living has no power to grant such a right even by deed, but only leave to bury in each particular instance. (*Bryan v. Whistler*, 8 B. & C. 288; 2 M. & Ryl. 318.) The right to sit in a pew in a church annexed to a house is an easement. (5 B. & Ald. 361. See Best on Evidence, p. 479, 3rd ed.; *Brumfitt v. Roberts*, L. R., 5 C. P. 224.) A man cannot prescribe to have a necessary easement in the land of another person for himself and his servants to catch fish in his several fishery. (*Peers v. Lacy*, 4 Mod. 362.) But the right to a fishing mill-dam in waters which are not navigable appears to be an easement. (*Leconfield v. Lonsdale*, L. R., 5 C. P. 657.)



2 & 3 Will. 4,  
c. 71, s. 2.

Subject-matter of  
the second section.

Passage of air  
to mill.

Watercourse.

Statute has not  
superseded com-  
mon law, except  
in cases of light.

The right of an owner of land to the support of the land is one of the ordinary rights of property, analogous to the right to a natural stream, incidental to all land, and not an easement or right acquired by grant or otherwise. (*Bonomi v. Backhouse*, Ell. Bl. & Ell. 642; *Backhouse v. Bonomi*, 9 H. L. C. 503.)

The second section refers to easements properly so called, and to rights which are in some way appurtenant to a dominant tenement. (*Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 14 W. R. 13.) A custom for the freemen of a town to enter upon another man's land for the purpose of holding horse-races there, is not an easement within this section. (*Mounsey v. Ismay*, 3 H. & C. 486; 13 W. R. 521.) This section includes only such easements upon or over the surface of the servient tenement as are susceptible of interruption by the owner of such servient tenement, so as to prevent the enjoyment on the part of the owner of the dominant tenement from ripening into a right. (*Webb v. Bird*, 10 C. B., N. S. 283, *per Erle*, C. J.) *Erle*, C. J., said, "It appears to me, that this section was not intended to give a right, after twenty years, to every sort of enjoyment which may be classed under the general term easement, but that it was meant to apply only to the two descriptions of easement therein specified, viz., the right to a way or watercourse which may be enjoyed or derived upon, over, or from any land or water." He did not think the passage of air over the land of another was, or could have been contemplated by the legislature when framing that section. They evidently intended it to apply only to the exercise of such rights upon or over the surface of the servient tenement as might be interrupted by the owner, if the right were disputed. It is clear that such was the intention of the legislature, because the section provides that the claim shall not be defeated where there has been actual enjoyment for the period mentioned "without interruption." (*Webb v. Bird*, 10 C. B., N. S. 282.) *Byles*, J., agreed that the words "or other easement" in the second section mean any other easement *ejusdem generis* with a way, — something that is to be exercised upon or over the soil of the adjoining owner, more especially as it is clear, from the next section, that the easement of the access of light is excluded. (*Ib.* p. 286.)

An owner of a windmill cannot claim, either by prescription or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill. (*Ib.*)

A claim, by the occupier of a copper-mine, to sink pits in his own land for the water pumped out of his mine and for the precipitation of the copper contained in such water, and for that purpose to put iron into the said pits, and to cover the same with the said water, and afterwards to let it off, impregnated with metallic substances, into a watercourse flowing over the land of another, is a claim to a watercourse within this section. (*Wright v. Williams*, 1 Tyr. & G. 375; 1 Mees. & W. 77.) The privilege of washing away sand, stone and rubble, dislodged in the necessary working of a tin mine, and of having the same sent down a natural stream through the plaintiff's land, may be the subject of a grant, and may be pleaded as a prescriptive right under this act to a declaration charging the defendants with throwing such stone, sand and rubble into the stream, and thereby filling up its bed within the plaintiff's land, and causing the water to flow over it. Such privilege may also be well pleaded as a local custom. (*Carlyon v. Lovering*, 1 H. & N. 784; 26 Law J., Exch. 251.) The right to have water which would otherwise have flowed down to the plaintiff's land diverted over other land, was held to be a claim to a watercourse within this section. (*Mason v. Shrewsbury, & Co. R. Co.*, L. R., 6 Q. B. 578. See also *Staffordshire, & Co. Canal Co. v. Birmingham Canal Co.*, L. R., 1 H. L. 254.)

The Prescription Act does not appear to have superseded the common law, except in the case of claims to light. (See note (3) at the end of the act.) As to the difference between the mode of claiming easements under the statute and at common law, see *Gale on Easements*, 153, note (c), 4th ed.

It has been decided under the statute 2 & 3 Will. 4, c. 71, that an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. In an action on the case for obstructing a way claimed from a wharf, in a close called Cliff meadow, through Eacham meadow, over the *locus in quo*, called the Acre, where the obstruction took place, into a public highway, it appeared that Cliff and Eacham meadows were held under the Bishop of Worcester by a lease for three lives, granted in 1805. In 1809 Roberts purchased the leasehold interest from Davis, and began to make bricks in Cliff meadow, and carried them through Eacham meadow and the Acre into the highway. In 1811 Dalton, the then occupier of the Acre, and the assignee of a copyhold lease for four lives, under the bishop, of the close called Acre, put up a gate to obstruct Roberts in carrying bricks. Roberts broke it down, and he and the plaintiff, who claimed under him, continued to carry bricks over the Acre, without interruption, for more than twenty years, when the defendant, claiming as assignee of the bishop's lease, under Dalton, obstructed the way, and for that obstruction the action was brought. No proof was given on either side, that either of the original leases had been surrendered, and therefore the case was considered as if both had continued to the time of the obstruction. The jury found, first, that they would not presume any grant of right of way by the bishop; and secondly, that the plaintiff Roberts had actually enjoyed the way without interruption for more than twenty years; and the only question was, whether such an enjoyment gave to the plaintiff a right of way over the defendant's close, so as to enable him to maintain the action, which question depended upon the construction of the above act, particularly the second section. *Parke, B.*, in giving the judgment of the court, after stating the second section of the act, said, "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by section 5, such a claim must be pleaded, and the like evidence would have been required before this statute, to prove a claim by prescription or non-existing grant. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly, and in the manner that a person rightfully entitled would have used it, but by stealth, as a trespasser would have done; if he shall have occasionally asked the permission of the occupier of the land, no title would be acquired, because it was not enjoyed 'as of right.' For the same reason it would not, if there had been unity of possession during all or part of the time; for then the claimant would not have enjoyed, 'as of right,' the 'easement,' but the soil itself. So it must have been enjoyed 'without interruption.' Again, such a claim may be defeated in any other way by which the same is now liable to be defeated; that is, by the same means by which a similar claim, arising by custom, prescription, or grant, would now be defeasible; and therefore it may be answered by proof of a grant or of a licence written or parol for a limited period, comprising the whole or part of the twenty years, or of the absence or ignorance of the parties interested in opposing the claim, and their agents, during the whole time that it was exercised. So far the construction of the act is clear, and this enjoyment of twenty years having been uninterrupted, and not defeated on any ground above mentioned, would give a good title; but if the enjoyment take place with the acquiescence or laches of one who is tenant for life only, the question is, what is its effect, according to the true meaning of the statute? Will it be good to give a right against the see, and against those claiming under it by a new lease, or only as against the termor and his assigns during the continuance of the term? or will it be altogether invalid? In the first place, it is quite clear that no right is gained against the bishop. Whatever construction is put on the seventh section, it admits of no doubt under the eighth. It is quite certain, that an enjoyment of forty years instead of twenty, under the circumstances of this case, would have given no title against the bishop, as he might dispute the right at any time within three years after the expiration of the lease; and if the lease for life be excluded from the longer

2 & 3 Will 4,  
c. 71, s. 2.

Enjoyment under  
statute.

*Bright v. Walker.*

Nature of the  
enjoyment.

2 & 3 Will. 4,  
c. 71, s. 2.

*Bright v. Walker.*

No title gained  
by user which  
does not give  
valid title against  
all.

period, as against the bishop, it certainly must from the shorter. Therefore, there is no doubt but that possession of twenty years gives no title as against the bishop, and cannot affect the right of the see.

"The important question is, whether this enjoyment, as it cannot give a title against all persons having estates in the *locus in quo*, gives a title as against the lessee and the defendant claiming under him, or not at all? We have had considerable difficulty in coming to a conclusion on this point; but on the fullest consideration we think that no title at all is gained by a user which does not give a valid title against all, and permanently affect the see.

"Before the statute this possession would indeed have been evidence to support a plea or claim by non-existing grant from the termor in the *locus in quo* to the termor under whom the plaintiff claims, though such a claim was by no means a matter of ordinary occurrence; and in practice the usual course was to state a grant by an owner in fee to an owner in fee. (See sect. 5.) But we think that since the statute such a qualified right is not given by an enjoyment for twenty years. For in the first place, the statute is for the shortening the time of *prescription*, and if the periods mentioned in it are to be deemed new times of prescription, it must have been intended that the enjoyment for those periods should give a good title against all, for titles by immemorial prescription are absolute and valid against all. They are such as absolutely bind the fee in the land. In the next place, the statute nowhere contains any intimation that there may be different classes of rights qualified and absolute, valid as to some persons and invalid as to others.

"From hence we are led to conclude, that an enjoyment of twenty years, if it give not a good title against all, gives no title at all; and as it is clear that this enjoyment, whilst the land was held by a tenant for life, cannot affect the reversion in the bishop now, and is therefore not good as against every one, it is not good against any one, and therefore not against the defendant. This view of the case derives confirmation from the 7th section. This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim to the way) is *tenant for life*; and unless the context makes it necessary for us, in order to avoid some manifest incongruity or absurdity, to put a different construction, we ought to construe the words in their ordinary sense. That construction does not appear to us to be at variance with any other part of the act, nor lead to any absurdity. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that, there must be that period of enjoyment *against* the owner of the fee.

"The conclusion, therefore, at which we have arrived is, that the statute in this case gives no right from the enjoyment that has taken place; and as sect. 6 forbids a presumption in favour of a claim to be drawn from a less period than that prescribed by the statute, and as more than twenty years is required in this case to give a right, the jury could not have been directed to presume a grant by one of the termors to the other by the proof of possession alone. Of course nothing that has been said by the court, and certainly nothing in the statute, will prevent the operation of an actual grant by one lessee to the other, proved by the deed itself, or upon proof of its loss by secondary evidence; nor prevent the jury from taking this possession into consideration, *with other circumstances*, as evidence of a grant which they may still find to have been made, if they are satisfied that it was made in point of fact." It was therefore decided that the plaintiff was not entitled to recover, and a nonsuit was entered. (*Bright v. Walker*, 4 Tyrw. 508, 513; 1 C., M. & R. 211, 223.)

Easement must  
have been enjoyed  
as such.

Effect of unity of  
possession.

The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within this statute, means a *continuous* enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of the twenty or forty years. (*Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290.) Where a plaintiff had enjoyed



2 & 3 Will. 4,  
c. 71, s. 2.

a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by an unity of possession from 1848 to 1853. (*Ib.*) And such unity of possession need not be specially replied under the 5th section. (*Onley v. Gardiner*, 4 Mees. & W. 496. See *Monmouthshire Canal Company v. Harford*, 1 C., M. & R. 631; 5 Tyr. 85; *Richards v. Fry*, 3 Nev. & P. 367; 7 Ad. & Ell. 698.) To an action of trespass on land, the defendant pleaded, that for twenty, thirty, forty, and sixty years, he and the occupiers of a mill had (as an easement) gone on the land to repair the banks of a stream which flowed to the mill. The replication denied the rights claimed. It appeared that within forty years B. had been lessee of the mill under one landlord, and of the land under another: it was held, that this was such a unity of possession as prevented his having an easement on the land. (*Clay v. Thackerah*, 9 Car. & P. 47; 2 M. & Rob. 244.)

A lease was made in 1775, by A. to B., which comprised two closes, Blackacre and Whiteacre. A mill was subsequently built on Blackacre, which was supplied by a stream through Whiteacre; and S., a tenant of the mill under B., and subsequent tenants, enjoyed this right of water from 1818. In 1836, C., who was entitled to the reversion expectant on B.'s lease, appointed Whiteacre to K. for life from the expiration of that lease, retaining Blackacre. The lease of 1775 expired in April, 1840. K., in 1841, demised Whiteacre to the defendant; and, in 1843, C. demised Blackacre to the plaintiff, with the right to water sufficient for the mill as enjoyed by S. In an action for the diversion of the water, commenced in June, 1860, there was evidence of uninterrupted enjoyment from 1818 to 1860; it was held that, as during the lease of 1775 there was a unity of possession in B., the enjoyment by his tenant pending that lease was not an enjoyment "as of right" within the meaning of this act. (*Wilson v. Stanley*, 12 Ir. Com. Law Rep., N. S. 345.) It was held also, that the user for more than twenty years since April, 1840, conferred no title to the easement under this section, the reversion of the servient tenement during that period being vested in the tenant for life. (*Ib.*)

Where two tenants occupied adjoining premises under the same landlord, it was suggested by *Kindersley, V.-C.*, that one tenant might acquire an easement over the adjoining property as against the other tenant. (*Daniel v. Anderson*, 31 L. J., Ch. 610; 10 W. R. 366.) It seems clear in general that the tenant of one close cannot as such by user acquire an easement over another close which belongs to the same landlord. (*Gayford v. Moffatt*, L. R., 4 Ch. 133; *Russell v. Harford*, L. R., 2 Eq. 507.)

According to the true construction of the statute, in order to make an user "as of right," it must be exercised for the period prescribed as *of right against all persons*, so as to be evidence of a perfect right. But a party has no right of way "as of right" if the exercise for the first seven years was during a period when the owner could not stop him.

Enjoyment as of  
right.

A plea under this act of an user of a way as of right for twenty years over a close is not supported by proof of an user of the way for part of the twenty years while a party was the landlord and owner as well of the messuage in respect of which the right was claimed as of the close over which it was exercised, and for the rest of the period when the defendant had acquired the freehold of the messuage.

In 1823, M. built two adjoining houses, behind each of which was a piece of ground appropriated as a yard, but no wall divided the yards. In 1832, M. permitted the defendant to occupy one of the houses without payment of rent, and he was accustomed to pass over the yard of the other house, which was let from time to time to different tenants, to a public highway. M. continued owner of both houses until his death in December, 1838. In August, 1839, the trustees under his will conveyed the last-mentioned house and the ground behind it to a person through whom the plaintiff derived his title. In September, 1839, the trustees conveyed the other house and ground to the defendant, who continued to occupy and use the way across the plaintiff's yard without interruption until 1853. It was held, that there was no user of the way "as of right" for twenty years within the

2 & 3 Will. 4,  
c. 71, s. 2.

Enjoyment as of  
right.

meaning of this section. The exercise, in the first instance, was during a period when the owner could not stop him, and therefore he gained no right during that time. The time when he used the way not of right could not be added to the time when he used it as of right. (*Winship v. Hudspeth*, 10 Exch. 5; 21 Law J., Exch. 268.)

The words, "enjoyed by any person *claiming right*," applied to easements in the 2nd section, and "enjoyment thereof *as of right*," in the 5th section of this act, mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it, but an enjoyment had openly and notoriously, without particular leave at the time by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years. (*Tickle v. Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 230. See *Bright v. Walker*, 1 Cr., M. & R. 219; *ante*, p. 9; *Arkwright v. Gell*, 5 Mees. & W. 333.) In the case of prescription, long enjoyments, in order to establish a right, must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time. (*Per Willes, J., Mills v. Mayor of Colchester*, L. R., 2 C. P. 486.)

Effect of leave  
being given.

It was said by *Alderson, B.*, that "if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years." (*Kinloch v. Neville*, 6 M. & W. 795.) Upon an issue with regard to twenty years' enjoyment of a railroad without interruption, for the convenient use and occupation of their closes, the defendants insisting upon such a right are bound to show an uninterrupted enjoyment as of right during that period, and the plaintiff may prove under such issue applications by the defendants during the twenty years for leave to cross their railroad, and it is not necessary for them to reply such licence specially. Where the simple issue is, whether there has been a continued enjoyment of the way for twenty years, any evidence negating the continuance is admissible. Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken. (*Monmouthshire Canal Company v. Harford*, 1 Cr., M. & R. 615.)

Effect of interrup-  
tions.

In questions under this section it is most important to show the nature of the user, and of the interruptions, as bearing on the question, whether the enjoyment was as of right. For though no interruption less than a year breaks the period when once the enjoyment as of right has begun, yet interruptions acquiesced in for less than a year may show that the enjoyment never was of right. (*Per Coleridge, J., Eaton v. Swansea Waterworks Co.*, 17 Q. B. 275.) See further as to interruptions in the enjoyment, the note to sect. 4, *post*.

The plaintiff and the defendant occupied contiguous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. That was done for the purpose of supplying their cattle with water whenever they wanted it, except when the owners of the defendant's land used the water as they did at certain seasons of the year for irrigation. It was held, that upon this evidence the jury was warranted in inferring an user as of right by the occupiers of the plaintiff's land, of the easement on the defendant's land, and that for the interruption of such easement the plaintiff might maintain an action against the defendant. (*Beeston v. Weate*, 5 Ell. & Bl. 986.)

Action by the owner of a mill on the river Calder, which mill of right ought to be supplied with a flow of water from a mill-pool on the Calder,

against an owner of works higher up the stream, for placing cinders and scorise at his works so as to fall into the stream of the Calder, whence they were carried down into the plaintiff's mill-pool, and filled it up to the obstruction of his right to water. Plea, that the occupiers of the defendant's works had for more than twenty years as of right placed cinders and scorise, the refuse of their works, on the banks of the stream and in its channel, and that the cinders and scorise complained of were such refuse so placed. Held, that the plea was bad, *non obstante veredicto*, as not showing that the defendant had during twenty years as of right caused the refuse to go into the pond; for until the occupiers of the mill sustained some damage from the defendant's user, no right as against them began to be acquired. (*Murgatroyd v. Robinson*, 7 El. & Bl. 391; 26 L. J., Q. B. 233; 3 Jur., N. S. 615. See also as to perceptible damage, *Sampson v. Hoddinott*, 1 C. B., N. S. 611; *O'Brien v. Enright*, I. R., 1 C. L. 718; *Goldsmid v. Tunbridge Wells Commissioners*, L. R., 1 Ch. 349.)

2 & 3 Will. 4,  
o. 71, s. 2.

Enjoyment as of  
right.

The plaintiff occupied as tenant certain clayworks. Previous to his occupation a watercourse had been cut by the then occupant from a stream to the works, and there was evidence of this being done with the consent of the owner of the stream on certain terms. A few years after the watercourse was cut the plaintiff took the works, and used the watercourse uninterruptedly for more than twenty years, and he knew nothing of the circumstances under which the watercourse was made. Held, that there was evidence to go to the jury that the watercourse had not been enjoyed by the plaintiff for twenty years as of right. (*Gaved v. Martyn*, 19 C. B., N. S. 732; 14 W. R. 62.)

The use of waste water from a canal was held not to be an enjoyment as of right. (*Staffordshire, &c. Canal Co. v. Birmingham Canal Co.*, L. R., 1 H. L. 254.) It was said by *Blackburn, J.*, that *Wood v. Waud* (3 Ex. 748) was in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose is served. (*Mason v. Shrewsbury, &c. R. Co.*, L. R., 6 Q. B. 584.)

A claim of enjoyment for one of the shorter periods mentioned in the statute may be defeated in any way in which the same was liable to be defeated at common law except one, viz., that the right originated within the time of legal memory. Where therefore an easement was enjoyed during part of the period in exercise of a statutory right, and the statutory right having ceased, the enjoyment was continued for the rest of the period, it was held that the claim could not be sustained. (*Kinloch v. Neville*, 6 M. & W. 806.)

Where a claim is made under the act, it is incumbent on the claimant to prove that the right founded on the claim by user might at the beginning of or during that user have been lawfully granted to him; and where such a grant would have been *ultra vires* and void by reason of an act of parliament, the claim cannot be sustained. (*Staffordshire, &c. Canal Co. v. Birmingham Canal Co.*, L. R., 1 H. L. 278.) So it has been held that a company incorporated by act of parliament for making and maintaining a canal, and having powers under their act to take water for the purpose of supplying the canal, cannot by user acquire, under this section, a prescriptive right to take the water for any other purpose. An easement to take water to fill a canal ceases when the canal no longer exists. (*National Guaranteed Manure Company v. Donald*, 4 H. & N. 8; 28 Law J., Exch. 184. See *Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287; *Mill v. New Forest Commissioners*, 18 C. B. 60, *ante*, p. 5.)

Right must be  
capable of being  
granted.

To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back. If evidence of user beyond forty years were to be excluded, it might be that, after the case had been established as far as thirty-eight years back, a discontinuance of proof might occur as to the two or three preceding years, and the party might fail because he was unable to carry his case on without going to the distance of forty-one. (*Lamson v. Langley*, 4 Ad. & Ell. 890.) To a plea of forty or twenty years' enjoyment of a way, a licence, if it cover the whole time, must be pleaded. (*Tickle v.*

Evidence of user.

2 & 3 Will. 4,  
c. 71, s. 2.

*Brown*, 4 Ad. & Ell. 869.) But a parol or other licence, given and acted on during the forty or twenty years, may be proved under a general traverse of the enjoyment as of right; and this, whether such licence be granted for a single time of using, or for a definite period. (*Ib.*) It seems, that where issue is joined on the allegation of an interruption acquiesced in, the party alleging the interruption, having proved a non-user during part of the time, may, in order to show that such non-user was not a voluntary forbearance, give evidence that, two years before the non-user commenced, the party claiming the way paid a consideration for being allowed to use it. (*Ib.*)

A right claimed under this act can only be co-extensive with the user; and an issue on a plea justifying under such a right is an issue, not upon the right, but the user, and differs therefore from an issue of a right claimed by prescription. (*Davies v. Williams*, 16 Q. B. 546.)

To an action for entering and passing over the plaintiff's close, the defendant pleaded a right of way from time immemorial, and an user for forty years and twenty years. An user, in fact, for more than forty years was proved. In 1839 all ways not set out in an award were extinguished by an act of parliament, and this way was not set out: it was held, that it could not be presumed from the user that the award was otherwise than properly made, and that less than twenty years having elapsed since the award, no right had been gained under this section. (*Holden v. Tilley*, 1 F. & F. 650.)

It seems that, under the 2nd section of this act, prescription for a right, every year, and at all times of the year, to put and turn the party's cattle into and upon a certain close is too vague, and may be demurred to. If there be no demurrer, and the issue on such plea be tried, the party prescribing and relying on the 2nd section must give proof applicable to some definite easement. And he will fail if the evidence entitle him not to an easement, but to a profit *à prendre*. (*Bailey v. Appleyard*, 8 Ad. & Ell. 161.)

See further as to evidence of user, the note to sect. 4, *post*.

### III. LIGHT.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

3. When the access and use of light to and for any dwelling-house, workshop or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing (*h*).

(*h*) See note on law of lights, *post*.

It is to be observed that the actual enjoyment required by this section must be for twenty years, without interruption, but it is not necessary for the enjoyment, as in the case of profits *à prendre* under the 1st section, and of easements under the 2nd section, that it should be had by *any person claiming right thereto*.

In the case of *Truscott v. Merchant Taylors' Company* (11 Exch. 855), Coleridge, J., said (p. 863): "In this case the Court of Exchequer gave judgment for the plaintiffs below, without argument, on the authority of *The Salters' Company v. Jay* (3 Q. B. 109). The only question is, whether that case was rightly decided. That depends on the construction of the 3rd section of the Prescription Act, which is addressed merely to the access of light. That section seems to me to simplify and almost new-found the mode of acquiring the right to the access of light. It founds it on actual enjoyment for the full period of twenty years without interruption, unless

General operation of this section.

2 & 3 Will. 4,  
c. 71, s. 3.

that enjoyment is shown to have been by consent or agreement expressly made by deed or writing, thus putting the right on a simple foundation and with the simplest exception." And *Cresswell*, J., said: "In the course of legislation then and since, parliament has been actuated by a desire to settle titles and rights. One object of the Prescription Act was to shorten the time by which persons who had the access and use of light could acquire an absolute right to it. The 3rd section does not say when the access and use of light shall have been enjoyed as of right, because every person has a right to so much light as can come in at his window. The Prescription Act brought this to a simple question; it says that after twenty years' enjoyment without interruption the right shall be deemed absolute and indefeasible." In *Salters' Company v. Jay* (8 Q. B. 109) and *Truscott v. Merchant Taylors' Company* (11 Exch. 855) it was held, that an enjoyment of light for twenty years next before the suit confers an indefeasible right under this section, notwithstanding the local custom of London (confirmed by acts of parliament) that house walls might be raised to any height if upon the ancient foundations; but if an action for obstructing the light were delayed till after the obstruction had continued for a year, the claimant could not rely upon this act, not having enjoyed the light for twenty years next before the suit (see sect. 4), and the custom would in that case prevail.

"Upon this section it is material to observe with reference to the present appeal, that the right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be vested on any presumption of grant or fiction of a licence having been obtained from the adjoining proprietor. Written consent or agreement may be used for the purpose of accounting for the enjoyment of the servitude, and thereby preventing the title which would otherwise arise from uninterrupted user or possession during the requisite period. This observation is material, because I think it will be found, that error in some decided cases has arisen from the fact of the courts treating the right as originating in a presumed grant or licence. It must also be observed, that after an enjoyment of an access of light for twenty years without interruption, the right is declared by the statute to be absolute and indefeasible; and it would seem, therefore, that it cannot be lost or defeated by a subsequent temporary intermission of enjoyment, not amounting to abandonment. Moreover, this absolute and indefeasible right, which is the creation of the statute, is not subjected to any condition or qualification, nor is it made liable to be affected or prejudiced by any attempt to extend the access or use of light beyond that which, having been enjoyed uninterruptedly during the required period, is declared to be not liable to be defeated." (*Per Lord Westbury, Tapling v. Jones*, 11 H. L. C. 290; 34 L. J., C. P. 842; 13 W. R. 617.) "Mr. Glasse has referred me to a case of *Jones v. Tapling*, and has argued that the rule as to ancient lights now depends not on the common law or the ancient principle, but upon the statute. I do not understand the statute to have made any difference, I only read the statute as meaning this (and I believe it has been uniformly so read), that there was no absolute period theretofore, but now the period is fixed at twenty years . . . the cases since that statute have proceeded upon the same principle as before; namely, that in order to establish the right to an ancient light, you must show that there has been an undisturbed peaceable enjoyment." (*Per Malins, V.-C., Lanfranchi v. Mackenzie*, L. R., 4 Eq. 427.) "The Prescription Act (2 & 3 Will. 4, c. 71) has not altered the nature of the right to light and air. It has altered most materially the mode in which that light can be gained, but I am of opinion that it has not altered the right itself." (*Per Mellish, L. J., Kelk v. Pearson*, L. R., 6 Ch. 818.)

This section of the act is retrospective, so that the right to the access of light and air may be acquired by virtue of an enjoyment prior to the passing of the act. (*Simper v. Foley*, 2 Johns. & H. 555.)

Section retro-  
spective.

The period of twenty years' enjoyment, which confers a right to the access of light under this section, is by the 4th section of this act the period of twenty years next before any suit or action wherein the claim to

Period of twenty  
years.



2 & 3 Will. 4,  
c. 71, s. 3.

the right was brought into question, and is not limited to the period of twenty years next before the pending suit or action. (*Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; 9 Jur., N. S. 575.) According to this section, a claim to the use of light could not have been established unless it had been actually enjoyed for the full period of twenty years before the commencement of the action, but if there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year. (*Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442, affirmed by House of Lords, 1 West. 671; 5 Jur. 811; 8 Cl. & Fin. 231.) Lord Campbell, C. J., observed, "The decision in *Flight v. Thomas* may establish conclusively that, when an easement has once been enjoyed as of right, such enjoyment must be taken, for the purposes of the act, to continue though interrupted, unless the interruption be acquiesced in for a year. But I do not think that any member of this court is inclined to go beyond that decision." (17 Q. B. 272.)

Nature of the  
enjoyment.

To acquire a right to the access of light and air by actual enjoyment under this section it is not necessary that the house should be occupied or that it should be fit for immediate occupation during the statutory period. (*Courtauld v. Legh*, L. R., 4 Ex. 126.) But there can be no prescription for light and air over open ground. (*Roberts v. Maood*, 1 M. & Rob. 230; *Potts v. Smith*, L. R., 6 Eq. 311.)

This section converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years in the character of an easement, distinct from the enjoyment of the land itself, and the statute places this species of negative easement on the same footing in this respect as those positive easements provided for by the other sections. (*Harbidge v. Warwick*, 3 Exch. 552.) A right to the access and use of light to a house cannot be acquired under this section by the lapse of time during which the owner of the house, or his occupying tenant, is also the occupier of the land over which the right would extend. During such period of unity of occupation the running of the twenty years under the statute is only suspended. (*Ladyman v. Grave*, L. R., 6 Ch. 763.)

Enjoyment as  
against tenant for  
life or years.

Before the statute.

Before the stat. 2 & 3 Will. 4, c. 71, s. 3, the acquiescence of lessees or tenants for life in the enjoyment of lights did not bind the landlord or reversioner, unless they had knowledge and acquiesced for twenty years, and a presumption against the owner of lands was not so easily inferred in the case of light as in cases of rights of way or common, where the tenant suffered an immediate injury. Thus it was held that an enjoyment of lights for more than twenty years, during the occupation of the opposite premises by a tenant, did not preclude his landlord, who was ignorant of the fact, from disputing the right to such enjoyment, although he would have been bound by twenty years' acquiescence, after having known that the windows were opened. (*Daniel v. North*, 11 East, 370.) So where lights had been enjoyed for more than twenty years, contiguous to land which, within that period, had been glebe land, but was conveyed to a purchaser under the 55 Geo. 3, c. 147, it was held, that no action would lie against such purchaser for building so as to obstruct the lights, inasmuch as the rector, who was tenant for life, could not grant the easement, and therefore no valid grant could be presumed. (*Barker v. Richardson*, 4 B. & Ald. 579; see also *Cross v. Lewis*, 2 B. & Cr. 686.)

Since the statute.

The 8th section of the act, providing for possession during particular estates, does not extend to lights. But from the language of sect. 8, it would seem that the legislature contemplated such an enjoyment as could be interrupted by the adjoining occupier, at least during some part of the time. (*Harbidge v. Warwick*, 3 Exch. 557.) It has been held, however, that since this statute, where the right to light is acquired against an owner of a leasehold interest, it is also acquired against the owner of the reversion. (*Simper v. Fvley*, 2 Johns. & H. 555.) Pollock, C. B., said it may be, since the prescription act, that if a man opens a light towards his neighbour's land, the reversioner may have no means of preventing a right

thereto being acquired by a twenty years' enjoyment, unless he can prevail upon his tenant to raise an obstruction, or is able to procure from the other party an acknowledgment that the light is enjoyed only by consent. (*Fremen v. Phillips*, 11 C. B., N. S. 455; and see *Ladyman v. Grave*, L. R., 6 Ch. 769.)

2 & 3 Will. 4,  
c. 71, s. 3.

The plaintiff and the defendant occupied houses adjoining each other as tenants under leases, both of which were granted by the same lessor on the same day and both expiring at the same time. The defendant, by building on his own premises, obstructed a window in the house of the plaintiff, though the latter had had uninterrupted enjoyment of light and air for more than twenty years: it was held that the circumstance of the two houses being held under the same landlord and for the same term did not prevent the one tenant from acquiring an indefeasible right to light as against the other. (*Fremen v. Phillips*, 11 C. B., N. S. 449; 7 Jur., N. S. 1246; 30 L. J., C. P. 356; 9 W. R. 786.)

Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section. (*Plasterers' Company v. Parish Clerks' Company* (in error), 6 Exch. 630; 15 Jur. 965; 20 L. J., Exch. Ch. 362.) The occupier of a house paid an annual sum, under a parol agreement, to the owner of the adjoining land for the liberty of keeping the windows open, which looked upon the land, and continued in such active enjoyment for twenty years. It was held, on error, in an action by the occupier against the owner of the adjoining premises for an obstruction to his lights, that the payment so made was no evidence of an interruption of the enjoyment within this section. (*Ib.*)

Payment of rent or verbal permission does not prevent acquisition of right.

An actual enjoyment of light for twenty years, even under a permission verbally asked for the occupier of a house, and given by the person having a right to obstruct, is sufficient to confer a right under this section. (*London (Mayor, &c.) v. Pensterers' Company*, 2 M. & Rob. 409.)

By the custom of London, which is stated in the case of *Wynstanley v. Lee* (2 Swanst. 339, 340), an occupier of a house there had not an absolute property in the enjoyment of his share of light, whatever it might be, but the owner of the adjoining house or site of houses might build to any height, and to the obstruction of his light, unless he was precluded by some writing between them. And the custom was not repealed *merely by the length of time* during which one party enjoyed and the other acquiesced in such enjoyment. (2 Swanst. 341. See *Privilegia Londini*, p. 101, cited *Mood. & Malk.* 351; and see *Godb.* 183; *Yelv.* 215; 1 Bulstr. 115; *Com. R.* 273; 1 Burr. 248; 3 Carr. & P. 317; *Shadwell v. Hutchinson*, 3 C. & P. 615; *M. & M.* 350; 2 B. & Ad. 97.)

Custom of London.

This section extends to the custom of the city of London, authorizing one neighbour to obstruct the access of light to another's messuage, &c., by building on an ancient foundation; therefore in an action for building so as to darken windows which had been enjoyed without interruption for twenty years, the custom of London is no longer a defence. (*Salters' Co. v. Jay*, 3 Q. B. 109; 2 Gale & D. 414.) The last case is confirmed by *Truscott v. Merchant Taylors' Co.*, 11 Exch. 855; 2 Jur., N. S. 356; 25 L. J., Exch. 173.)

#### IV. PERIODS HOW TO BE COMPUTED.

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice

Before-mentioned periods to be deemed those next before suit for claims to which such periods relate.

2 & 3 Will. 4,  
c. 71, s. 4.

thereof, and of the person making or authorizing the same to be made (i).

(i) This section is nothing but an exposition of the proof required to establish the right. (*Jones v. Price*, 3 Bing. N. C. 52.) In a plea under this statute it is sufficient to aver an user of the right for thirty, sixty, twenty or forty years, according to the nature of the case, next before the commencement of the suit, and it is not necessary to allege that it has existed for forty years before the act complained of in the declaration. (*Wright v. Williams*, 1 Tyr. & G. 375; 1 Mees. & W. 77; *Richards v. Fry*, 7 Ad. & Ell. 707.)

How periods  
mentioned in the  
act are to be com-  
puted.

*Wright v. Wil-  
liams.*

In an action on the case for an injury alleged to be done to the interest of the plaintiff's reversion in certain closes of land, the defendant pleaded an user for forty years *before the commencement of the suit*. It was objected that they should have averred the user for the allotted period to have taken place before the commission of the act complained of; and, in support of this objection, it was argued, that the court could only look upon the facts as they existed at the time the act complained of was committed; that it was absurd to say that the legality of an act must be ascertained, not by the state of things at the time the act was done, but by something that occurs afterwards. "If a literal construction," it was contended, "is to be put on the 4th section of the statute, an enjoyment of 500 years would give no indefeasible right, because the user is required to be during a period 'next before some suit or action, wherein the claim or matter to which such period may relate shall have been or shall be brought in question.' The language of the 2nd section is clear of all doubt. It says expressly that the claim shall not be defeated, where the way or other matter has been actually enjoyed, by any person claiming right thereto, without interruption for the full period, &c. If the computation be of a period before the commencement of a suit, a party might establish his right, although during the last nine months of the forty years there had been an obstruction to which he submitted; for by the 4th section no interruption can be effectual against the user, unless acquiesced in for a year." Lord Abinger, C. B., in delivering the judgment of the court, said, "It is said for the plaintiff, that although the act in the 4th section expressly states, that the periods of twenty and forty years shall be deemed and taken to be next before the commencement of some suit, wherein the claim shall have been brought in question, yet that this enactment must be construed to mean that the period shall be those years next before the act complained of, on account of the absurdities and inconveniences to which a literal construction of this provision would give rise. One of these alleged absurdities and inconveniences was, that no good title could arise to any incorporeal hereditament mentioned in the statute by virtue thereof, unless some action should have been brought by or against the party claiming it; to which may be added, that one action could not perfect the title to the right, as the act requires an enjoyment for the full period immediately before any action. Another was, that if the act be so construed, the plea justifying under such a right must be on the face of it absurd, as each of the pleas in question is suggested to be, for each justifies an act done at a particular time by the defendant, as being then lawful, and then done because the defendant actually enjoyed the right of doing the same thing for a period of time afterwards; so that it is said the character of the act, whether it be wrongful or rightful, cannot be known at the time by the party doing it, but depends upon a subsequent event. We are of opinion, however, that it is impossible to construe the act of parliament as intending that the periods of years therein mentioned should terminate at a different time from that fixed in express and positive terms. If the words of the statute were capable of being modified, so as to avoid an inconvenience plainly and manifestly arising from a strict construction of them, we ought to do so; but here the words are precise and unambiguous, and the mischief suggested is perhaps rather apparent than real; and most cases of grants by prescription before the act passed were of the same nature, and the validity of rights gained by them depended much upon the mode of enjoyment, until



that action was brought in which they came in question; and with respect to the form of the plea, which is at first sight somewhat incongruous, it is to be observed that there is something of the same kind of incongruity, though by no means to the same extent, in the usual mode of pleading a prescription, which states 'that some person seised in fee from time whereof the memory of man is not to the contrary, until and at the time when, &c., and from thence hitherto hath had and enjoyed, and hath been used and accustomed to have and enjoy, and still ought of right to have and enjoy,' a particular easement, and then justifies the act done by reason of that enjoyment, which enjoyment is both before and after the time of such act. It appears to us, that the statute in question intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance." The court held the pleas sufficient in point of law. (*Wright v. Williams*, 1 Mees. & W. 77, 98—100. See *Rea v. Inhabitants of Calow*, 8 Maule & S. 22.)

2 & 3 Will. 4,  
c. 71, s. 4.

Twenty years' enjoyment by the occupier, in order to give right under this statute, must be up to the time of the *commencement of the suit, not up to the time of the act complained of*; and, consequently, an enjoyment of twenty years or more before that act gives only what may be termed an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit. This apparent absurdity, arising from a strict construction of the act, was fully considered and acted on in *Wright v. Williams* and *Richards v. Fry* (*ubi sup.*). (*Per Parke, B., Ward v. Robins*, 15 Mees. & W. 242.)

It has been held that the period of twenty years may be the period of twenty years next before any suit or action wherein the claim to the right is brought into question, and is not limited to the twenty years next before the pending suit or action. (*Cooper v. Hubbuck*, 12 C. B., N. S. 456.)

Where a right of way was claimed by prescription at common law, it was held that there must be evidence of user for at least twenty years as of right; but that it need not be the twenty years next before the commencement of the suit. (*Darling v. Clue*, 4 F. & F. 329.)

A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it; and if the evidence go no further there is no case for the jury. In an action of trespass *quare clausum fregit* the defendant pleaded a right of way for twenty and forty years respectively, under the 2nd section. Evidence was given of user, in support of these pleas, more than fifty years ago, but there was a failure to show that the user continued for the last four or five years before the commencement of the action. A verdict was found for the plaintiff: on motion for a new trial the rule was refused. (*Parker v. Mitchell*, 3 P. & Dav. 655; 11 Ad. & Ell. 788.) This was considered a correct decision. Pleas of twenty and forty years' user respectively under this act are not supported by proof of user for forty years and upwards before the commencement of the action to within fourteen months of it. Some act of user must be shown to have been exercised in the year in which the action was brought. (*Lowe v. Carpenter*, 6 Exch. 825; see *Ennor v. Barmell*, 2 Giff. 420.) As it is impossible that the acts of user should continue to the very moment of action brought, or that they should be continued within a week or month of that time, *Parke, B.*, thought that, according to the true construction of the statute, some act of that description must take place within each year. *Alderson, B.*, said that *Parker v. Mitchell* decided that enjoyment during the last year is material; and *Bailey v. Appleyard* (8 Ad. & Ell. 161) decided that the enjoyment must be during the first year; and *Carr v. Foster* (3 Q. B. 581) seemed to intimate that the intermediate time was not so material. (*Lowe v. Carpenter*, 6 Exch. 832.)

Requisite evidence  
of user during  
statutory period.

It was said by *Patteson, J.*, that if there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, yet this may be a sufficient enjoyment of the old right for

2 & 3 Will. 4,  
c. 71, s. 4.

Interruption.

twenty years to make it indefeasible under this statute, for the agreement to suspend the enjoyment of the right does not extinguish it, nor is it inconsistent with the right. (*Payne v. Shedden*, 1 M. & Rob. 388.)

The interruption which defeats a prescriptive right under 2 & 3 Will. 4, c. 71, is an adverse obstruction, not a mere discontinuance of user by the claimant himself. (*Carr v. Foster*, 3 Q. B. 581. See note to sect. 6, *post*.) The mere intermission of the exercise of the right for more than a year, in the middle of the prescriptive period, is not necessarily an interruption of the right, within the meaning of this section: such an intermission may be explained, and it is for the jury to say whether there has notwithstanding been a substantial enjoyment of the right for the requisite period. (*Ib.*; and see *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630.)

The interruption may be caused by the act of a stranger, as well as by that of the person in whose land the easement is claimed. (*Davies v. Williams*, 16 Q. B. 558.)

Where it appeared that at a period much earlier than twenty years before the commencement of the action, a stream of water had flowed through the plaintiff's lands; but that there had been some interruption about twenty-two years before the action, and it was not till within nineteen years that the stream had again flowed constantly in its former course, and it was objected that there was a want of sufficient evidence to support the plaintiff's claim, *Tindal*, C. J., said, it would be very dangerous to hold, that a party should lose his right in consequence of such an interruption; if such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment. (*Hall v. Swift*, 4 Bing. N. C. 381; 6 Scott, 167. See the remarks of *Patteson*, J., on that case, 3 Q. B. 585, 586; and *Carr v. Foster*, 3 Q. B. 381.)

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from the date of that promise before proceedings were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy. (*Gale v. Abbott*, 8 Jur., N. S. 987; 10 W. R. 748.)

An interruption in the enjoyment may cause the acquisition of a qualified easement instead of altogether preventing the acquisition of any easement. (*Rolle v. Whyte*, L. R., 3 Q. B. 286.)

Although, under this section, no interruption will prevent a right from being acquired by twenty years' user, unless it has been acquiesced in for a whole year, yet an interruption for a shorter period may have the effect of showing that the enjoyment never was as of right, and thereby of preventing a right being acquired under the second section of this act. (*Eaton v. Swansea Waterworks Co.*, 15 Jur. 675; 20 L. J., Q. B. 482; 17 Q. B. 267; *ante*, p. 12.)

Enjoyment for  
nineteen years  
and a fraction.

The right to an easement which has been enjoyed for nineteen years and a fraction, and is then interrupted by the owner of the soil, may still be acquired under this statute at the end of the twentieth year; for the interruption to defeat twenty years' user must have been acquiesced in or submitted to for a whole year. In an action for obstructing certain windows, in a house occupied by the plaintiff, it appeared that at the time when a wall which caused the obstruction was erected, the part of a window had existed and been enjoyed, and the use of the light and air through the same had been enjoyed for the space of nineteen years and 330 days only, the period of a year not having elapsed from the time of the erection of the wall until the commencement of the action in which the right had been brought into question. The plaintiff had notice of the erection and of the prevention of the light and air from entering thereby through the said part of the window, and at the time of the commencement of the action, the part of the window had been made, and had existed and been enjoyed, and the access and use of light and air through the part of the window had been enjoyed for the full space of twenty years, except as aforesaid, without any interruption except the interruption above mentioned, and not under any consent or agreement given by deed or writing; and at the time of the

commencement of the action such interruption had not been acquiesced in for one year after the plaintiff had notice thereof. If the 3rd section had stood alone, the court held that the plaintiff below could not have established any claim to the use of the light in question, because it had not been actually enjoyed with the messuage for the full period of twenty years before the commencement of the action, but only for nineteen years and 330 days, when the enjoyment was interrupted by the erection of the wall. The 4th section, however, defines the meaning of the word *interruption*, and as upon the trial it was proved that the erection of the wall, which was the act complained of, had not been acquiesced in for one year after notice, inasmuch as the action was commenced within a few months after the erection of the wall, the court was of opinion that such erection of the wall and continuing it so erected, was not an interruption within the meaning of the 4th section of the act. (*Flight v. Thomas*, 11 Ad. & Ell. 688; 3 P. & Dav. 442; affirmed by the House of Lords, 5 Jurist, 811; 8 Cl. & Fin. 281. See 17 Q. B. 272.)

2 & 3 Will. 4,  
c. 71, s. 4.

As to evidence of interruptions to the right of common, see *Davies v. Williams*, 16 Q. B. 558; *Welcome v. Upton*, 6 M. & W. 536. Where the lord attempted to stop the user of a common, the fact that some of the tenants yielded is not an interruption of the right within the meaning of this section, so as to bar the rights of freeholders, who as a body have never yielded to, or acquiesced in, the claim of the lord (*Warrick v. Queen's College, Oxford*, L. R., 10 Eq. 105.) Non-acquiescence in an interruption is a question of fact for a jury, and need not necessarily be proved by bringing some suit or action within a year from the commencement of the interruption. (*Bennison v. Cartwright*, 5 B. & S. 1; 12 W. R. 425.)

Acquiescence in  
interruptions.

## V. PLEADINGS.

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation (*k*).

In actions on the  
case the claimant  
may allege his  
right generally as  
before this act.

In pleas to tres-  
pass and other  
pleadings, where  
party used to  
allege his claim  
from time imme-  
morial, the period  
mentioned in this  
act may be  
alleged; and  
exceptions or  
other matters to  
be replied  
specially.

(*k*) Before the passing of the statute 2 & 3 Will. 4, c. 71, a prescription in a *que estate* must always have been laid in the person who was seised of the

2 & 3 Will. 4,  
c. 71, s. 5.

fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord. (6 Rep. 60 a; Fortesc. 340.) The uniform practice, in a plea justifying under a right of common, was to set out the title to the common specially, by showing a seisin in fee of the land to which the defendant claimed a right of common, either in himself or in some other person under whom he derived title, and then to prescribe in the *que estate* for the right of common, by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial. (*Grimstead v. Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n. (1).) And if the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad. (Cro. Car. 599; 4 Rep. 38.) As where a defendant justified under a right of common of pasture, showing a demise from a freeholder for life of the land in respect of which he claimed, and averred that he the defendant, and all those whose estate he then had, and his landlord, from time, &c., had common of pasture in respect of the demised premises, it was held upon demurrer to be a bad plea. (*Attorney-General v. Gauntlett*, 8 Y. & Jer. 93.) But by the above section in actions on the case, the claimant may allege his right generally; and in pleading to actions of trespass, where previously it would have been necessary to have alleged the right to have existed from time immemorial, it will be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed during the period provided by the act, and without claiming in the name of the owner of the fee.

The leading provision of this statute is in favour of enjoyment "as of right," that is, of such a nature that its origin could be reasonably referred to nothing but some right, though it were not capable of being exactly described. (*Per Lord Denman*, C. J., 4 Q. B. 355. See 1 Exch. R. 286.)

For the meaning of "enjoyment as of right," see *Tickle v. Brown*, 4 Ad. & Ell. 369, quoted *ante*, p. 12.

The 5th section gives a new plea, by enacting, that in certain cases it shall be sufficient to allege the enjoyment "as of right." If the parties choose to avail themselves of that provision, they must follow the very words; and if they neglect to do so, the plea is bad, and the omission would be ground of demurrer. Since this statute, it is usual in pleading a right of way to plead first a prescriptive right, then a right of way existing for the last forty years, and then a right of way existing twenty years, and so of other rights under that statute. (*Per Alderson*, B., *Earl of Stamford v. Dunbar*, 13 Mees. & W. 827.)

A plea in trespass alleging that the defendant and all other prior occupiers of a certain tenement, for twenty years next before the commencement of the suit, have had, used and actually enjoyed without interruption, and of right ought to have had, used and actually enjoyed, &c. a way through the *locus in quo*, was held to be bad after verdict, as the actual enjoyment was not alleged to have been under the right claimed, and the enjoyment therefore was not shown to be "as of right," according to the 5th section. (*Holford v. Hankinson*, 1 Dav. & Mer. 478; 5 Q. B. 584.) The plea alleged a defective title, and came within the reason of the decision in *Jackson v. Peshed*, 1 Man. & S. 234. The distinction between a defective statement and the statement of a defective title was exemplified in *Davis v. Black*, 1 Q. B. 900, and *Rutter v. Chapman*, 8 Mees. & W. 1.

Matters to be  
replied specially.

Where a defendant pleads an enjoyment of an easement for thirty years under this act, and the plaintiff relies on the existence of a life estate, or any of the other portions of time which by sect. 7 are to be excluded from the computation of the thirty years, not being inconsistent with the actual fact of enjoyment, he is bound under the 5th section of this statute to plead such life estate, &c. specially. (*Pye v. Mumford*, L. J. 1848, Q. B. 138; 12 Jur. 578; 5 Dowl. & L. 414.)

It has been decided upon this section, that where a defendant justifies under an enjoyment of twenty or forty years, if the plaintiff relies upon a licence covering the whole of that period, he must reply such licence specially: but a licence granted and acted on during the period may be given in evidence under the general traverse of the enjoyment during the period alleged, showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle v. Brown*, 4 Ad. & Ell. 369; 6 Nev. & M. 280;—see *Lowry v. Crothers*, 1 R., 5 C. L. 98, *ante*, p. 5.)

2 & 3 Will. 4,  
c. 71, s. 5.

When licence  
must be replied  
specially.

To a declaration in trespass *qu. cl. fr.* the defendant pleaded, that he and the former occupiers of a house and land had for twenty years used and enjoyed as of right a certain way on foot and with horses, &c., from and out of a common highway, towards, into, through and over the plaintiff's close, to the defendant's house and lands and back, at all times of the year, at their free will and pleasure. The replication averred, that the defendant, &c. used and enjoyed the right of way mentioned in the plea, but they did so under the plaintiff's leave and licence. At the trial it appeared, that the defendant and the former occupiers of his house and land had an admitted right of way from thence over the *locus in quo* to the highway, and across the highway to a close called Reddings, and that for the last twenty years they had a licence from the plaintiff to use, whenever they pleased, a way from the defendant's house and lands over the *locus in quo* to the highway and back, when they had not any intention of going to Reddings. It was held, that the replication was not supported by this evidence, and that the plaintiff was bound to show a licence co-extensive with the right claimed in the plea and admitted by the replication. (*Colchester v. Roberts*, 4 Mees. & W. 769.)

Licence must be  
co-extensive with  
the right claimed.

The asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. (*Monmouthshire Canal Co. v. Harford*, 1 Cr. M. & R. 614. See *Tickle v. Brown*, 4 Ad. & Ell. 383.) Lord Denman, C. J., said, that in looking at the report of the case of the *Monmouthshire Canal Co. v. Harford* (1 Cr. M. & R. 614; 5 Tyr. 68; see *post*), we find that the decision rests on this ground, viz. that the asking leave from time to time *within* the forty or twenty years breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and therefore the evidence of such asking *within* the period is admissible under a general traverse of the enjoyment for forty or twenty years as of right. To this ground of decision we quite accede; and it will follow, that not only an asking leave, but an agreement *commencing within the period* may be given in evidence under the general traverse, notwithstanding the words of the 5th section; for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as showing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years. (*Tickle v. Brown*, 4 Ad. & Ell. 383, 384.) In *Beasley v. Clark* (3 Scott, 258; 2 Bing. N. C. 709), Tindal, C. J., said, "Under a replication denying that the defendant had used the way for forty years as of right, and without interruption, the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section not being inconsistent with the simple fact of enjoyment, being referable, as we understand the statute, to the fact of enjoyment as before stated in the act, viz. an enjoyment claimed and exercised as of right."

Evidence admis-  
sible under  
general traverse.

Asking leave.



2 & 3 Will. 4,  
c. 71, s. 5.

Evidence of unity  
of possession.

In *Onley v. Gardiner* (4 Mees. & W. 494), it was decided, that unity of possession was "inconsistent with the simple fact of enjoyment as of right," and therefore need not be specially pleaded. The simple fact of enjoyment referred to in the 5th section is an enjoyment "as of right," and proof that there was an occasional unity of possession is as much in denial of that allegation, as the occasionally asking permission would be. In *Clayton v. Corby* (2 Q. B. 813), it was held, that evidence of unity of possession was receivable under the traverse of a plea of enjoyment for sixty years, inasmuch as such proof went to show that the enjoyment was not as of right. (See *Pye v. Mumford*, 5 Dowl. & L. 414.) In trespass *quare clausum fregit*, to a plea of enjoyment of a right of way over the plaintiff's close, by the occupiers of a close called W. for twenty years next before the commencement of the suit, under this statute, the plaintiff replied that, before the period of twenty years mentioned in the plea, one W. C. was seised in fee, as well of the close mentioned in the declaration as of the close called W., and continued so seised during part of the said period of twenty years, to wit, until, &c., when he died so seised; it was held bad on special demurrer; for that unity of *seisin* was not inconsistent with the right as alleged in the plea, and unity of *possession* (if that were meant by the replication) might have been given in evidence under a traverse of the right as alleged in the plea. (*England v. Wall*, 10 Mees. & W. 699.)

In trespass, upon issue joined, whether the defendant had for thirty years enjoyed as of right a certain privilege, &c., upon the plaintiff's land, the plaintiff, in order to raise the presumption that the enjoyment was permissive, may give in evidence an old lease made to the defendant's predecessor, and expiring immediately before the commencement of the thirty years, whereby the lessee was entitled to the privilege, &c., during the term. It is not necessary in such a case for the plaintiff to reply the lease specially under this section. (*Clay v. Thackerah*, 2 M. & Rob. 244; 9 Carr. & P. 47; *ante*, p. 11.) In an action of trespass *quare clausum fregit*, it was also held, that this unity of possession need not be specially replied; and that, without a special replication under the 5th section, the lease of the land to B., and letters written by B. while lessee of the mill, and before he became lessee of the land, were receivable in evidence. (*Ib.*) And it was held, that B.'s lease of the land having expired more than thirty years ago, the acts of the occupiers of the mill in repairing the banks ever since that time, without any leave asked by them, or any notice from the other side of any adverse claim, must be taken to be done as of right. (*Ib.*)

Evidence of ex-  
tent of right.

The plea under this act was of a right of way for the occupiers of a close for twenty years, for horses, carts, waggons, and carriages, at their free will and pleasure. The replication traversed such right. It was held that, under the issue, the plaintiff might show that the defendant had a right of way for horses, carts, waggons, and carriages, for certain purposes only, and not for all, and was not compelled to new assign; and might show that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which the right extended. (*Cowling v. Higginson*, 4 Mees. & W. 245.) In an action of trespass *quare clausum fregit*, defendant justified the acts complained of, as having been done in exercise of a right of way for foot passengers. Plaintiff taking issue upon that, gave evidence at the trial that defendant had used the alleged pathway with horses and carts. Held, that the excessive user should have been new assigned. (*Lane v. Hone*, 1 R., 6 C. L. 232.) It is sufficient *prima facie* proof of a prescription for a general easement as a right of way for all purposes to show the actual exercise of the right for more than twenty years for all the purposes to which the use or enjoyment of the premises at different times required its exercise, although for some of those purposes it appears that it was first used, in fact, within that period. (*Dare v. Heathcote*, 25 L. J., Exch. 245.) Hence, where a right of way was pleaded for cattle and carts, and it appeared that the right had been used for cattle for more than twenty years, and had for the first time been used for carts within that period on

the first occasion which had arisen requiring its use in that manner; it was held that the evidence was enough to go to the jury, as raising a presumption that the right had existed to the general extent to which it was claimed, although it had not been exercised for a period so long as in itself to create a prescription. (*Ib.*)

2 & 3 Will. 4,  
c. 71, s. 5.

In cases of prescription the allegation must be proved as laid. Thus, in replevin, if the defendant avow taking the cattle as damage feasant, and the plaintiff plead in bar a right of common, and aver that the cattle were levant and couchant, on which averment issue is joined, proof only for part of the cattle will not be sufficient, for the issue is upon the whole. (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 318. See 2 H. Bl. 224.) But though a party must prove a prescriptive right commensurate with the right claimed, he will not be precluded from recovering, because he proves a more ample right than what he claims. Evidence of a right of common for sheep and cows will support a plea prescribing for common only for sheep. (Cro. Eliz. 722; 1 Taunt. 142; *West v. Andrews*, 1 B. & Cr. 77.) A party may prescribe for less than he proves, but that implies that the lesser right claimed is included in the greater. (*Bailey v. Appleyard*, 8 Ad. & Ell. 167.) Where a plaintiff claimed a right of common for all his commonable cattle, and the proof was that he had turned on all cattle that he kept, but that he had never kept any sheep; it was held to be evidence of a right for all commonable cattle, which ought to have been left to the consideration of the jury. It might have been otherwise if there had been evidence of the plaintiff having kept cattle which he did not turn on. A right of common was held to be well laid as "for sheep at all times of the year;" though it was proved to be subject to folding the sheep at night in a certain farm, the expression being held to mean all usual times. (*Manifold v. Pennington*, 4 B. & Cr. 161; *Brook v. Willet*, 2 H. Bl. 224.) Where in debt, for not setting out tithe of hay, plaintiff averred that there was a certain annual custom as to setting out the tithe "within the parish, and the limits, bounds and tithable places thereof;" it was held, that such averment was proved, for that the custom prevailed in all parts of the parish where tithe of hay was set out, and that proof of a modus for hay in one township made no difference. (*Pigott v. Bayley*, 6 B. & Cr. 16.) Where a plaintiff claimed an easement of hanging linen across a yard for drying them, larger than that proved, the court refused to allow the plaintiff to amend on payment of costs, inasmuch as he was not thereby precluded from bringing another action, if he were interrupted in the enjoyment of the limited right. (*Drewell v. Towler*, 3 B. & Ad. 735.) The general rule of pleading in cases of tort is, that it is sufficient if part only of the allegation stated in the declaration be proved, provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved. There is an exception, however, to this rule, which is, where the allegation contains matter of description. There, if the proof given be different from the statement, the variance is fatal. (*Ricketts v. Salway*, 2 B. & Ald. 363. See *Beadsworth v. Torkington*, 1 Q. B. 782; *Brunton v. Hall*, *Ib.* 792.) If the allegation of right be divisible, it seems that the plaintiff is entitled to a limited verdict for a divisible part of the right alleged, though he fails to prove the residue. (See *Giles v. Groves*, 12 Q. B. 721; 1 Chit. Pl. 400, 7th ed.; Bullen and Leake's Precedents of Pleadings, 285, 711, 3rd ed.)

Prescriptive right commensurate with right claimed must be proved.

The latter part of the 5th section, in express terms, applies only to rights which can be claimed by the occupiers of a tenement in respect of it, which, it has been contended, is confined to a claim appendant or appurtenant, and does not apply to a right in gross, as a right to take the whole pasturage in gross. (See 5 Mees. & W. 402; 6 Mees. & W. 540; 7 Mees. & W. 81.) It is questionable whether a right of common in gross be within this statute. Parke, B., said, "If the only question had been whether a right of common in gross be within the 5th section, we should probably have granted a rule for the purpose of giving that question further consideration, although we might be disposed to think that the present case is within the equity of the statute." (*Welcome v. Upton*, 6 Mees. & W. 542. See & C. 5 Mees. & W. 404. See also *per Willes, J.*, *Bailey v. Stevens*,

Right in gross not within the statute.

2 & 3 Will. 4, 12 C. B., N. S. 113.) It is now decided that rights in gross are not within the statute. (*Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 14 W. R. 18.)

Restricting the presumption to be allowed in support of claims herein provided for.

## VI. LESS PERIOD NOT TO BE ALLOWED.

6. In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim (l).

(l) This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed by the statute. (*Bright v. Walker*, 1 Cr., M. & Rosc. 222; *ante*, pp. 9, 10.)

The "interruption" which defeats a prescriptive right, under this statute, is an adverse obstruction, not a mere discontinuance of user by the claimant himself. In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is always a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference to be drawn from the facts proved on this point is not a presumption within the 6th section. Where a commoner had ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after: it was held, that a jury were justified in finding a continued enjoyment of the right during thirty years. (*Carr v. Foster*, 3 Q. B. 581; 2 Gale & D. 753. See *Hall v. Swift*, 4 Bing. N. C. 381.)

The meaning of this section seems to be that no presumption or inference in support of the claim shall be derived from the bare fact of user or enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight or evidence, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant. (*Per Lord Westbury, Hanmer v. Chance*, 13 W. R. 556; 34 L. J., Ch. 416.)

## VII. DISABILITIES.

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible (m).

(m) It is the intention of the act, that an enjoyment of thirty years, or twenty years, shall be of no avail against an idiot or other person labouring under incapacity, but that one of sixty or forty years shall confer an abso-



late title, even against parties under disabilities. (See *Wright v. Williams*, 1 Tyr. & Gr. 392; 1 Mees. & W. 77.) This section, it is to be observed, in express terms excludes the time that the person (who is capable of resisting the claim) is *tenant for life*. During the period of a tenancy for life, the exercise of an easement will not affect the fee; in order to do that there must be that period of enjoyment *against* an owner of the fee. (*Bright v. Walker*, 1 Cr., M. & R. 222; *ante*, pp. 9, 10.) The cases when the right is declared by the statute to be absolute and indefeasible are as follows. By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water, shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

2 & 3 Will. 4,  
c. 71, s. 7.

Cases where right  
is declared abso-  
lute.

A claim was defeated by proof of an outstanding life estate under this section. (*Hale v. Oldroyd*, 14 M. & W. 739.)

Under sects. 1, 4 and 7 of this act, an enjoyment as of right for thirty years next before the commencement of an action, may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life. The defendant pleaded generally, that he had enjoyed as of right for thirty years *next before* the commencement of the action; the plaintiff replied that a life estate was outstanding for twenty-seven of the said thirty years; the defendant rejoined that such estate did not continue during any part of the said thirty years: and issue was thereupon joined. The defendant proved enjoyment during two periods, amounting together to thirty years; one period before and one after the life estate. It was held, that the defendant's issue was proved, and that as the plaintiff had replied and set up a tenancy for life he excluded the term of such tenancy, and drove the defendant to show thirty years' enjoyment, either wholly before the tenancy for life if it had still subsisted, or partly before and partly after, whereas in this case it had determined. (*Clayton v. Corby*, 2 Q. B. 813.)



### VIII. TIME EXCLUDED FROM FORTY YEARS.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (n) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person

What time to be  
excluded in com-  
puting the term  
of forty years  
appointed by this  
act.

2 & 3 Will. 4, c. 71, s. 8. entitled to any reversion expectant on the determination thereof (*o*).

Omission of easement in 8th section.

(*n*) The words of the 2nd section extend to all easements; but the word "easement" is omitted in the 8th section. There seems reason for thinking that the word *convenient* has crept into the 8th section instead of the word "easement," for, with that exception, the expressions in the two sections are the same. It does not appear why it should be supposed that the legislature would have neglected to protect the interests of reversioners in the case of other easements than ways and watercourses. (See *Wright v. Williams*, 1 Tyr. & G. 390; 1 Mees. & W. 77.)

(*o*) According to the 7th section a tenancy for life is included in the period of forty years; the 8th section only takes it out on condition that the reversioner shall bring his action within three years after its determination; a user of forty years confers a *prima facie* title, which is good, unless the reversioner pursues his remedy within the three years. (*Wright v. Williams*, 1 Tyr. & G. 393; 1 Mees. & W. 77.) The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned. (*Onley v. Gardiner*, 4 Mees. & W. 500.)

Under the 7th and 8th sections of this act, the time during which the servient tenement has been under lease for a term exceeding three years, is to be excluded from the computation of forty years' enjoyment, but not from the computation of an enjoyment for twenty years. (*Palk v. Skinner*, 18 Q. B. 568.) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold, that it applies also to the computation of an enjoyment for twenty years. (*Per Erle, J.*, *Ib.* 575.)

Replication of life estate.

Where a replication to a plea of enjoyment of an easement for forty years, under this act, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate. (*Wright v. Williams*, 1 M. & W. 100.)

Not to extend to Scotland or Ireland.

9. This act shall not extend to Scotland or Ireland (*p*).

(*p*) This act has been extended to Ireland by 21 & 22 Vict. c. 42, see *ante*, p. 2, n. (*a*).

Commencement of act.

10. This act shall commence and take effect on the first day of Michaelmas Term now next ensuing.

## OF SUBJECTS INCLUDED IN THE PRESCRIPTION ACT.

1. *Of the Nature of Prescription.*
2. *Of Rights of Common.*
3. *Of the Presumption of Grants of Easements and of Licences.*
4. *Of Rights of Way.*
5. *Of Watercourses.*
6. *Of the Right to Pews.*
7. *Of the Right to Light and Air.*

### (1.) OF THE NATURE OF PRESCRIPTION.

Nature of prescription.

Every species of prescription by which property is acquired or lost is founded on this presumption, that he who has a quiet and uninterrupted

possession of any thing for a certain number of years is supposed to have a just right, without which he would not have been suffered to continue in the enjoyment of it; for a long possession may be considered as a better title than can commonly be produced, as it supposes an acquiescence in all other claimants, and that acquiescence also supposes some reason for which the claim was forborne. (1 Domat, 461.) The most ancient and distinguished writers on the common law of England have recognized the principle, that a right to any incorporeal hereditament may be acquired by length of time. This mode of acquisition they have denominated *prescription*, "*præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis.*" (Co. Litt. 113 b.) Every prescription supposes a *grant* once made, and afterwards lost, and therefore nothing can be claimed by prescription which in its nature could not have been granted. Provision was made against the insecurity to property for want of a reasonable term of limitation by the stat. 3 Edw. I. (Westm. 1), c. 39, by protecting possession, when as old as Richard I., against certain legal proceedings. By analogy to that statute, the term of legal memory was fixed at the same period; but as no provision was made to shift the period, in consequence of the continual lapse of time, the reign of Richard I. was left as the point from which legal memory was dated. Hence, in order to constitute a prescription previously to 2 & 3 Will. 4, c. 71, the enjoyment must have existed *time out of mind*, or, in other words, must have commenced antecedent to the reign of Richard I. (Bract. L. 2, c. 22; 3 Lev. 160; 1 Bl. Comm. 76; 2 *Id.* 263.) The period called *legal memory*, in contradistinction to living memory, commenced in 1189. (Co. Litt. 114 b; 2 Inst. 238; 2 Ves. sen. 511.) But in order to make persons on the alert in guarding their rights, and to prevent disputes respecting rights which have been long and peaceably enjoyed, the courts have interpreted an enjoyment of an incorporeal right for the period of forty years, or even twenty years, unless rebutted by other circumstances, *presumptive evidence* that the right has existed time out of mind, and consequently (unless its origin could be proved) a sufficient foundation for establishing a prescriptive right. (10 East, 476; 2 Brod. & Bing. 403; Cowp. 215; 2 Wils. 23.) And accordingly a regular usage for twenty years, not explained nor contradicted, was that upon which many public and private rights were held, and, where there was nothing to contravene public policy, was sufficient to establish a custom. (*Rex v. Joliffe*, 2 B. & Cr. 54; 6 East, 214; 2 Wms. Saund. 175, a, d. See *The Free Fishers of Whitstable v. Gann*, 11 C. B., N. S. 412.) But since the stat. 2 & 3 Will. 4, c. 71, a title to subjects included in the first section of that act cannot be established by an enjoyment for a less period than thirty years, *ante*, p. 3. To every prescription there were two inseparable incidents—time and usage. (Co. Litt. 113.) Prescription, and time whereof no memory runneth to the contrary, were all one in law. (Litt. s. 170.) And this was understood not only of the memory of any one living, but also of proof by any record or writing, or otherwise, to the contrary, which was considered within memory. (Co. Litt. 115 a.) Thus a lease of ground for fifty-six years to be a passage negatived a prescription, and suffering it to be used for three or four years after the expiration of the lease was held not to amount to a gift to the public. (*Rex v. Hudson*, Str. 909.) A prescription ought to be certain; therefore a prescription for copyholders to pay to the lord for a fine upon death *two years' rent or less* is bad. (Com. Dig. Prescription (E. 3); see *Att.-Gen. v. Mathias*, 4 K. & J. 592.) And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor. (*Id.* (E. 4).) But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church. (2 Roll. Abr. 265, l. 40.)

A right by prescription to incorporeal hereditaments is founded on immemorial usage, as where a person shows no other title to what he claims than that he, and those under whom he claims, have immemorially used to enjoy it. Such a prescription differs from custom in this respect, that a custom is properly a local usage, not annexed to the person,—such as the custom that all the copyholders of a manor have common of pasture upon a particular waste; whereas prescription is always annexed to a particular

Prescription.

Supposes a grant.

Twenty years' enjoyment presumptive evidence of prescriptive right.

Prescription must be certain and reasonable.

Difference between custom and prescription.

## Prescription.

person. (Co. Litt. 113 b; 4 Rep. 31 b.) This kind of prescription is of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of a particular estate, and only exercisable by those who are seized of the estate. The first is termed a prescription in the person; the second is called a prescription in a *que estate*, which, in plain English, means a right or privilege claimed by prescription as annexed to and going along with particular lands. (Co. Litt. 18 b, 121 a; 3 Gwill. 1291.) As to prescribing in *que estate*, see note to 2 & 3 Will. 4, c. 71, s. 5, *ante*, p. 81.

The same rights may be claimed either by custom or prescription: (but see *Blowitt v. Tregonning*, 3 Ad. & Ell. 588; *Padwick v. Knight*, 7 Exch. 854). Custom is local, prescription personal: and the difference lies in the mode of claim suited to the difference of the claimants. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there, or if he prescribes in the *que estate*, it must be under cover of the tenant in fee. The case of copyholders claiming common by custom is a strong instance. So occupiers of houses may set up a custom to cut turves. (*Bean v. Bloom*, 2 Bl. R. 928; *S. C.* 3 Wils. 456; *Sharp v. Lowther*, Cas. temp. Hardwicke, 293; but see *Knight v. King*, 20 L. T., N. S. 494.) And although inhabitants cannot prescribe, they may allege a custom to have a right of common. (Vin. Abr. Custom (B. 2); Owen, 71.) The inhabitants of a town cannot by that name and description prescribe for an easement *in alieno solo*; but where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription. (Co. Litt. 3 a; *Day v. Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b; *S. C.* as *Smith v. Gateward*, Cro. Jac. 152; *Baker v. Brereman*, Cro. Car. 418; *Fitch v. Rawling*, 2 H. Bl. 898.) As to the claims to rights of common by prescription in the case of freeholders, and by custom in the case of copyholders, see the judgments in *Warriok v. Queen's College, Oxford*, L. R., 10 Eq. 105; 6 Ch. 716.

A custom which had existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84; and yet a grant of such an easement to fishermen within the district *eo nomine* might well be held to be void. (*Lockwood v. Wood*, 6 Q. B. 64, 65.) See further as to the distinction between custom and prescription proper, Brown's Law of Limitation, pp. 134, 209.

A profit claimed out of another man's soil must be alleged by way of prescription, and not by way of custom, for a custom to take a profit *in alieno solo* is bad (*Blowitt v. Tregonning*, 3 Ad. & Ell. 575; see 9 C. B., N. S. 682), but an easement, as a right of way *in alieno solo*, may be claimed by custom. (*Grimstead v. Marlow*, 4 T. R. 717.) The reason why a profit *à prendre* cannot be supported by a custom in an indefinite number of people is, that the subject of the profit *à prendre* would in that case be liable to be entirely destroyed. (*Per Lord Campbell*, C. J., *Race v. Ward*, 4 Ell. & Bl. 705.) It was observed by Lord Denman, C. J., "That it might be collected from the case, *Day v. Savadge*, Hob. 85, 86, that that which is matter of interest, as the taking a profit from the soil, must for its existence have some person in whom it is; and a flux body, which has no entirety or permanence, cannot take that interest, which by the supposition is immemorial and permanent, because, from its nature, it cannot prescribe for anything. Necessity, however, will control this: the case of common of pasture exemplifies both the rule and the exception; in itself it is an interest; it is the taking a profit from the soil; it is properly matter of prescription. If the copyholders of one manor will claim it in the

Profit *à prendre*  
in another's soil  
must be claimed  
by prescription.

wastes of another, they must, because they can, do so by prescribing in the name of their lord, who, in the eye of the law, by reason of his estate, has such a permanence as enables him to prescribe; but, if they claim it in his wastes, they cannot prescribe in their own names and rights by reason of the want of permanence; nor can they in their lord's name, for he cannot claim common in his own land; they are, therefore, from necessity, allowed to claim it by custom. But what is the necessity? that growing out of the original compact, when they received permission to cultivate for their own benefit, and on condition of certain services, certain portion of their lord's land. That compact included the right of common on the lord's waste; and the law will not suffer that right to want a legal character, and so be without the means of its legal enforcement, though at the expense of strict legal reasoning. In the same way, the right now in question must have originated in each instance in a virtual contract: the owner has permitted the tinner to enter and work, when he did not work himself or devote his waste exclusively to other purposes by inclosure, on the condition that the tinner shall render to him a certain portion, fixed by custom, of the produce of the mine. Here, as in the instance of a common, the thing is in its nature to be claimed by prescription only; but they who have it, and ought to have it in justice, cannot prescribe for it from necessity; therefore, that the undoubted right may not be defeated, they shall be allowed to claim it by custom." (*Rogers v. Brenton*, 10 Q. B. 60, 62.)

In that case the plaintiff claimed under the following custom, which the jury found to exist in fact: any person may enter on the waste land of another in *Cornwall*, and mark out by four corner boundaries a certain area; a written description of the plot of land so marked with metes and bounds, and the name of the person for whose use the proceeding is taken is recorded in an immemorial local court, called the Stannary Court, and proclaimed at three successive courts held at stated intervals; if no objection is successfully made by any other person, the court awards a writ to the bailiff of the court to deliver possession of the said "bounds or tin work" to the bounder, who thereupon has the exclusive right to search for, dig and take for his own use all tin and tin ore within the described limits, paying to the landowner a certain customary proportion of the ore raised, under the name of toll tin. The right descends to executors, and may be preserved for an indefinite time, either by actually working and paying toll, or by annually renewing the four boundary marks on a day certain. It was held, that the custom to preserve the right by the mere ceremony of an annual renewal, without working, is unreasonable and bad in law, and that the plaintiff (who had ceased to work or pay toll for eighteen years) could not recover in the above action even as against a stranger, and that although the alleged custom involved a claim of profit *in alieno solo* it would have been a good one, if *bond fide* working had been found to be obligatory under it. (*Rogers v. Brenton*, 10 Q. B. 26.)

It was said by Willes, J., "This is a right claimed by a custom which is clearly bad. You cannot claim a profit *à prendre* out of another man's land, though you may claim an easement. All the cases, if any, in which such a custom is held to be good must be taken to have been overruled." (*Constable v. Nicholson*, 11 W. R. 698; 14 C. B., N. S. 230. And see the remarks of Byles, J., *Att.-Gen. v. Mathias*, 4 K. & J. 591.) In an action of trespass for taking stones, sand, &c., from the sea shore, the defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of the highways of that township to take such stones, sand, &c., for the repair of the highways. On demurrer, the court held that such a custom was bad, being a profit *à prendre in alieno solo*, and that the overseers of the highways and the inhabitants of a township not being a corporation were not capable of taking by grant, and therefore could not claim such right by prescription. (*Constable v. Nicholson*, 11 W. R. 698; 14 C. B., N. S. 230; and see *Pitts v. Kingsbridge Highway Board*, 19 W. R. 884.) As to a grant by the crown to a body which could not claim either by prescription or custom, see *Willingale v. Maitland*, L. R., 3 Eq. 103.

It is an acknowledged principle that, to give validity to a custom,— which

What customs are valid.



Prescription.

has been well described to be an usage, which obtains the force of law, and is in truth the binding law, within a particular district or at a particular place, of the persons and things which it concerns (see *Dary's Reports*, 31, 32 (a))—it must be certain, or capable of being reduced to a certainty, reasonable in itself (see *Tyson v. Smith*, 9 Ad. & Ell. 406, 421), commencing from time immemorial, and continued without interruption, subject, however, to the qualifications introduced by the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1–28). It belongs to the judges of the land to determine whether a custom is reasonable or not. There are several cases in the books upon the question, what customs are reasonable and what are not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for "*consuetudo ex certâ causâ rationabili usitata privatâ communem legem*" (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. (Year B. Trin. 2 H. 4, fol. 24, B. pl. 20.) So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will. (Litt. s. 212.) A custom is void which sets up a claim to lay coals to an indefinite extent and for an indefinite time on the lands of other copyholders, whereby their lands may be made practically useless, although they would still be liable to pay their rents, and to perform their stipulated services to the lord. (*Broadbent v. Wilks*, Willes, 360; 1 Wils. 63, recognized in H. L., *Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692.) In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate. (*Tyson v. Smith*, 6 Ad. & Ell. 421; 1 P. & Dav. 307; 6 Ad. & Ell. 746.)

In trespass for breaking the plaintiff's close and digging and carrying away clay, the defendant justified as owner of a brick kiln, and pleaded that all occupiers thereof for thirty years had enjoyed, as of right, &c., a right to dig, take, and carry from the close so much clay as was at any time required by him and them for making bricks at the brick kiln, in every year and at all times of the year: it was held unreasonable and bad, as amounting to an indefinite claim to take all the clay out of the close in question. (*Clayton v. Corby*, 5 Q. B. 415; see 2 Q. B. 813.)

Customs derogatory from the general right of property must be construed strictly, and, above all things, they must be reasonable. (*Rogers v. Brenton*, 10 Q. B. 57.) It is a general rule that customs are not to be enlarged beyond the usage, because it is the usage and practice that make the law in such cases, and not the reason of the thing. (11 Mod. 160; Fitzgib. 243.) An usage for the inhabitants to have common to their houses was held not to extend to a new house. (Owen, 4.) A custom would be bad which required a township, part of a parish, to pay a proportion of a church rate without requiring the inhabitants of the township to be summoned to consider the rate. (*Reg. v. Dalby*, 3 Q. B. 602.) A custom for the inhabitants of a township to go on a close and take water from a spring was held good. (*Race v. Ward*, 4 Ell. & Bl. 702; 3 W. R. 240.) The custom to erect booths in the highway during a fair has been held legal. Such custom was in substance for every victualler to enter upon any parts of a certain

close within a borough within which there was a fair immemorially held for three weeks, but leaving sufficient part of such close open for use as a public highway, and for the more conveniently carrying on their trade during the fair, to erect booths and keep goods there, until the fair was ended, paying to the owner of the soil a reasonable compensation for the use thereof. (*Elwood v. Bullock*, 6 Q. B. 383.) But a custom to erect stalls at statute sessions for hiring servants was held to be bad, as it could not have had a legal origin. (*Simpson v. Wells*, L. R., 7 Q. B. 214.) A custom for all the inhabitants of a vill to dance on a particular close at all times of the year at their free will for their recreation has been held good. (*Abbot v. Weekly*, 1 Lev. 176; cited 4 Ed. & Bl. 713. See *Warrick v. Queen's College, Oxford*, L. R., 10 Eq. 105.) A custom is good for the freemen of a town to hold horse races over certain land every Ascension day. (*Mounsey v. Ismay*, 1 H. & C. 729; 11 W. R. 270.) Such a custom cannot be claimed on behalf of all the Queen's subjects, but only on behalf of a limited class of people. (*Earl of Coventry v. Willes*, 12 W. R. 127.) A custom for the inhabitants of a parish to exercise and train horses at all reasonable times of the year in a place beyond the limits of the parish is bad. (*Sowerby v. Coleman*, L. R., 2 Ex. 96.)

Equally in the case of custom as in that of prescription long enjoyments in order to establish a right must have been as of right, and therefore neither by violence nor by stealth nor by leave asked from time to time. Therefore where the owners of an oyster fishery had since the reign of Elizabeth held courts and granted for a reasonable fee licences to fish to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman, it was held that, as every act of fishing had been by licence, there had been no enjoyment as of right so as to give rise to a custom. (*Mills v. Mayor of Colchester*, L. R., 2 C. P. 476; 3 C. P. 575.) A particular custom as to the appointment of a churchwarden was held valid. (*Bremner v. Hull*, 14 W. R. 964.) As to a claim by custom to visitation fees, see *Shephard v. Payne* (16 C. B., N. S. 132); and to marriage fees, *Bryant v. Foot* (L. R., 2 Q. B. 161; 3 Q. B. 497), where it was said by *Kelly*, C. B., "The true principle of law applicable to this question is, that where a fee has been received for a great length of time, the right to which could have had a legal origin, it may and ought to be assumed that it was received as of right during the whole period of legal memory, that is, from the reign of Richard I. to the present time, unless the contrary is proved." (L. R., 3 Q. B. 505.) The requisites of a valid custom are stated in Broom's Commentaries, 12—19, 4th ed.

Enjoyment in case of custom must have been as of right.

A declaration stated that lands were in the occupation of a tenant of the plaintiff, the reversion belonging to him, and that the defendant wrongfully dug out of the lands large quantities of stone, sand and soil, and carried away the same, and made large holes, excavations and cuttings in and through parts of the lands, and erected mounds and banks of earth and rubbish in and upon other parts of the lands, so as thereby permanently to alter, damage, injure and spoil the surface of the lands. The defendant pleaded that R. was seised in fee of all the mines and quarries of stone under the earth or upon the earth within certain parts of a lordship, and that he and all those whose estate he had and has of and in the mines and quarries within the lordship, from time whereof the memory of man is not to the contrary, have been used and accustomed of right, as often as it might be necessary, for the purpose of effectually getting, winning or working the mines or quarries within the parts of the lordship, to enter into and upon any lands within the said parts, within or under which the mines or quarries were situate, such lands being, or having been, part of the waste of the lordship, and to dig, excavate and cut into and through the same lands unto the stone of the mines and quarries, and out of the holes and excavations so made to raise, dig and get the stones of the mines and quarries, and carry away the same, doing no more damage than necessary. The plea then stated that R. demised a quarry of stone, situate within and under the lands of the plaintiff, being parcel of the mines and quarries of stone within the lordship, to the defendant from year to year; and the plea justified the acts complained of in the exercise of the right.

Customs as to mines and quarries.

## Prescription.

Custom for mine owner to work mines so as to let down surface without paying compensation.

There were two other pleas under the 2 & 3 Will. 4, c. 71, alleging an enjoyment of the right by the defendant as occupier of the quarry for forty and twenty years. On demurrer it was held, that the pleas were good, for the right was not unreasonable, and might have originated in grant. (*Roger v. Taylor*, 1 H. & N. 706; 26 L. J., Exch. 208.) The custom was upheld in this case on the ground that it was of the nature of an easement. (*Constable v. Nicholson*, 11 W. R. 699, *per Willes*, J.)

In an action for working mines under ground near to a house so that the house was injured and in danger of falling for want of support, the defendant claimed as lessee of the manor in which the house was situate and of the mines therein, a prescriptive right to work the mines under any houses parcel of the manor, paying to the occupiers of the surface a reasonable compensation for the use of the surface, but without making compensation on any other account; and the defendant justified under that right. Held, that such a prescription was bad as being unreasonable, and that such a right could not exist by custom. (*Hilton v. Granville*, 5 Q. B. 701; see Cr. & Phil. 283.) "There can be no doubt but that, to some extent, the authority of *Hilton v. Lord Granville* has been shaken, inasmuch as a position assumed in the reasoning of the court, as one of the grounds of its decision, has since been distinctly overruled in *Rowbotham v. Wilson* (8 H. L. Cas. 348; 30 L. J., Q. B. 965), in which the question presented itself for adjudication; and it cannot be denied that the decision itself has not met with the universal approval of the profession, and that it may be desirable that the validity of that decision should be brought under the consideration of a court of error. At the same time it is equally clear, that though the reasoning of the court in *Hilton v. Lord Granville* has been impugned, the decision in that case has not been overruled; and the judgment having been a considered judgment, and standing unreversed, we do not feel ourselves as otherwise than bound by it. We must, therefore, but without expressing any opinion one way or the other as to the propriety of the decision in question, give judgment on the third plea for the plaintiff, leaving the defendants to take the case into error, if they shall be so advised." (*Per Cockburn*, C. J., in *Blackett v. Bradley*, 8 Jur., N. S. 588, 589; 1 B. & S. 140.) "*Hilton v. Lord Granville* decided against a custom for a mine owner to work his mines so as to let down the surface without paying compensation to the person so injured by his mining operations. . . . Even if *Hilton v. Lord Granville* is an authority that where there is nothing to show for the right but a customary exercise of it, the custom cannot be supported (which I think is open to question), yet the dictum of Lord Denman in that case, that a grant in specie to the effect of the custom could not be supported, has been since overruled." (*Per Lord Chelmsford, Duke of Buccleuch v. Wakefield*, L. R., 4 H. L. 410.) A custom as between the owner of the surface and the owner of the mine, entitling the latter to cause a subsidence of the surface, if necessary in working his mines, would be bad and wholly void. (*Duke of Buccleuch v. Wakefield*, L. R., 4 Eq. 618.)

Rights incident to grant of mines.

The rights of a grantee of minerals depend on the terms of the deed by which they are conveyed. Under a grant of minerals a power to get them is a necessary incident. (*Rowbotham v. Wilson*, 8 H. L. Cas. 348; 30 L. J., Q. B. 965.) *Primâ facie* the owner of the surface of land is entitled to the surface itself and all below it *ex jure naturæ*; and those who claim the property in the minerals below, or any interest in them, must do so by some grant from or conveyance by him. The rights of the grantee of minerals must depend upon the terms of the deed by which they are conveyed or reserved when the surface is conveyed. *Primâ facie* it must be presumed that the minerals are to be enjoyed, and therefore that a power to get them must also be granted or reserved as a necessary incident. A similar presumption *primâ facie* arises, that the owner of the mines is not to injure the soil above by getting them, if it can be avoided. (*Rowbotham v. Wilson*, 8 H. L. Cas. 360, *per Lord Wensleydale*.)

Customs as to mines in Cornwall.

A custom of tin bounders as to marking out tin works on waste lands in Cornwall is stated in *Rogers v. Brenton* (10 Q. B. 26, p. 31, *ante*). Tin bounders also claim to be entitled by custom to divert all water within their bounds for the purposes of their mines. (*Gaved v. Martyn*, 19 C. B.,



N. S. 732; 14 W. R. 62.) This claim was discussed, and it was held that a presumption should be made that a right to use the water had been acquired by arrangement with the owner of the mine as well as with the bounders. (*Irimay v. Stocker*, L. R., 1 Ch. 396.)

Prescription.

In order to make out a prescriptive right it must be claimed as annexed to land, or as having been created by a grant and enjoyed by a body corporate in continuance from time immemorial, or as a right handed down from ancestor to heir without intermission until the person who claims the present enjoyment. (*Constable v. Nicholson*, 14 C. B., N. S. 230; 11 W. R. 699.)

Prescription proper.

There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected. It does not follow that rights which can be sustained by grant can necessarily be sustained by prescription. The law of Scotland agrees with the law of England in holding that the right to village greens and playgrounds stands upon a principle of original dedication to the use of the public. (*Dyce v. Hay*, 1 Macq. H. L. 305.)

A prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like. (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B.); Com. Dig. Prescription (C.); *Ib.* Franchises (A. 1).) A prescription to have a free warren in a manor and in the demesnes thereof is good. (*Rea v. Talbot*, Cro. Car. 311; Jones, 320. As to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40.) The general rule with regard to prescriptive claims is, that every such claim may be good if by possibility it might have had a legal commencement. (1 T. R. 667.) The right to hold a fair or market may be acquired by grant and by prescription. (2 Inst. 220.) And where the grantee of a market, under letters-patent from the crown, suffered another to erect a market in his neighbourhood, and to use it for the space of twenty-three years without interruption, it was adjudged that such user operated as a bar to an action on the case for a disturbance of his market. (*Holcroft v. Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 174, n.; and *Campbell v. Wilson*, 3 East, 294.) The lord of an ancient market may by time have a right to prevent other persons from selling goods in their private houses situated within the limits of his franchise. (*Moseley v. Walker*, 7 B. & C. 40; *Mayor of Macclesfield v. Pedley*, 4 B. & Ad. 404.) So he may determine in what part of the township the market shall be held, and shift it from place to place, or confine the right of holding it to a particular place. (*Curwen v. Salkeld*, 3 East, 538; *De Rutzen v. Lloyd*, 5 Ad. & Ell. 456.)

What may be claimed by prescription.

Markets.

Stallage is a payment due to the owner of a market in respect of the exclusive occupation of a portion of the soil. Therefore where a person used a market with a chair and a "ped," that is, a wooden or wicker basket, four feet long, two feet and a-half wide, and two feet high, with a lid which, being turned back and supported by pieces of wood *not fixed* in the soil, formed a table on which he exposed his provisions for sale, it was held that he was liable for stallage. (*Mayor of Yarmouth v. Groom*, 1 H. & Colt. 102.) The word "toll" in a grant of a market may include stallage. An exemption from stallage for the inhabitants of a town can be only by way of custom, not of grant or prescription. Whether an exemption or discharge from toll, other than stallage, could be claimed by such grant or prescription for inhabitants generally, was questioned. (*Lockwood v. Wood*, 6 Q. B. 31; affirmed by Exch. Ch. *Ib.* 50.) The grant of a market does not of itself imply a right in the grantee to prevent persons from selling marketable articles in their private shops within the limits of the franchise on market days. (*Macclesfield (Mayor, &c.) v. Chapman*, 12 Mees. & W. 18; 13 L. J., N. S., Exch. 32.) Such a right can exist only by immemorial custom. (*Ib.*) As to claims to a market toll by prescription, see *Lawrence v. Hitch*, L. R., 2 Q. B. 184; 3 Q. B. 521. The stat. 10 & 11 Vict. c. 14, consolidates in one act the provisions usually contained in acts for constructing and regulating markets and fairs.

Stallage.

Prescription.  
Tolls.

Toll *traverse*, which is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.)), or a duty which a man pays for passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.)), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454), may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription. (2 Wils. 296.) Until the act 2 & 3 Will. 4, c. 71, such toll could not have been claimed unless it had been taken time out of mind (Fitzh. tit. Toll, pl. 3), and reserved contemporaneously with the dedication of the way to the public. (*Pelham v. Pickersgill*, 1 T. R. 660; see *Lawrence v. Hith*, L. R., 3 Q. B. 521.)

In order to support a prescription against public right, a consideration must be proved; as where *toll-thorough*, that is, a toll for passing over the public highway, is claimed. (*Mayor and Burgesses of Nottingham v. Lambert*, Willes, 111; *Brett v. Beales*, 10 B. & C. 508.) And where the plaintiff claimed toll-thorough, and showed that the soil and the tolls before the time of legal memory belonged to the same owner, although they had been severed since, it was held that it was to be presumed that the right of passage had been granted to the public in consideration of the toll. (*Pelham v. Pickersgill*, 1 T. R. 660.) A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, and no proof is given of anything like a contract by the party against whom the claim is made; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way without showing any contract between the owner of the market and the occupier of the stall. (*Mayor, &c. of Newport v. Saunders*, 8 B. & Ad. 411.) The exemption from toll may also be claimed by prescription or by the king's grant. (4 Inst. 252; 1 H. Bl. 206; 4 T. R. 130; 1 Bos. & Pul. 512; 7 Br. P. C. 126; *Mayor of Truro v. Reynolds*, 8 Bing. 275; *Lord Middleton v. Lambert*, 1 Ad. & Ell. 401; 3 Nev. & M. 841.) The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls. (F. N. B. 226, l.; 1 H. Bl. 206; Com. Dig. Toll (G. 1.). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker v. Brereman*, Cro. Car. 418; recognized 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription. (*Foreman v. Free Fishers of Whitstable*, L. R., 4 H. L. 266.)

What cannot be  
claimed by pre-  
scription.

A title to lands and other corporeal substances, of which more certain evidence may be had, cannot be made by prescription, as that a man, and all those whose estate he has, have been seised time out of mind of particular lands. (Brooke, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132; 2 Bl. Comm. 264.) The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land. (*Wilkinson v. Proud*, 11 Mees. & W. 33. See *Stoughton v. Lee*, 1 Taunt. 402.) What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title. (Co. Litt. 114; 2 Bl. Comm. 265.) A prescription for a right common to all the subjects of the realm cannot be supported. (*Pell v. Towers*, Noy, 20; Br. Abr. Pres. pl. 71.) Every man of common right may fish in the sea, or with lawful nets in a navigable river (*Warren v. Matthews*, 6 Mod. 73; Salk. 357), and therefore a prescription for a right of fishing in the sea, as annexed to certain tenements, is bad (*Ward v. Cresswell*, Willes, 265), which is not merely the law of this country, but also of nations (Grot. de Jure Belli et Pacis, b. 2, c. 3, s. 9; Bract. lib. 1, c. 22, s. 6); but a subject may have a several fishery in an arm of the sea by prescription. (*Mayor of Oxford v. Richardson*, 4 T. R. 439.) And though *prima facie* every subject has a right to take fish found upon the seashore between high and low watermark, such general right may be

abridged by the existence of an exclusive right in some individual. (*Bagott v. Orr*, 2 Bos. & P. 472.)

Prescription.

One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases. (*Aldred's case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4).)

A man cannot prescribe or allege a custom against a statute, because it is the highest matter of record in law (3 T. R. 271; 11 East, 495), unless the custom or prescription be saved or preserved by another act. (Co. Litt. 115.) And Lord *Coke* makes a difference between acts in the negative and in the affirmative; for a statute in the affirmative, without any negative, express or implied, does not take away the common law; and likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as well as he may against a common law. (Hargrave's Co. Litt. 115 a, n. (15).)

An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom. (*Merchant Taylors' Company v. Truscott*, 11 Exch. 855; *Salter's Company v. Jay*, 3 Q. B. 109.)

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the statute of limitations (32 Hen. 8, c. 2), it is enacted that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such seisin or possession had been within three-score years next before such prescription made. (2 Bl. Com. 263, 264.) And the remedy for such rights, so far as it depended upon real actions, was farther abridged by the abolition of real actions after 31st December, 1834, by the statute 3 & 4 Will. 4, c. 27, s. 36 (see *post*). Where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged. (3 Bligh, 245.) But a title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common, and the land charged therewith of an estate equally high and perdurable in both. (Co. Litt. 114 b.) An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right. (*Canham v. Fish*, 2 Cr. & Jerv. 126.) Thus if a person, having a right of common by prescription, takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right. (Co. Litt. 113 b.)

How prescriptive rights may be lost.

Easements are extinguished by the union of seisin of the dominant and servient tenements in the same person. (*James v. Plant*, 4 Ad. & El. 749.) Easements are sometimes extinguished by statute, *e.g.*, the General Inclosure Act, 41 Geo. 3, c. 109, s. 8. They are extinguished when the purpose for which they were created no longer exists. (*National Guaranteed Manure Company v. Donald*, 4 H. & N. 8.) A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed. (Hob. 39; 4 Rep. 86 a, 87 a.) Alterations in the dominant tenement will sometimes extinguish an easement. (*Allan v. Gomme*, 11 Ad. & El. 772.) The release of an easement may be implied from abandonment or non-user. (*Cook v. Mayor of Bath*, L. R., 6 Eq. 177.) It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights. (*Moore v. Ranson*, 3 B. & Cr. 339.) But "it is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and

## Prescription.

the intention in him which either the one or the other indicates which are material." (Per Lord Denman, *Reg. v. Chorley*, 12 Q. B. 519. See *Crossley v. Lightowler*, L. R., 2 Ch. 482.) The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years. (*Rex v. The Steward, &c. of Havering*, 5 B. & Ald. 691; *Rex v. The Mayor, &c. of Hastings*, *Id.* 692, n.)

## Effect of ancient grant.

An ancient grant without date did not necessarily destroy a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury. (*Addington v. Clode*, 2 Bl. Rep. 989.) A plea, that before and at, &c., the defendant and all his ancestors, whose heir he is, from time whereof the memory of man is not to the contrary, have had, and been used and accustomed to have, and of right ought to have had, and the defendant still of right ought to have for himself and themselves, the sole and several herbage and pasturage of and in divers, to wit, 217 acres, &c., of a certain open field, called, &c., was held to be disproved by showing a grant to the defendant's ancestor eighty-one years before for a valuable consideration; and such plea is not aided by the stat. 2 & 3 Will. 4, c. 71, s. 1, which, if relied on, ought to be pleaded. (*Welcome v. Upton*, 5 Mees. & W. 398. See *Reg. v. Westmark*, 2 M. & Rob. 805.)

The doctrine as to the grant of a franchise by the crown within time of memory being a determination of a prescriptive claim to the same franchise does not appear to be settled. Where a bishop, having free warren by prescription over the demesne and tenemental lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor. (*Earl of Carnarvon v. Villebois*, 13 Mees. & W. 313.)

## Prescription against the crown.

Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription (F. 1); Broom's Maxims, pp. 65—68, 5th ed.). Liberties and franchises were excepted in the statute 9 Geo. 3, c. 16, limiting the claims of the crown to sixty years (see *post*, note on the limitation of the rights of the crown). By 32 Geo. 3, c. 58, the crown is barred in informations for usurping corporate offices or franchises by the lapse of six years. (See Bac. Abr., 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *Reg. v. Harris*, 11 Ad. & Ell. 518.) It will be observed that by the stat. 2 & 3 Will. 4, c. 71, ss. 1, 2 (*ante*, pp. 1, 6), the crown is placed upon the same footing with the subject as to the rights affected by that act.

## (2.) OF RIGHTS OF COMMON.

## Several species of common.

*Common* is a right or privilege which one or more persons claim to take or use in some part or portion of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which by age being formed into a prescription continues good, although there be no deed or instrument in writing that proves the original contract or agreement. (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common.) Common has been divided into five sorts, viz. 1st, *Common of pasture*, which is a right or liberty that one man or more have to feed or fodder their beasts or cattle in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house. (See Noy, 145; 7 East, 121; 3 Lev. 165.) 3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (See Cro. Jac. 25, 256; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 520; Plowd. 381.) 4thly, *Common of piscary*, or a

right and liberty of taking fish in another's pond, pool, or river. And, 5thly, a liberty which in some manors the tenants have, of digging and taking sand, gravel, stone, &c. in the lord's soil. (Bac. Abr. Common, (A).) All claims of this kind, in order to be valid, must be made with some limitation and restriction. (*Clayton v. Corby*, 5 Q. B. 419; see *post*, p. 47.)

Of Rights of  
Common.

A party may prescribe to take the sole and several herbage which may be granted; (Co. Litt. 122; *Hoskins v. Robins*, Pollexf. 13; *Potter v. North*, 1 Vent. 385; *Welcome v. Upton*, 6 Mees. & W. 543;) although it was formerly doubted. (*North v. Cox*, 1 Lev. 253.) Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the north of England, although some have thought the owners of them are tenants in common of the soil. (*Welcome v. Upton*, 6 Mees. & W. 541, 542; *Rex v. Whizley*, 1 T. R. 137.) The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself. (Co. Litt. 4 b.) A cattle-gate is not a more extensive right than the above, and does not include the right to the soil. (*Rigg v. Earl Lonsdale*, 1 H. & N. 923, 936.) A person may prescribe to have the sole and several pasture, vesture or herbage, for a *limited time in every year*, in exclusion of the owner of the soil. (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45.) And a like prescription, in exclusion of the owner of the soil for the whole year, was held good, as it did not exclude the lord from his profits of mines, trees, and quarries. (*Hoskins v. Robins*, 2 Saund. 324; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74.) So a tenant may prescribe to have all the thorns growing upon such a place in exclusion of the owner of the soil. (*Douglass v. Kendal*, Cro. Jac. 256.) But a man cannot prescribe to have *common eo nomine* for the *whole* year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing. (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395.) However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year. (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257.) So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year; (1 Roll. Abr. 405, 406); and that the commoners may prescribe to have common in exclusion of the lord for part of a year. (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2).) So a man may prescribe to have a separate fishery, to the exclusion of the owner of the soil wholly from fishing; for he has still the profit of the soil and water. (Co. Litt. 122 a, and n.; Ventr. 391. See 2 Saund. 326.)

What common-  
able rights may  
be prescribed for.

The claim in right of a freehold estate and the lands which formerly belonged to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding, (Kielway, 198 a; *Punsany and Leader's case*, 1 Leon. 11,) which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an act of parliament. (*Iratt v. Mann*, 3 Man. & G. 699.)

*Common of pasture* is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant or in gross. (Selw. N. P. Common, s. 2.)

Common of  
pasture.

*Common appendant* is a right belonging to the owners or occupiers of arable lands to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either horses and oxen to plough the land, and cows and sheep to manure it. (Co. Litt. 122 a.) This as matter of universal right was originally permitted not only for the encouragement of agriculture but for the necessity of the thing. For when lords of manors granted out parcels of land to tenants for services either done or to be done, these tenants could not plough or manure the land without beasts. These beasts could not be sustained without pasture, and pasture could not be had but in the lord's wastes and in the uninclosed

Common ap-  
pendant.



fallow grounds of themselves and the other tenants. The law therefore annexed this right of common as inseparably incident to the grant of the lands. (2 Bl. Com. 83; *Tyrringham's case*, 4 Rep. 36 a; 2 Inst. 85.)

There is no general common law right of tenants of a manor to common appendant in the waste. *Parke*, B., said, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes, (see *Mellor v. Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett v. Reeve*, Willes, 227; Com. Dig. Comm. B.,) it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant. The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor. (*Lord Dunraven v. Llewellyn*, 15 Q. B. 810, 811.) As to this decision see Williams' Real Property, Appendix C., 463, 9th ed., and the remarks of Lord Romilly in *Warrick v. Queen's College, Oxford*, L. R., 10 Eq. 123.

Meaning of  
levant and  
couchant.

Common appendant may be claimed in pleading as appendant, without laying a prescription, although appendancy implies a prescription. (Harg. Co. Litt. 122 a, n. 2.) It can only be claimed in the lord's wastes (2 Inst. 85; 1 Roll. 396; 4 Rep. 37), for the claimant's own commonable cattle levant and couchant upon the land. (*Id.*; Burr. 320.) A right of common for cattle "*levant and couchant*," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer is capable of maintaining. (*Whitelock v. Hutchinson*, 2 Mood. & Rob. 205; 5 T. R. 46; Willes, R. 227; 8 T. R. 396; *Willis v. Ward*, 2 Chit. 297.) In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter. (*Dyce v. Hay*, 1 Macq. H. L. C. 313.) Levant and couchant expresses a measure of the number of cattle that may be put in, and does not necessarily refer to cattle actually fed upon the particular land. (*Johnson v. Barnes*, 27 L. T., N. S. 157. See *Carr v. Lambert*, L. R., 1 Exch. 168.) This species of common must have existed from time immemorial (1 Roll. Abr. 396), and only arises in the case of grants of arable land. (*Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 730.) It might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), it was requisite for a cottage to have four acres of land attached to it. (*Emerson v. Selby*, 1 Salk. 169; 2 Lord Raym. 1015.) Common appendant can only be claimed for such cattle as are necessary for tillage, as horses and oxen to plough the land, and cows and sheep to manure it. (Co. Litt. 122 a.) Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to common appendant. (Willess, 240.) As to whether the right to common appendant is extinguished by building on the land in respect of which it is claimed, see *Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 730.

Common appur-  
tenant.

*Common appurtenant* may be claimed as well by grant within time of memory as by prescription; and after a unity of possession in the lord of the land, in respect of which the right of common was claimed with the soil and freehold of the waste, proof that the lord's tenant of the land had for fifty years past enjoyed the right of common on the waste, is evidence for the jury to presume a new grant of common as appurtenant, so as to support a count in an action by the tenant for surcharging the common declaring upon his possession of the messuage and land with the appurtenances, and that by reason thereof he was entitled of right to the common of pasture, as belonging and appertaining to his messuage and land; and also to support another count, in substance the same, alleging his possession of the messuage and land, and that by reason thereof he was entitled to com-

mon of pasture. (*Corlam v. Slack*, 15 East, 108.) This species of common though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant, whereas common appendant can only arise from prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land. (4 Rep. 37 a.) And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399.) Common appurtenant for a fractional part of a cow was claimed in *Nicholls v. Chapman* (5 H. & N. 643; 29 L. J., Ex. 461; 8 W. R. 664). A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained. (Bac. Abr. 96; *Richard v. Squibb*, 1 Ld. Raym. 726; see *Stevens v. Austin*, 2 Mod. 185; *Thornel v. Lassels*, Cro. Jac. 27.) The principle furnished by *Potter v. North* (1 Wms. Saund. 635; *Hoskins v. Robins*, 2 Wms. Saund. 726), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved by the grant, and to see whether the act be in derogation of the latter. Thus, where tenant of B. prescribed to have for himself and his tenants, &c., occupiers of the farm of B., the sole and exclusive right of pasture and feeding of sheep and lambs on L. as to the said farm of B. belonging and appertaining: it was held, that this did not entitle him to take in the sheep and lambs of other persons to pasture in L., for that by the terms of the grant some interest in the pasture was reserved to the lord, and the above practice was prejudicial to such interest. (*Jones v. Richard*, 6 Ad. & Ell. 530. See 5 *Ib.* 413.) If the common appurtenant be for an uncertain number of cattle, it is limited to the claimant's own commonable cattle levant and couchant upon his lands. (See *Earl of Manchester v. Vale*, 1 Wms. Saund. 28, ed. 1871; and see further, as to common appurtenant for cattle levant and couchant, *Bowen v. Jenkin*, 6 Ad. & Ell. 911.) A claim of a right of common without stint, as annexed to an ancient messuage without land, cannot, as such, exist by law. (*Benson v. Chester*, 8 T. R. 396; *Scholes v. Hargraves*, 5 T. R. 46.) A right of common appurtenant for cattle levant and couchant proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now and for more than thirty years past turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purpose of feeding cattle. (*Carr v. Lambert*, L. R., 1 Exch. 168.)

A person cannot prescribe for a right of common as occupier of a messuage. (*English v. Burnell*, 2 Wils. 258.) And a plea claiming an immemorial right of common in occupiers for the time being, was held bad after verdict. (*Davies v. Williams*, 16 Q. B. 543.) Where a right of common was claimed as appurtenant to land, it was held that the owners and occupiers of such land might be joined as plaintiffs in a suit to protect the right. (*Commissioners of Sewers v. Glassey*, L. R., 7 Ch. 456.)

Claims to common  
by prescription.

Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the court will presume that the inhabitants claimed through the freehold tenants. And where such rights have been exercised for many years, the court will try to find a legal origin for those rights, and presume a grant, if necessary. (*Warwick v. Queen's College, Oxford*, L. R., 6 Ch. 716.) Such rights may be claimed in the case of copyhold tenants of the manor by custom, and in the case of the freehold tenants, by prescription. (*Ib.*)

Copyholders may claim rights of common in the wastes of the lord by custom. (*Gateward's case*, 6 Rep. 59.) And it has been held that the occupier of a messuage and lands, who had common in the lord's waste, might set up a custom to cut rushes as annexed to his rights of common. (*Bean v. Bloom*, 2 Bl. R. 926; *S. C.*, 3 Wils. 456.) A custom, however, for the tenants of tenements and premises in a manor to have common of

Claims to common  
by custom.

Of Rights of  
Common.Apportionment of  
common.

pasture in the waste of the manor was held bad. (*Knight v. King*, 20 L. T., N. S. 494.)

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant. (Co. Litt. 122 a, 164 a; *Tyrringham's case*, 4 Rep. 36; *Wild's case*, 8 Rep. 78; *O'Hare v. Fahy*, 10 Ir. C. L. R. 318.)

The rent-charges under the acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are to be a charge on the allotments thereafter to be made in respect of the lands to which the right of common is attached. (2 & 3 Vict. c. 62, s. 14.)

Common because  
of vicinage.

*Common because of vicinage* or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits. (*Musgrove v. Cave*, Willes, 322.) And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of themselves, the law winks at the trespass. (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 83.) The position, that this species of common is not a right, but matter of excuse for a trespass, is sufficiently established. (*Wells v. Pearoy*, 1 Bing. N. C. 556; 1 Scott, 426; *Gullett v. Lopes*, 13 East, 348.) Although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the statute 2 & 3 Will. 4, c. 71. (*Prichard v. Powell*, 10 Q. B. 589.) Reputation may be given in evidence in support of the immemorial right of such common so pleaded. (*Ib.*) If to an action of trespass in the common called A., the defendant plead that A. and B. commons lie open to each other, and then prescribe for a right in both commons, the plaintiff must traverse the whole prescription. (*Morewood v. Wood*, 14 East, 327.) The plaintiff being possessed of a house and land in E., had for sixty years exercised rights of common in W.; it appeared at the trial that this was done near the boundary of two commons of W. and E., which lay open and uninclosed, and adjacent to each other, and that the parties exercising the right did not at the time know the exact boundary; that the plaintiff had on the previous inclosure of the common at E., obtained an allotment there in respect of his estate: it was held, that it was properly left to the jury to say whether the evidence was referable to an exercise of the right in E., and a mistake of the boundary, or to an exercise of the right in W. (*Hetherington v. Vane*, 4 B. & Ald. 428.) Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence or visible boundary separating the downs. (*Heath v. Elliot*, 4 Bing. N. C. 388; 6 Scott, 172.)

## Evidence.

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed. (*Clarke v. Tinker*, 10 Q. B. 604.) It seems that a plea is bad, after verdict, which professes to show a common *pur cause de vicinage* by usage between the close of an individual and a waste or common. (*Ib.*)



Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the common of fifty acres than it will feed, without any respect to the common in the other town. (*Corbet's case*, 7 Rep. 5 a.)

Of Rights of  
Common.

The Court of Exchequer Chamber inclined to think that common *pur cause de vicinage* may exist between two neighbouring proprietors, though there be no right of common over the land on either side, from which the cattle escape. (*Jones v. Robin* (in error), 10 Q. B. 620.) It was held by the same court (affirming the judgment of the Queen's Bench, 10 Q. B. 581), that a plea claiming common *pur cause de vicinage* in respect of a private estate, over which no other right of common is shown, and alleging such common to exist by custom, is bad, and that a plea of such common against the owner of the land into which the cattle escape, must be a plea of grant or prescription. (*Ib.*)

An end may be put to this species of common by inclosure. (*Tyrringham's case*, 4 Rep. 36 b, 38 b, 39 a; *Corbet's case*, 7 Rep. 5 a.) Where one of two adjoining commons, with common of vicinage, is inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway, which led over the one to the other; yet, as the separation was not complete, so as to prevent cattle straying from one to the other by means of the highway, the common by vicinage still continues. (*Gullett v. Lopes*, 13 East, 348.) In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land. (2 Wils. 269.) By a local act, all rights of common whatever in B. were extinguished; the wastes were divided; the owners of allotments were directed to inclose and authorized to distrain the cattle of strangers trespassing. No fence having been made, it was held, that the owner of an allotment in B. could not distrain cattle which had strayed into his allotment from a common in W. in pursuance of an alleged right of common *pur cause de vicinage* in the inhabitants of W. (*Wells v. Pearcey*, 1 Scott, 426; 1 Bing. N. R. 556.) It seems that the cattle would be liable to distress, or the owner to an action of trespass, notwithstanding the want or defect of fences, if the cattle were suffered to remain in the *locus in quo* after notice to the owner that they were trespassing there. (*Ib.*) It was questioned whether a notice in fact to the commissioners in W. (without inclosure), that all the rights of common in B. were extinguished, would put an end to the legal excuse of trespasses *pur cause de vicinage*. (*Ib.*) It was admitted, that when there is a common *pur cause de vicinage* between two wastes, and one of them is under a private act of parliament conveyed to allottees, for the purpose of being inclosed, and the commissioners under the act extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage*. (*Clarke v. Tinker*, 10 Q. B. 604.)

Determination of  
right.

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor. (Co. Litt. 122 a; 2 Bl. Comm. 34.) Common appurtenant for a certain number of cattle may be converted into common in gross. (Cro. Jac. 15; 5 Taunt. 244.) If A. and all those whose estate he has in the manor of D. have had from time immemorial a fold course, that is, common of pasture for any number of sheep not exceeding 300, in a certain field, as appurtenant to the manor, he may grant over to another this fold course, and so make it in gross; because the common is for a certain number, and by the prescription the sheep are not to be levant and couchant on the manor, but it is a common for so many sheep appurtenant to the manor, which may be severed from the manor as well as an advowson, without any prejudice to the owner of the land where the common is to be taken. (1 Roll. Abr. 402, pl. 3; *Day v. Spooner*, Cro. Car. 432; Sir W. Jones, 875; 3 Wms. Saund. 327, n.) A right of common

Common in gross.

in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist (1 Saund. 346; 1 Ld. Raym. 407; Willes, 232; 8 T. R. 396), and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle. (*Bennett v. Reere*, Willes, 232.) A right of common in gross does not confer a vote for the coroner of a county. (*Reg. v. Day*, 3 Ell. & Bl. 859.)

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre*. (*Mellor v. Spateman*, 1 Saund. 343; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; *Johnson v. Barnes*, 27 L. T., N. S. 152.) Where, before the passing of 5 & 6 Will. 4, c. 76, all freemen inhabiting within an ancient borough claimed right of common on certain lands, and that act (sect. 7) has extended the limits of the borough, the right of common can no longer be described in pleading to be a right "in all freemen inhabiting within the borough;" for that act only reserves the right to those who reside within the old limits, and does not make the newly-defined borough the same to all intents and purposes as the old one. (*Beadsworth v. Torkington*, 1 Q. B. 782). See a plea of common by a burgess under a grant to a corporation, *Purry v. Thomas*, 5 Exch. 37. The new burgesses created under the stat. 5 & 6 Will. 4, c. 76, are not entitled to participate in the rights of common enjoyed by the old burgesses and freemen for their own benefit prior to the passing of that act. (*Hulls v. Estcourt*, 2 New Rep. 131.)

The stat. 2 & 3 Vict. c. 62, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes, under the acts for the commutation of tithes in England and Wales.

*Common of turbary* is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale. (*Valentine v. Penny*, Noy, 145. See *Hayward v. Cannington*, 1 Lev. 231; 1 Sid. 354.) An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or at the most, for the house which supplies the place of that house. (*Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 730). A custom for all the customary tenants of a manor, having gardens, to dig turf on the waste, for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad in law, as being indefinite, uncertain, and destructive of the common. (*Wilson v. Willes*, 7 East, 121, recognized in *Marquis of Salisbury v. Gladstone*, 8 Jur., N. S. 627, *post*, p. 48. See *Peppin v. Shakespear*, 6 T. R. 748.) Common of turbary, appurtenant to a house, will pass by a grant or demise of such house with the appurtenances. (*Solme v. Bullock*, 3 Levinz, 165; *Dobbyn v. Somers*, 13 Ir. C. L. R. 293.)

In an action of trespass *qu. cl. fr.*, the pleas justified under a right of common of turbary, claimed by prescription and by enjoyment for thirty and sixty years over G., whereof the *locus in quo* was part. The replication denied the right of common of turbary in the *locus in quo*. On the trial, it appeared that the defendant had enjoyed the right on every part of G. where any fuel had been found, that the *locus in quo* was part of G., but that it was on a rock on which no fuel ever had been, or in the ordinary course of nature could ever be found. A verdict having been given for plaintiff, it was held, that the inference drawn from the user was, that the right extended to all parts of G. fit for the production of fuel and not to such a spot as the *locus in quo*, and that the verdict for the plaintiff was right. (*Pearson v. Underhill*, 16 Q. B. 120.)

There is nothing in law to prevent a party dealing with his own land and demising it, from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be subsequently built upon the premises. (*Hill v. Barry*, Hay. & J. 688; *Duggan v. Carey*, 8 Ir. C. L. R. 210.)

A., by an indenture in 1735, demised lands to B. and C., for a term of 889 years, and A. covenanted that B. and C., "their executors, adminis-

trators and assigns, and every of them, should and might from time to time, and at all times during the grant, cut and carry away from off the bog of Coolnemoney and Ballyna," (the absolute property of the lessor, and not included in the lease,) "turf sufficient to be expended on the premises." B. and C. covenanted to repair all houses and outhouses that were or thereafter might be built upon the premises. In 1735, B. and C. partitioned the lands, and in 1856 the Commissioners of the Incumbered Estates Court granted B.'s moiety to the plaintiff, "with the appurtenances:"—It was held, that the right of turbary was apportionable, and that the plaintiff was entitled to a proportional share. (*Hargrove v. Congleton*, 12 Ir. C. L. R. 368.)

*Common of estovers*, or *estouviers*, that is, necessities (from *estover*, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word *bote* is used by us as synonyms to the French *estovers*: and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary. (Co. Litt. 41; 2 Bl. Com. 35.) The rule is founded on the obligation upon tenants of making necessary repairs. (*De Salis v. Crossan*, 1 Ball & B. 188.) Where no wood exists, and where part of the premises demised are bog, from which no other beneficial use can arise, a tenant is at the common law in Ireland entitled to use such bog for the purposes of fuel, as he would have been authorized to use wood, had there been any for a like purpose. (*Howley v. Jebb*, 8 Ir. C. L. R. 435.) Where tenants abuse their right of estovers, the Court of Chancery will grant an injunction, as if they cut turf for sale. (*Lord Courtown v. Ward*, 1 Sch. & Lef. 8; see *Wilson v. Bragg*, 8 Bac. Abr. 428, Waste (O).)

Common of  
estovers.

Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions. (2 Bl. Com. 282.) The right to estovers may also be appendant or appurtenant to a messuage or dwelling-house by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers.

This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad. (*Gateward's case*, 6 Rep. 59; *Bean v. Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead v. Marlome*, 4 T. R. 717; *Selby v. Robinson*, 2 T. R. 758; *Hoskins v. Robins*, 1 Vent. 123—163; 2 Saund. 320.) A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailiff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to. (5 Rep. 25 a.) A person having common of estovers, either by grant or prescription annexed to his house, may alter the rooms or chambers, or build new chimneys, or add to the house without losing the right, but he cannot use any of the estovers in the parts newly added. (*Luttrell's case*, 4 Rep. 87 a.)

A person prescribed to have estovers for repairing houses, or for building new houses on the land. It was alleged that the prescription was unreasonable to take estovers for the building of new houses, but the majority of the court held it to be a good prescription, for one might grant such estovers at that day; but one of the judges held the prescription to be bad, as it ought only to be for the repair of ancient houses. (*Arundel v. Steer*, Cro. Jac. 25.)

Common of estovers can only be claimed by prescription for an ancient

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house (F. N. B. 180; 4 Co. 86); but if it be pulled down and another rebuilt, either in the same or another place, the prescription will not be lost. (*Costard and Wingfield's case*, Godb. 97; *Cowper v. Andrews*, Hob. 39.) A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue. (Cro. Eliz. 820; Cro. Jac. 256.) A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself; for in either of those cases, the estovers cannot be severed from the house, because they must be spent on the house. (Plowd. 381.)

The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54); and cannot be sold to be used elsewhere. (11 H. 6, 11 b.; *Earl of Pembroke's case*, Clayt. 47.)

A claim of a prescriptive right in the owners or occupiers of close A. to enter close B. (belonging to a third person), and to cut down and carry away and convert to their own use all the trees and wood growing and being thereon "as to the close A. appertaining," is void as being too large. (*Bailey v. Stephens*, 12 C. B., N. S. 91; 8 Jur., N. S. 1068; 31 L. J., C. P. 226.)

Where the crown granted to the inhabitants of L., which was a crown manor and parish within a royal forest, that the labouring or poor people inhabiting the parish and having families might, during a certain period of every year, cut or lop the boughs and branches above seven feet from the ground, on the trees growing on the waste lands of the manor and parish of L., for their own use and consumption, and for sale for their own relief to all or any of the inhabitants for their consumption within the parish as fuel;—it was held that, although such a right could not have been claimed by prescription or custom, yet the grant by the crown was valid, inasmuch as the grantees might be treated as a corporation quoad the grant. (*Willingale v. Maitland*, L. R., 3 Eq. 103.)

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common (Salk. 637); and trespass will not lie for an injury to it. A person having a common fishery in another's land cannot cut the grass growing on the bank. (13 Hen. 8, p. 15, b.) Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, except in times of extraordinary flood. (*Weld v. Hornby*, 7 East, 195. As to the right of fishery, see Selw. N. P. tit. Fishery.)

A *several fishery* is when a person has an exclusive right of fishery either in his own soil or in the soil of another. (1 Selw. N. P. 751, 13th ed.) It seems that the owner of a several fishery, in ordinary cases, and when the terms of the grant are unknown, may be presumed to be the owner of the soil. (*Duke of Somerset v. Fogwell*, 5 B. & C. 875.) Such an owner has the exclusive right of taking the fish within particular limits. (3 Salk. 360; 2 Salk. 637. See Co. Litt. 122 a, n. 7; *Rex v. Ellis*, 1 Maule & S. 652.)

The word "several," as applied to a right of fishing, has the same meaning as the word "separalis" had before the pleadings were in English. A declaration, reciting that the defendant had been summoned to answer plaintiff in an action of trespass, charged that the defendant, with force and arms, broke and entered a fishery, to wit, the sole and exclusive fishery of the plaintiff in a certain part of the river then flowing and being over the soil of one F., and then fished for fish in the said fishery of the plaintiff, and the fish of the said fishery of the plaintiff there found, and being in the said fishery chased and disturbed. The declaration concluded, and other wrongs to the plaintiff did against the Queen's peace and to the plaintiff's

Common of  
fishery.

Several fishery.

damage. Held, first, that the words "sole and exclusive fishery" were at any rate after verdict equivalent to "several fishery," that is, the right of fishing exclusive of all others in a particular place: that the statement that the soil was in F. did not vitiate the count, or render it necessary to deduce a title from the owner of the fee. And, secondly, that an action for trespass will lie for fishing in a several fishery. *Holford v. Bailey*, 18 Q. B. 426; 8 Q. B. 1000.)

The soil of navigable tidal rivers, so far as the tide flows and reflows, is *prima facie* in the crown, and the right of fishery therein is *prima facie* in the public. But the right to exclude the public therefrom and to create a several fishery existed in the crown, and might lawfully have been exercised by the crown before Magna Charta; and the several fishery could lawfully be afterwards made a subject of grant by the crown to a private individual. (*Malcolmson v. O'Dea*, 10 H. L. C. 593; 12 W. R. 198.)

Where a private river runs through a manor, the presumption of law is, that each owner of land within the manor, and on the bank of the river, has the right of fishing in front of his land; and, if the lord claims a several fishery, he must make out that claim by evidence. (*Lamb v. Newbiggin*, 1 Car. & K. 549.) From the words of a deed under which the lord claimed it was attempted to raise a presumption that the right of several fishery within the manor passed to him by that deed as appurtenant to the manor; it was held, that this presumption was rebutted by proof that before the date of that deed, owners of land within the manor and on the bank of the river had the right of free fishery therein. (*Ib.*)

As to the various kinds of fisheries, it was laid down by Willes, J., in delivering the opinion of the judges to the House of Lords, that the only substantial distinction is between an exclusive right of fishery usually called "several" sometimes "free" (used as in free warren), and a right in common with others, usually called "common of fishery" sometimes "free" (used as in free port). (*Malcolmson v. O'Dea*, 10 H. L. C. 593.) The Prescription Act does not apply to a claim to a free fishery in the waters of another. (*Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 14 W. R. 13.)

Free fishery.

Evidence of a continuous practice for upwards of sixty years wholly unresisted for a corporation to grant licences to fish in a navigable tidal river, and to appoint watchers in order to prevent unlicensed persons from fishing therein, is sufficient for a jury to infer the ownership of a free fishery in the corporation: and it is not a just conclusion from the fact of their having recovered in a former trial, where a part only of the entire subject-matter of the free fishery was in issue, that at that time the corporation was not possessed of the whole, and that their claim to the remainder was therefore an usurpation. (*Mannall v. Fisher*, 5 C. B., N. S. 856; 5 Jur., N. S. 389; *Little v. Wingfield*, 8 Ir. C. L. R. 279.) As to the presumption of the grant of a right of fishing from adverse user for sixty years, see *Beaman v. Kinsella*, 8 Ir. C. L. R. 291. When the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Company v. Ashby*, 6 H. & N. 394; 80 L. J., Exch. 203; *Clarke v. Mercer*, 1 F. & F. 492.

Evidence of rights  
of fishing.

As to the relief in equity in the case of common of fishery, see *post*.

In ejectment for a forfeiture by a lord of a manor against a copyholder of inheritance for digging and taking clay from the manor to be sold off the manor to any one, the defendant pleaded and proved a custom from time immemorial for the copyholders of inheritance, without licence from the lord, to break the surface and to dig clay without limit from and out of the copyhold tenements, for the purpose of making it into bricks to be sold off the manor. The custom was held to be good, as it might have resulted from an agreement between the lord and his tenants before the time of legal memory. Lord *Wensleydale* doubted whether this custom was good; for although the lord, being owner of the soil originally, could have given by express grant such a power, and even a much larger power to his tenants; yet, when there is no express grant but one which is sought to be implied by usage, as a custom is, it is a condition required by law

Custom to dig  
clay.



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Common.

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that the custom should not be unreasonable, otherwise the prevalence of the use is to be referred to the ignorance or carelessness of those whose property is affected by its exercise, rather than to a grant. (*Marquis of Salisbury v. Gladstone*, 9 H. L. C. 692. See pp. 701, 702, 704, 705; followed in *Hanmer v. Chance*, 13 W. R. 556; see *Duke of Portland v. Hill*, L. R., 2 Eq. 765.)

Where an inclosure act directed that the commissioners should set out and allot a certain portion of the common lands for the getting of stone, gravel and other materials, for the repairs of the highways and other roads to be set out under the act, and for the use of the inhabitants within the parish: it was held, that this did not authorize the inhabitants to take such materials for their private purposes, but only for the repairs of the roads. (*Rylatt v. Marfleet*, 14 Mees. & W. 233.)

Custom to erect  
booths.

A custom for all victuallers to erect booths on a common, being parcel of the waste of a manor (selected by the lord for holding fairs yearly, every fortnight), and to place posts and tables there, a reasonable time before the Monday next after the feast of Pentecost, and to continue them so erected until the feast of All Souls, each paying therefor to the lord a compensation of 2d., is good. (*Tyson v. Smith*, 1 P. & Dav. 307; 9 Ad. & Ell. 406.)

Presumption that  
waste land  
belongs to lord of  
manor.

*Prima facie* the lord of the manor is entitled to all waste lands within the manor; and it is not essential that the lord should show acts of ownership of such lands; and evidence that the public have been used to throw rubbish on waste lands is rather evidence that it belongs to the lord than to any private individual. (*Doe d. Dunraven v. Williams*, 7 Carr. & P. 332.) A right to any part of the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like. (*Tyrwhitt v. Wynne*, 2 B. & Ald. 554; *Barnes v. Mawson*, 1 Maule & S. 77; *Richards v. Peaks*, 2 B. & C. 918.) The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right. (*Folkard v. Hemmett*, 5 T. R. 417.) In like manner there may be a valid custom in a manor within the limits of an ancient forest belonging to the crown, for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights. (*Boulcott v. Winmill*, 2 Camp. 261; see *Northwich v. Stanway*, 3 Bos. & P. 346.) But without a custom for the purpose, the lord cannot make a new grant of copyhold. (*Rex v. Hornchurch*, 2 B. & Ald. 189; *Rex v. Wilby*, 2 Maule & S. 504.) A custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law. (*Badger v. Fbrd*, 3 B. & Ald. 153.) A custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the *onus* of proving that a sufficiency is left lies on the lord. (*Arlett v. Ellis*, 7 B. & C. 346. See *Rogers v. Wynne*, 7 D. & R. 521; *Betts v. Thompson*, L. R., 6 Ch. 732.)

Grants by the  
lord.

The stat. 4 & 5 Vict. c. 35, s. 91, enacts, "That where by the custom of any manor the lord of such manor is authorized, with the consent of the homage of such manor, to grant any common or waste lands of such manor to be holden of the lord by copy of court roll, nothing in that act contained shall operate to authorize or empower the lord to grant any such common or waste lands without the consent of the homage assembled at a customary court holden for such manor, nor shall any court holden for such manor be deemed or taken to be a good or sufficient customary court for such purpose, unless the same shall have been duly summoned and holden according to the custom of such manor in such cases used and accustomed before the passing of that act, and unless there shall be present at such court a sufficient number of persons holding lands of such manor by copy of court roll to constitute, according to such custom, a homage assembled at such court."

Presumption that  
encroachments by  
tenant belong to  
the landlord.

It is well settled, that encroachments made by a tenant are for the benefit of the landlord, unless it appears clearly, by some act done at the time of the making of the encroachments, that the tenant intended the encroach-

ments for his own benefit, and not to hold them as he held the farm to which the encroachments were adjacent. (*Doe d. Lewis v. Rees*, 6 Carr. & P. 610.) This doctrine originated in those cases where the landlord was lord of the manor, and the tenant encroached upon the waste. (*Per Lord Campbell*, C. J., 2 Ell. & Bl. 353.) Where a tenant who holds under the lord of a manor encroaches upon the waste, he is presumed to have approved against the commoners for the benefit of the lord. In other cases, when the power to encroach is derived from the occupation of the premises held of a landlord, and the encroachment is occupied as if it was part of the holding, then at the end of the tenancy the presumption as between the landlord and tenant is, that it is part of the holding, and it belongs to the landlord. (*Doe d. Croft v. Tidbury*, 14 C. B. 304. See p. 324.) Such presumption may be rebutted by the special circumstances of the case. (*Berney v. Bickmore*, 8 L. T., N. S. 353.)

The presumption was held to prevail where the landlord was not lord of the waste (*Doe d. Lloyd v. Jones*, 15 M. & W. 380), and was not rebutted by the fact that the encroachment was separated from the tenant's holding by a road. (*Andrews v. Hailes*, 2 Ell. & Bl. 349.) The presumption in favour of the landlord only prevails as against the tenant, and not as against the rights of a third party. (*Doe d. Baddeley v. Massey*, 17 Q. B. 373.)

It is laid down in all the cases, whether the inclosed land is part of the waste or belongs to the landlord or a third person, that the presumption is, that the tenant has inclosed it for the benefit of his landlord, unless he has done some act disclaiming the landlord's title. *Parke*, B., observed, "I am disposed to discard the definition, that the encroachment is made 'for the benefit of the landlord,' and to adopt that of Lord *Campbell*, viz., that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit. It is not necessary that the land inclosed should be adjacent to the demised premises; the same rule prevails where the encroachment is at a distance. That is now law, and I must add, that even though at the time of making the encroachment there is nothing to rebut the presumption that the tenant intended to hold it as a portion of his farm, yet circumstances may afterwards occur by which it may be severed from the farm; for instance, if the tenant conveys it to another person, and the conveyance is communicated to the landlord, then it can no longer be considered as part of the holding: But if the landlord is allowed to remain under the belief that the encroachment is part of the farm, the tenant is estopped from denying it, and must render it up at the end of the term as a portion of the holding." (*Kingsmill v. Millard*, 11 Exch. 318, 319. See further, *Earl of Lisburne v. Davies*, L. R., 1 C. P. 259; and *Whitmore v. Humphries*, L. R., 7 C. P. 1.

This presumption does not apply where the tenant is in occupation of the waste land before entering upon his tenancy. (*Dixon v. Baty*, 14 W. R. 836.)

By the statute of Merton (20 Hen. 3, c. 4), and by subsequent statutes (29 Geo. 2, c. 36, and 31 Geo. 2, c. 41), the lord of a manor may inclose so much of the common as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled to rights of common. This inclosure, when justifiable, is called in law "*approving*," an ancient expression signifying the same as "*improving*." (2 Bl. Com. 34.) The onus of showing that sufficient waste is left for the commoners lies upon the lord. (*Betts v. Thompson*, L. R., 6 Ch. 732.)

A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve. (2 T. R. 392, n.) The lord may dig clay pits on the common without leaving sufficient herbage, if it can be proved that such right has been immemorially exercised. (*Bateson v. Green*, 5 T. R. 411.) If this decision imports that a lord, after granting rights of common, may help himself to any portion of the common land to the exclusion of his grantees, such a doctrine is incompatible with many other cases, and cannot be supported on principle. (*Per Lord Denman*, C. J., 5 Q. B. 729, 730. See

*Folkard v. Hemmett*, 5 T. R. 417.) A custom for the owners of a waste to set out to the owners of certain ancient messuages portions of the waste to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good. (*Clarkson v. Woodhouse*, 5 T. R. 412, n.; and see *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318; 2 Atk. 189.)

A person seised in fee of part of the waste, although he be not lord, may approve without the consent of the homage, provided he leaves a sufficiency of common for the tenants of the manor. (*Glorer v. Lane*, 3 T. R. 445.) But there can be no approvement against the tenants of a manor who have a right to dig gravel on the wastes, and to take estovers (*Duberley v. Page*, 2 T. R. 391; see *Grant v. Gunner*, 1 Taunt. 435), although the lord may approve against common of pasture by the statute of Merton (20 Hen. 3, c. 4), notwithstanding there may be other rights of common against which he cannot approve. (*Shakespear v. Peppin*, 6 T. R. 741.)

On the trial of an issue between the lord of a manor and a commoner as to the right of the lord to inclose a portion of the waste, leaving a sufficiency of common for those having a right of common, the waste there being part of a royal forest: it was held, that the right of the crown to turn deer on the waste did not form an element for the consideration of the jury on the question of sufficiency of common in a case where no deer had been turned on the waste for upwards of twenty years. (*Lake v. Plaxton*, 10 Exch. 196; 24 Law J., Exch. 52.)

An owner *pur autre vie* of a common may prove under the stats. 20 Hen. 3, c. 4, and 13 Edw. 1, st. 1, c. 46. The owner of a common may erect thereon a house necessary for the habitation of beast-keepers, for the care of the cattle of himself and the other persons having rights of common there. So he may erect a house necessary for the habitation of a woodward to protect the woods and underwoods on the common. A plea justifying the erection of a house for such beast-keepers need not state the names of the other commoners, nor that they assented to the appointment of beast-keepers. To an action on the case for a continuing disturbance of common, the defendant pleaded an approvement of the *locus in quo*, "leaving sufficient common of pasture for the said plaintiff and all other persons entitled thereto, together with sufficient ingress and egress to and from the same, according to the form of the statute, &c.:" it was held, that the plea sufficiently showed that enough of common was left at the time of the approvement, and in the place where the plaintiff was entitled to enjoy it. (*Patrick v. Stubbs*, 9 Mees. & W. 830.)

Inclosure acts.

The greater part of the commons in England have been inclosed under local acts of parliament.

The 41 Geo. 3, c. 109, called the General Inclosure Act, consolidated certain provisions which had usually been inserted in acts of inclosure, and facilitated the mode of proving the several facts usually required on the passing of such acts. The 1 & 2 Geo. 4, c. 23, amended the law respecting the inclosure of open fields, common, and waste lands in England. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure acts, in consequence of the award not having been enrolled, or not having been enrolled within the time limited by the several inclosure acts, and authorized the appointment of new commissioners where the same should have been omitted. Further facilities for the inclosure of open and common, arable, meadow and pasture lands and fields in England and Wales were given by stat. 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31.

Inclosure commis-  
sioners.

By 8 & 9 Vict. c. 118, the superintendence of applications for the inclosure of lands and the carrying the same into operation is entrusted to the first commissioner of woods and forests, and two other commissioners, who are styled "The Inclosure Commissioners for England and Wales." Under the sanction of these commissioners inclosures may be more readily effected, and several local inclosures may be combined in one act. The appointments under the act were limited to five years next after the 8th August, 1845, and thenceforth until the end of the then next session of parliament.



35 & 36 Vict. c. 88, continues the inclosure commission to the 1st August, 1873.

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The act 8 & 9 Vict. c. 118, is amended by 9 & 10 Vict. c. 70, and extended by 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 14 & 15 Vict. c. 53; 15 & 16 Vict. c. 79; 17 & 18 Vict. c. 97; 20 & 21 Vict. c. 31; 22 & 23 Vict. c. 43; 29 & 30 Vict. c. 70; 31 & 32 Vict. c. 89.

29 & 30 Vict. c. 122, amended and extended by 32 & 33 Vict. c. 107, and 34 & 35 Vict. c. 93, provides for the improvement, protection and management of commons near the metropolis.

Under the act 8 & 9 Vict. c. 118, gavelkind lands in Kent may be exchanged for lands in Middlesex held in common socage. (*Minet v. Leman*, 7 De G., M. & G. 340; 1 Jur., N. S. 692; 24 L. J., Ch. 545.)

Where, by an agreement between the lord of the manor and the copyholders, the waste lands are allotted and inclosed, the allotments taken by the copyholders are of freehold tenure. (*Paine v. Ryder*, 24 Beav. 151; *Doe d. Loves v. Davidson*, 4 M. & Selw. 175.)

Where, under an inclosure act, the waste lands of a manor are directed to be allotted in certain proportions, the freehold of such part of the lands as are not portioned out in the award remains in the lord of the manor. (*Packe v. Mee*, 9 W. R. 335.) See further, as to inclosure, *Church v. Inclosure Commissioners for England and Wales* (11 C. B., N. S. 664); *Partridge v. Inclosure Commissioners, &c.* (9 W. R. 336); *Grubb v. Inclosure Commissioners, &c.* (9 C. B., N. S. 612); *Vernon v. Lord Manvers* (11 W. R. 133); Cooke on Inclosures, 4th ed.

The interest which a commoner has in the common is, in the legal phrase, to eat the grass with the mouths of his cattle. He must not meddle at all with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common. (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Sir Simon de Harcourt's case*.) Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there. (12 H. 8, 2 a; *per Brooke, J.*, 2 Leon. 202; Godb. 182, pl. 258; *Anon. Bridg.* 10; *Samborn v. Harilo*, 2 Bul. 116; *Carrill v. Pack*, 1 Sid. 251.) If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action on the case. (6 Term Rep. 483; *Sadgrove v. Kirby*, 1 Bos. & Pull. Rep. 13.) So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows, for it would be a meddling with the soil, and a judging for himself, but he must have recourse to his action against the lord. (*Cooper v. Marshall*, 1 Burr. 259; & C., 2 Wils. 51; 1 Roll. Abr. 405, pl. 3.) Much less can a commoner kill the rabbits to prevent their increase, to the prejudice of the common. (*Hodson v. Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; *S. C.*, cited 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 353, n.)

Interest of the  
commoner.

By the conveyance of the lands to which either common appendant or appurtenant is annexed, the right of common will pass. (*Solme v. Bullock*, 3 Lev. 165; *Sacheverell v. Porter*, Cro. Car. 482; *Drury v. Kent*, Cro. Jac. 14.) Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging" only are used, the right will not pass, those words not being sufficient to revive the right, though those who have occupied the tenement since the extinguishment have always enjoyed the common. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right. (*Clements v. Lambert*, 1 Taunt. 205; *Morris v. Eggington*, 3 Taunt. 24; *Barlow v. Rhodes*, 1 Cr. & Mees. 448; *Wardle v. Brooklebank*, Ell. & Ell. 1058.) The effect of an enfranchisement of copyholds, being to extinguish all rights and privileges annexed to the copyholder's estate as such, if a copyholder has a right of common, and his copyhold is enfranchised, the common is gone, since the copyhold tenure has ceased: and the right of common will not pass by the word "appurtenances" in the deed of enfranchisement (Moore, 667; Cro. Jac. 258; 2 Ld. Raym. 1225; Salk.

By what words a  
right of common  
will pass.

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170, 364); but must be made by express grant. (Moore, 667; Cro. Eliz. 570.) Where a copyhold tenement, to which a right of common was originally appendant, having vested in the lord by forfeiture, was granted by him as copyhold, with the appurtenances; it was held, that having always continued demisable while in the hands of the lord, it was a customary tenement, and as such was still entitled to a right of common. (*Badger v. Ford*, 3 B. & Ald. 153.) And a copyholder, who has common in a waste, *without* the manor of which his copyhold is parcel, has it as annexed to the land, and not to his customary estate, such common is not extinct by enfranchisement of the copyhold, though there be no words of regrant. And after enfranchisement, the feoffee must, previously to the stat. 2 & 3 Will. 4, c. 71, have prescribed in a *que estate* of his lord for himself and his customary tenants till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement. (*Barnick v. Matthews*, 5 Taunt. 365.)

Extinguishment  
of common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. A right of common may be extinguished by a release of it to the owner of the soil; and if the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole. (*Rotherham v. Green*, Cro. Eliz. 593; 1 Show. 350.) Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But in order to extinguish a right of common by unity of possession, it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the tenements in respect of which the common is claimed, and in the premises over which the right was claimed. (*Rex v. Inhabitants of Hermitage*, Carth. 239; *Bradshaw v. Eyr*, Cro. Eliz. 570; 4 Rep. 38 a; see *Lloyd v. Earl of Powis*, 4 El. & Bl. 485.) Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished. (1 Roll. Abr. 401.) Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone. (*Marsham v. Hunter*, Cro. Jac. 253; Gilb. Ten. 224.) Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law. (*Styant v. Staker*, 2 Vern. 250; Comb. 127.)

In case of the enfranchisement of copyholds, under the statutes 4 & 5 Vict. c. 35, s. 81, and 15 & 16 Vict. c. 51, s. 45, it is provided that copyhold lands when enfranchised are to become freehold, subject to the payment of the consideration for the enfranchisement; but it is provided that nothing contained in those acts shall operate to deprive any tenant of any commonable right to which he may be entitled in respect of such lands, but such right shall continue attached thereto, notwithstanding the same shall become freehold.

As to the extinguishment of a right of common appurtenant for cattle levant and couchant by alteration in the dominant tenement, see *Carr v. Lambert* (L. R., 1 Ex. 168, *ante*, p. 41).

Remedies for dis-  
turbance of right  
of common.

## Action at law.

The usual remedy adopted by commoners for an injury to the right of common is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or owner of the soil, (*Hassard v. Cantrell*, Lutw. 101,) or a stranger or a commoner. (1 Selw. N. P. 381, 13th edit.) In this action the plaintiff must prove an injury sustained; but the smallest injury is sufficient, as that of taking away the manure which was dropped on the common by the cattle. (*Pindar v. Wadsworth*, 2 East, 154. See cases cited in *Marzetti v. Williams*, 1 B. & Ad. 426; and *Blofield v. Payne*, 4 B. & Ad. 410.) In case for disturbance of a right of common, the declaration alleged that the mayor, aldermen and burgesses of the town and borough of Stamford had the right

in question for every resident freeman paying scot and lot; it appeared in evidence that the right relied upon was an ancient right. By 2 & 3 Will. 4, c. 64, and 5 & 6 Will. 4, c. 76, part of an additional parish is thrown within the borough of Stamford: it was held, that the declaration was not supported, as the right claimed was larger than that proved. (*Beadsworth v. Torkington*, 1 G. & D. 482; 1 Q. B. 782.) In an action on the case for disturbance of common, when the defendant justifies under a right of common for his cattle levant and couchant, the plaintiff must new assign, if he intends to prove a surcharge. (*Bowen v. Jenkins*, 2 Nev. & P. 84; 6 Ad. & Ell. 911).

If one of the commoners surcharges the common, that is, puts more cattle into the common than he is entitled to do, the commoner who is injured may maintain an action on the case against the other for a surcharge, notwithstanding he has himself been guilty of a surcharge. (*Hobson v. Todd*, 4 T. R. 71.) In an action on the case for the surcharge of a common, the plaintiff may declare generally for the injury, without stating the defendant's right of common, and how he had exceeded that right. (*Atkinson v. Teesdale*, 2 W. Bl. 817; 3 Wils. 278. See *Cheesman v. Hardham*, 1 B. & Ald. 706.) In case for a surcharge of common, the plaintiff need not show that he was exercising his right of common at the time of the surcharge, but only that he could not enjoy his common so beneficially as he ought. (*Wells v. Watling*, 2 W. Bl. 1233.) As to the right of distress for a surcharge, see 1 Wms. Saund. 630, edit. 1871.

An action of trespass will lie by one tenant in common against another, and also against his licensee, for making holes in the common, and for digging and taking turves away, when those acts are not done in the exercise of a right of common. And the plea, that the close was not the plaintiff's close, does not put in issue the exclusive possession of the plaintiff. But the plaintiff will recover such damages only as are proportionate to his interest. (*Wilkinson v. Haygarth*, 11 Jur. 104; 16 L. J., Q. B. 103.)

An owner seised in fee of a close, upon which the burgesses of a borough had a right during a certain portion of the year to depasture their cattle, and having during that period exclusive possession of the close, may maintain an action of trespass against a party who, during that period, commits a trespass in the subsoil by digging holes; but not against one who, during that period, merely rides over the close. (*Cox v. Glue*, 5 C. B. 533.) The defendant in trespass pleaded, that for thirty years before suit he and all occupiers for the time being had enjoyed common of right and without interruption in, upon and throughout the close called P., and issue was joined on a traverse of this plea. The close P. was 3,000 acres in extent, and interruption by inclosure of ten acres had been acquiesced in for a year, and the trespass complained of was committed on these ten acres: it was held, that the defendant would only have proved his plea by proof of user on the place where the trespass was committed: the plaintiff was entitled to the verdict. (*Davies v. Williams*, 16 Q. B. 543.) As to pleading in an action of trespass against several claiming a right of common, see *Church v. Wright*, 15 C. B., N. S. 750.

Before the stat. 3 & 4 Will. 4, c. 27, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the lapse of sixty years, within which time he might recover the lands by a real action. (*Edwards v. M'Leay*, Cooper, C. C. 318; *Hawke v. Bacon*, 2 Taunt. 155; *Creack v. Wilmot*, *Id.* 159. See 2 Smith's L. C. 632, 5th ed.) Writs of assize have been abolished by 3 & 4 Will. 4, c. 27, s. 36, *post*.

It is the policy of the law not to allow commoners to abate except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages he has sustained. The cases where the law allows an abatement by a commoner, are where the acts of the lord are directly contrary to the nature of the common. For by the grant of it, the grantor gives everything

Abatement.

which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a wall, gate, hedge or fence around the common, to prevent the commoner's cattle from going into the common, the commoner may abate the erection, because it is inconsistent with the terms of the grant. (2 Roll. Abr. 145, (W.) pl. 2; *Cooper v. Marshall*, 1 Burr. 259; *Sadgrove v. Kirby*, 6 Term Rep. 485.) The power of abatement in this case seems analogous to other cases where the acts done are inconsistent with the terms of the grant; and if the grantor of a way, &c., stops it up, the grantees may abate the erection.

A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time. (*Perry v. Fitzhorne*, 15 Law J., N. S., Q. B. 239; 10 Jur. 799; 8 Q. B. 757.) In trespass for pulling down the dwelling-house of the plaintiff, in which he and his family were inhabitants and actually present at the time, a plea justifying, because it was wrongfully erected upon a place over which defendant had a right of common, is bad. (*Ib.*) If a mere stranger erect a building upon land belonging to another, the owner of the land is justified in pulling down the building for the purpose of ejecting the intruder; and the fact of the latter being at the time in the building will not be any ground for maintaining an action of trespass against the real owner. (*Barking v. Read*, 19 Law J., Q. B. 291.) This is a very different case from *Perry v. Fitzhorne* (8 Q. B. 757); for the defendant alleged that the house was his own, and that the plaintiff was a mere intruder; and it cannot be that such a person can prevent the owner from doing what he pleases on his own land. In the latter case, the plaintiff had a right of possession, but in the former case he had none. (See *Harvey v. Bridges*, 1 Exch. 261.) A declaration for breaking the plaintiff's house in which he was, and pulling it down is not answered by a plea as to the breaking and entering, that the defendant was entitled to common of pasture over the land on which the house had been wrongfully erected, and that he necessarily and unavoidably committed the trespasses complained of in removing the house. (*Jones v. Jones*, 8 Jur., N. S. 1132; 1 H. & Colt. 1.) In this case the court was of opinion that this case was not distinguishable from *Perry v. Fitzhorne*, but declined to express any opinion whether they would for the first time have concurred in the judgment in that case. Where a house obstructs the exercise of a right of common, the commoner may after notice and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house. (*Davies v. Williams*, 16 Q. B. 543.)

So where the commoner is deprived of part of his common, by the erection of a wall, gate or hedge upon the common itself, it seems he may abate the erection, for it deprives him of his common, and forms no part of the soil of the common, and by such abatement the commoner does not at all meddle with the soil. (*Mason v. Caesar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38.) And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of being punished in an action of trespass, provided the lord has left a sufficiency of common. When a part and not the whole of a common had been inclosed, a commoner in asserting his right of common may throw down the whole of the hedge erected on the common, and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle. (*Arlett v. Ellis*, 7 B. & C. 346; 9 D. & R. 897; 9 B. & C. 671.) But where a hedge or erection is made upon other land, which is no part of the common, but surrounds the common, the commoner can only abate so much of the erection as to make a way for his cattle to go into the common. (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88; *Mason v. Caesar*, 2 Mod. 65. See 1 Wms. Saund. 353, a.) If the lord of a manor plant trees upon a common, a commoner has no right to cut them down; his remedy is only by an action. (6 T. R. 483.)

Remedy in equity. Where there has been possession of a fishery for a considerable length of time, a person claiming a sole right to it may bring a bill to be quieted in the possession of it, though he has not established his right at law. (*Mayor of York v. Pilkington and others*, 1 Atk. 282.) And if the

persons who dispute the right are numerous, so that it cannot be determined in one action at law, the party claiming an exclusive right may go to a court of equity first, which will direct an issue for settling the right, as in disputes between the lords of manors and their tenants, or the tenants of different manors. (*Lord Tenham v. Herbert*, 2 Atk. 483.) But if the question about a right of fishing arises between two lords of manors, neither of them can go into equity for relief until the right has been established at law. (*Lord Tenham v. Herbert*, 2 Atk. 483; *Whitchurch v. Hyde*, *Id.* 391; *Welby v. Duke of Rutland*, 6 Br. P. C. 575; see 1 Br. C. C. 40, 572.)

A bill will lie against the lord by one copyholder, on behalf of himself and the other copyholders, to have their rights of common ascertained: but one copyholder not suing on behalf of all cannot maintain such a bill. (*Phillips v. Hudson*, L. R., 2 Ch. 243.) A suit for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants. (*Smith v. Earl Brownlow*, L. R., 9 Eq. 241.) And by one freehold tenant of a manor on behalf of himself and all other freehold tenants. (*Warrick v. Queen's College, Oxford*, L. R., 6 Ch. 716; *Betts v. Thompson*, L. R., 6 Ch. 732.) A bill for the purpose of establishing a right of common over the wastes of a forest may be maintained by an owner and occupier of land within the forest on behalf of all the owners and occupiers. (*Commissioners of Sewers v. Glassey*, L. R., 7 Ch. 456.)

As to production of documents in a suit instituted to establish a right of common of vicinage, see *Minet v. Morgan*, L. R., 11 Eq. 284.

As to the law of common in general, see Bac. Abr. Common; Com. Dig. Common; Cruise's Dig. tit. XXIII.; Woolrych on Rights of Common, 2nd ed.

### (3.) OF THE PRESUMPTION OF GRANTS OF EASEMENTS; AND OF LICENCES.

For a long series of years prior to the passing of the act 2 & 3 Will. 4, c. 71, judges had been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the statute of limitations, 21 Jac. 1, c. 16. Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but, as said by a learned author, (2 Stark. on Ev. 669,) "a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation; and though in theory it was mere presumptive evidence, in practice and effect it was a bar." The act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury. (*Bright v. Walker*, 4 Tyrw. 507; 1 Cr., Mees. & Rosc. 217. See *ante*, pp. 9, 10.)

Presumption at common law of grant of incorporeal rights from exercise during twenty years.

The presumption of a legal title, by grant or otherwise, to incorporeal rights in the lands of others, founded on adverse possession and enjoyment of such rights for the space of twenty years, appears to have been adopted in analogy to the enactment of the statute of limitations, 21 Jac. 1, c. 16, which made an adverse enjoyment of twenty years a bar to an action of ejectment; (*Holcroft v. Heel*, 1 Bos. & Pull. 460; 2 Saund. 175 a;) for as an adverse possession of that duration will give a possessory title to the land itself, it seems to be also reasonable that it should afford a presumption of right to a minor interest arising out of land. (*Campbell v. Wilson*, 3 East, 294; *Read v. Brookman*, 8 T. R. 151.) This rule, according to Lord Mansfield, C. J., "is founded upon principles of sound policy and convenience;" (Cowp. 110;) and the grant is presumed, as the same learned judge declares, "for the purpose and from a principle of quieting a long possession." (*Ib.* 215.) The rule was resorted to, with the view of reliev-



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ing the infirmity and necessity of mankind, who require, for the preservation of their property and rights, where there is no written document, the admission of some general principle to take the place of individual and specific belief; and the legal presumption supplied the place of such belief. (*Hillary v. Waller*, 12 Ves. 266.)

A presumption of a grant is raised upon the general principle, that what has been done should be presumed to be rightly done; *ex diuturnitate temporis omnia presumuntur solemniter esse acta*. (Co. Litt. 6 b.) In applying this principle to a right of way, if it be found that the act has been often repeated, (for the occasional use of a walk or a path across a man's field would hardly be such an use as would establish the right,) but if the act must necessarily have been often repeated with the knowledge of the persons acting upon an adverse right, it affords a strong presumption in favour of the right so exercised. The same principle is applied to presumption in the case of light or of flowing water. (3 B. & C. 621, 622.) If there has been an uninterrupted possession of light, water, or any other easement for twenty years, it affords a ground for presuming a right by grant, covenant or otherwise, according to the nature of the easement, and if there is nothing to rebut the presumption, a jury may be directed to act upon it. (*Yard v. Ford*, 2 Wms. Saund. n. (2); *Cross v. Lewis*, 2 Barn. & Cress. 686; S. C. 4 Dowl. & Ryl. 234; *Livett v. Wilson*, 3 Bing. 115; and see the judgment of *Holroyd, J.*, *Williams v. Moorland*, 2 Barn. & Cress. 914; S. C. 4 Dowl. & Ryl. 588, and the cases there cited.) But the rule was subject to this qualification, that the possession was with the acquiescence of him who was seised of an estate of inheritance; for a tenant for life or years has no power to grant any such right for a longer period than during the continuance of his particular estate; (2 Wms. Saund. 174, n. (2); *Daniel v. North*, 11 East, 372; *Barker v. Richardson*, 4 Barn. & Ald. 579; *Wood v. Veal*, 5 Barn. & Ald. 454; S. C. 1 Dowl. & Ryl. 20;) but if the easement existed previously to the commencement of the tenancy, the fact of the premises having since been for a long period in the possession of a tenant will not defeat the presumption of a grant. (*Cross v. Lewis*, B. & Cr. 686.)

A grant of mines will not be presumed against an express reservation of them, although the owner had allowed the person in possession of the surface to expend money in working them. (*Norway v. Rowe*, 19 Ves. 156; *Bowser v. Colby*, 1 Hare, 139.)

Pleading a non-existing grant.

In order to obviate the difficulty of proving an immemorial usage, it formerly became a practice to plead a right of way by what was termed a *non-existing grant*; (*Blewitt v. Tregonning*, 3 Ad. & Ell. 554;) that is, a *feigned* grant by deed (supposed to be lost) from a former freeholder of the land, in or upon which the easement was exercisable, to a former freeholder of the tenements in respect of which it was claimed, but it was necessary that the names of the parties to, and the date of, such supposed grant should be stated; (*Hendy v. Stephenson*, 10 East, 55;) but profert of the deed is excused if it be averred that the deed has been lost by time and accident. (*Read v. Brookman*, 3 T. R. 151.) It is necessary to support the plea, if denied, by proof that, at the anterior period stated, the parties described as the former freeholders (the pretended grantor and grantee) of the easement really were such freeholders concurrently of the respective properties. (*Blewitt v. Tregonning*, 3 Ad. & Ell. 554.) The defendant pleaded a grant of right of way by deed, subsequently lost. The plaintiff in his replication traversed the grant. At the trial, there being conflicting testimony as to the uninterrupted user of the way, the judge directed the jury, that if, upon this issue, they thought the defendant had exercised the right of way uninterruptedly for more than twenty years by virtue of a deed, they would find for the defendant; if they thought there had been no way granted by deed they would find for the plaintiff:—it was held that this direction was right. (*Livett v. Wilson*, 3 Bing. 115; 10 Moore, 439. See *Doe d. Fenwick v. Read*, 5 B. & Ald. 232.) If the plaintiff merely traverse a non-existing grant of a way, he cannot on the trial give evidence to show that the supposed grantor was not, as alleged in the plea, seised in fee, even for the purpose of rebutting

the presumption of the grant. (*Cowlsham v. Cheslyn*, 1 Cr. & Jerv: 48; Chitty, Pl. 597, 6th edit.) With reference to pleas of this kind, it was said by *Littledale*, J.,—"If the evidence establish an user as far back as memory goes, and there does not appear to have been any time at which it did not exist, that is proof of prescription; and, supposing the evidence sufficiently strong, a prescription is what the jury would find, and they have no right to find a grant, unless more be shown. Supposing the evidence in such a case to leave it doubtful whether the right existed sixty or seventy years ago, it may be protected under a plea of *non-existing* grant; but if the evidence of user goes far enough to prove a prescription, such evidence cannot be relied on to prove a grant." (*Blewitt v. Tregonning*, 3 Ad. & Ell. 583, 584.)

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"The occasion of the enactment of the Prescription Act is well known. It had been long established that the enjoyment of an easement as of right for twenty years was practically conclusive of a right from the reign of Richard I., or in other words of a right by prescription, except proof was given of an impossibility of the existence of the right from that period. A very common mode of defeating such a right was proof of unity of possession since the time of legal memory. To meet this the grant by a lost deed was invented: but in progress of time a difficulty arose in requiring a jury to find upon their oaths that a deed had been executed, which everybody knew never existed: hence the Prescription Act." (*Per Martin*, B., *Mounsey v. Ismay*, 3 H. & C. 486; 13 W. R. 521.) See also the remarks of *Cockburn*, C. J., in *Bryant v. Foot*, L. R., 2 Q. B. 181.

There is nothing in the act 2 & 3 Will. 4, c. 71, to interfere with a claim of a right of way or other easement by express grant. (*Bright v. Walker*, 1 Cr., M. & R. 223; *ante*, pp. 9, 10; *Livett v. Wilson*, 3 Bing. 115; *Plant v. James*, 2 N. & M. 517; 4 Ad. & Ell. 749, 765; *Blewitt v. Tregonning*, 3 Ad. & Ell. 554.) Although that statute has facilitated the proof of profits à prendre and easements, it does not appear to have superseded the common law, so that a party may elect to proceed either under the statute or according to the common law. (See *Holford v. Hankinson*, 5 Q. B. 584.) In *Onley v. Gardiner* (4 Mees. & W. 496), where the defendant failed in proving a sufficient title under the statute, in consequence of an unity of possession, the court after argument, in which it was held that such unity defeated the title under the statute, allowed the defendant to amend his plea, by pleading a right of way immemorially. (See *Richards v. Fry*, 3 Nev. & P. 72; *Welcome v. Upton*, 5 Mees. & W. 403, 404; *Parker v. Mitchell*, 11 A. & E. 788; *Lowe v. Carpenter*, 6 Ex. 825.) So also in the case of tithes, where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before 2 & 3 Will. 4, c. 100, was passed. (*Earl of Stamford v. Dunbar*, 13 M. & W. 822.)

How far Prescription Act has superseded common law.

It is frequently advisable to plead together in the same case pleas of prescription by the statute, of prescription at common law, and of a non-existing grant. (Bullen & Leake, Prec. Plead. 813, 3rd ed.) These pleas were pleaded together in *Bailey v. Stevens*, 12 C. B., N. S. 91; 10 W. R. 868.

In the case of rights to light acquired by prescription, Lord Westbury said, "The right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on any presumption of a grant or fiction of a licence having been obtained from the adjoining proprietor." (*Tapling v. Jones*, 11 H. L. C. 290; 13 W. R. 617.)

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and a freehold interest therein cannot be created or passed otherwise than by deed. (*Hewlins v. Shippam*, 5 B. & C. 221.) A term for years in an incorporeal hereditament, or in a thing lying in grant, cannot be created without deed. (14 Vin. Abr. tit. Grant (G a); 2 Roll. Abr. 63, tit. Grant (G); Co. Litt. 85 a; 5 B. & C. 882.) Although the older authorities speak of incorporeal *inheritances*, yet

Necessity of a deed to pass incorporeal rights and easements.



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there is no doubt but that the principle does not depend on the quantity of interest granted, but on the nature of the subject-matter; a right of common or a right of way can no more be granted for life or for years without a deed, than in fee simple. (*Per Alderson, B.*, in *Wood v. Leadbitter*, 13 Mees. & W. 842, 843.) Where a subject is owner of a several fishery in a navigable river, where the tide flows and reflows, granted to him (as must be presumed) before *Magna Charta*, by the description of "*separalem piscariam*," it being an incorporeal hereditament, a term for years cannot be created in it without deed. (*Duke of Somerset v. Fogwell*, 5 B. & C. 875.) Where there was an agreement in writing, but not under seal, to let a messuage, together with the full and free and exclusive licence and leave to hunt, hawk, course, shoot, and sport over a manor, and the tenant entered and was possessed during the term, it was held, in an action of assumpsit on the agreement for the rent, on demurrer to a plea, that, not being by deed, the agreement was void, because an *incorporeal hereditament* was agreed to be let, and that the plaintiff was not entitled to recover in respect of the actual enjoyment of the premises let by the defendant, of which he had taken possession. (*Bird v. Higginson*, 2 Ad. & Ell. 696; 4 Nev. & M. 505; 1 Har. & Woll. 61; 6 Ad. & Ell. 824.) In the case of a written agreement not under seal, whereby the plaintiff agreed to let land to the defendant, with a right of sporting, the defendant to make satisfaction to the plaintiff's tenants for the damage done by game on their farms: although it was held that the right of sporting did not pass by the agreement, yet that the agreement to make compensation was valid and good ground for an action, the defendant having had the full benefit of such agreement. An agreement to execute a conveyance is valid as an agreement, though it does not operate to pass an estate; and its validity is not affected by the question whether the subject of the deed be corporeal or incorporeal. (*Thomas v. Fredericks*, 10 Q. B. 775; see *Smart v. Jones*, 33 L. J., C. P. 154; 12 W. R. 430.) A licence to a stranger to use a common, in effect amounting to a grant of the common of pasture, can only be by deed. (*Hoskins v. Robins*, 2 Wms. Saund. 328, and n. 12; Shep. Touch. 330.) Where the plaintiff in replevin answered an avowry for damage feasant by a plea of licence from the commoner, who had right of common for twenty beasts, it was objected, that if the commoner could license, he could not do so without deed, and of that opinion was the whole court. (*Monk v. Butler*, Cro. Jac. 574.) A licence or liberty cannot be created and annexed to an estate of inheritance or freehold without deed. (Shep. Touch. 231.) Whatever may be the effect of a parol licence by the owner of land to fence off part of a common and to build a house thereon, as against such owner it is clear that a grant of a freehold interest running with the inheritance cannot be binding on a stranger to the grantor, unless the grant was by deed. (*Perry v. Fitzhorne*, 8 Q. B. 757. See *Ramsey v. Rawson*, 1 Vent. 18—25.) It seems questionable whether a custom to demise by parol a right of common can be supported at law. (*Lathbury v. Arnold*, 1 Bing. 219; 8 Moore, 72. See *Rex v. Lane*, 1 D. & R. 78; 5 B. & Ald. 488.)

It seems to require a deed to create the right to have light and air come unobstructed from the land of one owner to the newly-opened window of an adjoining owner. (*Blanchard v. Blanchard*, 1 Ad. & Ell. 536; 3 Nev. & M. 691; *Blanchard v. Bridges*, 4 Ad. & Ell. 195. See *post*, note on lights.) The plaintiff, a tenant of a house for a term of years, being possessed of certain fixtures, which were his own property, but annexed to the freehold, requested the landlord to purchase them at the expiration of the term, or let them remain for purchase by the incoming tenant, but to be taken away by the plaintiff if the tenant should refuse them. The landlord wrote an answer declining to purchase, but adding "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant." The articles remained unsevered from the freehold until the entry of the new tenant, who came in under demise from the same landlord, but who declined to take them. The plaintiff then (after the tenant had been two months in possession) demanded liberty to enter and remove the fixtures, but the tenant refused permission, and the

plaintiff thereupon brought an action for the hindrance and trover against the tenant: it was held, that if the landlord's letter to the plaintiff amounted to a licence to take away the articles, yet, not being under seal, it was no valid grant of such privilege as against a new tenant in possession, and not party to the licence. (*Roffey v. Henderson*, 17 Q. B. 574; 21 L. J., Q. B. 49.) See also *Corcor v. Payne*, 1 R., 4 C. L. 380.

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In *Thomas v. Sorrell* (Vaugh. 351), *Vaughan, J.*, says:—"A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it would have been unlawful. As a licence to hunt in a man's park, to come into his house, are only actions which, without licence, had been unlawful. But a licence to hunt in a man's park and carry away the deer killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licences as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down, they are grants." A mere licence is revocable, but that which is called a licence is often something more than a licence; it often comprises or is connected with a grant, and then the party who has given it cannot in general revoke it, so as to defeat his grant, to which it was incident. It may further be observed, that a licence under seal (provided it be a mere licence) is as revocable as a licence by parol; and on the other hand a licence by parol, coupled with a grant, is as irrevocable as a licence by deed, provided only that the grant is of a nature capable of being made by parol. But where there is a licence by parol, coupled with a parol grant, or pretended grant, of something which is incapable of being granted otherwise than by deed, there the licence is a mere licence; it is not an incident to a valid grant, and it is therefore revocable. Thus a licence by A. to hunt in his park, whether given by deed or by parol, is revocable; it merely renders the act of hunting lawful, which, without the licence, would have been unlawful. If the licence be, as put by Chief Justice *Vaughan*, a licence not only to hunt, but also to take away the deer when killed to his own use, this is in truth a grant of the deer, with a licence annexed to come on the land: and supposing the grant of the deer to be good, then the licence would be irrevocable by the party who had given it; he would be estopped from defeating his own grant, or act in the nature of a grant. But suppose the case of a parol licence to come on my lands and there to make a watercourse, to flow on the land of the licensee, in such a case there is no valid grant of the watercourse, and the licence remains a mere licence, and therefore capable of being revoked. On the other hand, if such a licence were granted by deed, then the question would be on the construction of the deed, whether it amounted to a grant of the watercourse; and if it did, then the licence would be irrevocable. (*Per Alderson, B., Wood v. Leadbitter*, 13 Mees. & W. 844, 845.)

Nature of a licence.

Where a personal licence of pleasure is granted, it extends only to the individual, and it cannot be exercised with or by servants, but if there is a licence of profit and not of pleasure it may. (*Duchess of Norfolk v. Worman*, Year Book, 12 Hen. 7, 25, and 13 Hen. 7, 13, pl. 2, cited 7 Mees. & W. 77.) A plea of leave and licence to erect and maintain a wall upon a given spot is not supported by proof of a licence to erect only. (*Alexander v. Bonnin*, 6 Scott, 611; 4 Bing. N. C. 799; 1 Arn. 337.)

A mere parol licence is revocable at law at any time, although the licence has been executed and expense incurred by the licensee. Thus where it appeared by entries in the court roll of a manor that the lord had granted a licence to build a cottage on the waste, subject to the payment of an annual rent, and the licence had been executed, and the cottage inhabited, Lord *Ellenborough* said:—"A licence is not a grant, but may be recalled immediately, and so might this licence the day after it was granted." (*Rex v. Inhabitants of Hornden-on-the-Hill*, 4 Maule & S. 565. See *Rex v. Inhabitants of Geddington*, 2 B. & C. 129; *Rex v. Inhabitants of Hagworthingham*, 1 B. & C. 634; *Rex v. Warblington*, 1 T. R. 241; *Rex v. Inhabitants of Standon*, 2 Maule & S. 461.)

Parol licence revocable at law, although executed and expense incurred by licensee.

An agreement to let a party have a trench for water, though given for a valuable consideration, if there be no conveyance, is a parol licence, re-

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vocable at the will of the grantor. (*Fentiman v. Smith*, 4 East, 107.) The right to a drain running through the adjoining land cannot be conferred by a parol licence; but such interest can only be created by deed. In an action on the case for obstructing a drain, the plaintiff claimed right and title to the drain by virtue of a licence granted to his landlords, their heirs and assigns, to make the drain, and have the foul water pass from their scullery through the drain across the defendant's yard into another yard appurtenant to the premises in the plaintiff's occupation: it was held, that the interest as declared upon by the plaintiff being in its nature freehold, and the licence to support it being merely by parol and not by deed, the action was not maintainable. (*Hewlins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783.) So where the plaintiff sued for an obstruction of a certain drain which had been originally constructed at the plaintiff's expense on the defendant's land by his consent verbally given: after it had been enjoyed some time, the defendant obstructed the channel, so that the water was prevented running as before; and it was contended on the part of the plaintiff that the licence so given having been acted on, could not be revoked by the defendant; but the court held that the plaintiff was clearly not entitled to recover. With regard to the question of licence, the court said, "The case of *Hewlins v. Shippam* is decisive to show that an easement like the present cannot be conferred except by deed, nor has the plaintiff acquired any other title to the water." The mere entry into the close of another, and cutting a drain there, cannot confer a right. (*Cocker v. Conper*, 1 Cr., M. & R. 418.)

The right to be buried in a particular vault was held to be an easement capable of being created by deed only; and therefore a parol agreement not under seal was held to confer no right, though the plaintiff had paid a valuable consideration on the faith of its validity. (*Bryan v. Whistler*, 8 B. & C. 298; 2 M. & R. 318. See *Adams v. Andrews*, 15 Q. B. 284.)

A right to come and remain for a certain time on the land of another can be granted only by deed; and a parol licence to do so, though money be paid for it, is revocable at any time, and without paying back the money. To an action of trespass for assault and false imprisonment, the defendant pleaded that, at the time of the supposed trespass, the plaintiff was in a close of Lord E., and that the defendant, as the servant of Lord E., and by his command, *molliter manus imposuit* on the plaintiff to remove him from the said close, which was the trespass complained of. The plaintiff replied, that he was in the close by the leave and licence of Lord E.; which was traversed by the rejoinder. The evidence was, that Lord E. was steward of the Doncaster races; that tickets of admission to the grand stand were issued with his sanction, and sold for a guinea each, entitling the holders to come into the stand and the inclosure round it during the races; that the plaintiff bought one of the tickets, and was in the inclosure during the races; that the defendant, by the order of Lord E., desired him to leave it, and, on his refusing to do so, the defendant, after a reasonable time had elapsed for his quitting it, put him out, using no unnecessary violence, but not returning the guinea: it was held, that on this evidence the jury were properly directed to find the issue for the defendant. (*Wood v. Leadbitter*, 13 Mces. & W. 838, where *Alderson*, B., discusses the cases of *Webb v. Paternoster*, Palm. 71; *Wood v. Lake*, Sayer, 3; and *Taylor v. Waters*, 7 Taunt. 374; which had been relied on in support of the doctrine that a parol licence was irrevocable. The case of *Taylor v. Waters* was expressly disapproved.)

But irrevocable in equity where expense has been incurred, and there has been acquiescence.

Where, however, an agreement for valuable consideration has been entered into for the use of an easement, at any rate where the owner of the servient tenement has stood by and allowed the expenditure of money on the faith of such an agreement, a court of equity will not allow him to recall the licence. Thus where the defendant consented to the plaintiff's making a watercourse through his land upon being paid "a proper and reasonable sum;" and the watercourse was made, but no grant executed and no sum arranged; and after nine years user the defendant stopped it up, he was restrained from so doing, and a reference was made to the master to settle a proper compensation. (*Duke of Devonshire v. Eglin*, 14

Beav. 580. See also *Moreland v. Richardson*, 22 Beav. 596; *Mold v. Wheatcroft*, 27 Beav. 510; *Laird v. Birkenhead Ry. Co.*, John. 500; *Bell v. Midland Ry. Co.*, 3 De G. & J. 673; *Bankart v. Tennant*, L. R., 10 Eq. 141.) A canal company, in consideration of the lessee's expenditure on certain icehouses on the banks of the canal, granted a lease thereof, with licence to take ice from a part of the canal: it was held, that the licence was not exclusive, but that it was a grant of sufficient to enable the lessee to fill the icehouses; and that so long as the lessee was able and willing to take this quantity of ice, the lessors could not derogate from their grant by subsequent licences which would interfere with it. (*Newby v. Harrison*, 1 John. & H. 393; and see as to mining licences, *Carr v. Benson*, L. R., 3 Ch. 524.)

And even at common law it appears that a man may in some cases by parol licence relinquish irrevocably a right which he has acquired in addition to the ordinary rights of property, and thus restore his own and his neighbour's property to their original and natural condition. But in order that a parol licence should have this effect, it seems that the act licensed should be executed, and the necessary consequence of such execution should be, *per se*, the extinguishment of the right. Thus a parol licence to put a skylight over the defendant's area (which impeded the light and air from coming to the plaintiff's dwelling-house through a window), cannot be recalled at pleasure, after it has been executed at the defendant's expense, at least not without tendering the expenses he had been put to; and therefore no action lies as for a private nuisance arising from the existence of such skylight. (*Winter v. Brockwell*, 8 East, 308.) *Bailey, J.*, said, "The case of *Winter v. Brockwell*, 8 East, 309, is distinguishable from *Hewlins v. Shippam*, 5 B. & C. 221. All that the defendant there did he did upon his own land: he claimed no right or easement upon the land of the plaintiff. The plaintiff claimed a right and easement against him, viz. the privilege of light and air through a parlour window, and a free passage for the smells of an adjoining house through defendant's area; and the only point decided there was, that as the plaintiff had consented to the obstruction of such easement, and had allowed the defendant to incur expense in making such obstruction, he could not retract that consent without reimbursing the defendant that expense. But that was not the case of the grant of an easement to be exercised upon the grantor's land but a permission to the grantee to use his own land in a way which, but for an easement of the plaintiff's, such grantee would have had a clear right to use it. *Webb v. Paternoster*, *Wood v. Lake*, and *Taylor v. Waters*, were not cases of freehold interest, and in none of them was the objection taken that the right lay in grant, and therefore could not pass without deed." (5 B. & C. 233.) The court seems to have proceeded upon the same distinction in the following case—where the plaintiff's father gave the defendant leave, by parol, to lower the bank of a river and to erect a weir, whereby a part of the water which before flowed to the plaintiff's mill was diverted: it was held that his son could not maintain an action against the defendants for continuing the weir. (*Liggins v. Inge*, 7 Bing. 682; 5 M. & P. 712. See *Blood v. Keller*, 11 Ir. C. L. R. 124.)

Parol licence in some cases irrevocable at law.

A licence is also irrevocable when connected with a grant. (*Wood v. Leadbitter*, 13 M. & W. 844.) A licence to dig for tin and to dispose of the tin obtained was held to be irrevocable on account of its carrying an interest in the ore. (*Doe v. Wood*, 2 B. & Ald. 738.)

Licence irrevocable when connected with grant.

In an action of trover for sand, tin ore and gravel, a party claiming ownership in a field granted to the plaintiff a parol licence to search therein for minerals. The plaintiff, acting under this licence, dug pits in the field, and threw up sand and gravel, mixed with ore, which the defendant took away, professing to act under the authority of a third party. Before the defendant took away the sand, gravel and ore, the party who gave the plaintiff the parol licence granted him a similar licence by deed: it was held, that the plaintiff was entitled to maintain an action for the gravel, sand and ore, as against the defendant, who was a wrong-doer. (*Northam v. Bowden*, 11 Exch. 70; 24 Law J., Exch. 237.)

A parol licence from A. to B. to enjoy an easement over A.'s land, is

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countermandable at any time whilst it remains executory; and if A. conveys the land to another, the licence is determined at once, without notice to B. of the transfer, and B. is liable in trespass if he afterwards enters upon the land. A mere parol licence to enjoy an easement on the land of another does not bind the grantor, after he has transferred his interest and possession in the land to a third person. In order to make the grantee a wrong-doer in such a case he is not entitled to notice from the purchaser of the change of ownership in the soil, as that is a fact which he is obliged to know at his peril. (*Wallis v. Harrison*, 4 Mees. & W. 538.) A licence for the free admission to a theatre is determined by an assignment of the subject-matter in respect of which the privilege is to be enjoyed. (*Coleman v. Foster*, 1 H. & N. 37.) The locking a gate, through which parol leave has been given to pass, is of itself sufficient notice of revocation of the leave. (*Hyde v. Graham*, 1 H. & C. 593; 11 W. R. 119. See also *Russell v. Harford*, L. R., 2 Eq. 507.)

What will operate  
as a licence.

A parol agreement which is void under the Statute of Frauds, 29 Car. 2, c. 3, s. 4, may operate as a licence so as to excuse what would otherwise be a trespass, as where the purchaser entered to take away a crop. (*Carrington v. Roots*, 2 Mees. & W. 257; *Crosby v. Wadsworth*, 6 East, 602.) Goods which were upon the plaintiff's land were sold to the defendant; by the conditions of sale, to which the plaintiff was a party, the buyer was to be allowed to enter and take the goods: it was held, that after the sale the plaintiff could not countermand the licence. And the defendant having entered to take, and the plaintiff having brought trespass, and the defendant having pleaded leave and licence and a peaceable entry to take, to which the plaintiff replied *de injuriâ*, it was held, that the defendant was entitled to the verdict, though it appeared that the plaintiff had, between the sale and the entry, locked the gates and forbidden the defendant to enter, and the defendant had broken down the gates and entered to take the goods. (*Wood v. Manley*, 11 Ad. & Ell. 34; 3 P. & D. 5.) Alderson, B., approved of this decision, and said it was a case not of a mere licence, but of a licence coupled with an interest. The hay, by the sale, became the property of the defendant, and the licence to remove it became, as in the case of the tree and the deer, put by C. J. Vaughan, irrevocable by the plaintiff. (Vaugh. 351, ante, p. 59.) This case was analogous to that of a man taking another's goods and putting them on his land, in which case the owner is justified in going on to the land and removing them. (*Wood v. Leadbitter*, 13 Mees. & W. 853; citing Vin. Abr. Trespass H. a. 2, pl. 12; *Patrick v. Colerich*, 3 Mees. & W. 483. See *Williams v. Morris*, 11 Law J., N. S. 126, Exch.)

It seems that the crown may, by parol, confer privileges over land so as to deprive itself of the power of treating the party exercising the privilege as a wrong-doer; the actual possession of crown lands, under a parol licence from the crown, entitles the party in possession to maintain trespass against a wrong-doer. Generally speaking, trespass may be maintained by a person in the actual possession of land against a wrong-doer, even where that possession may be wrongful as against a third person. (*Harper v. Charlesworth*, 4 B. & C. 590; 8 D. & R. 572.)



#### (4.) OF RIGHTS OF WAY, PUBLIC AND PRIVATE.

##### 1. *Public Rights of Way and Highways.*

Highways.

A right of way may be either public or private. Ways common to all the king's subjects are called highways. (1 Ventr. 189; 1 T. R. 570.) A way leading to any market town, and common for all travellers, and communicating with any great road, is a highway; but if it lead only to a church, or to a house, or a village, or to the fields, it is a private way; whether it be a public or private way is a matter of fact, and depends much on common reputation. (1 Ventr. 189; Hawk. P. C. b. 1, c. 76, s. 1.) The public may have a right to a road as a common street, although there be no thoroughfare (*Rugby Charity v. Merryweather*, 11 East, 375; *Bateman v. Bluck*,



18 Q. B. 870; *Campbell v. Lang*, 1 Macq. H. L. C. 451); or to a road terminating in a common. (*Rex v. Inhabitants of Wandsworth*, 1 B. & Ald. 63.) So it may be a highway, although it is circuitous (*Rex v. Lloyd*, 1 Camp. 261; 3 T. R. 265); and although it is only occasionally used by the public, and does not terminate in any town, or in any other public road (*Rex v. Inhabitants of Wandsworth*, 1 B. & Ald. 63); and, on the contrary, it is not necessarily a public highway, although it does lead from one market town to another, or connect any two points by a line which might be advantageously used by the public, or is used by them under certain restrictions. (11 East, 376, n. (a).)

When an ordinary highway runs between two fences, one on each side, the right of passage which the public has along it extends *prima facie*, and unless there is evidence to the contrary, over the whole space between the fences. (*Reg. v. U. K. Electric Telegraph Co.*, 31 L. J., M. C. 166; 10 W. R. 538; *Turner v. Ringwood Highway Board*, L. R., 9 Eq. 418.)

On an issue, whether or not certain land in a district, repairing its own roads, was a common highway, it is admissible evidence of reputation (though slight), that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway, there being at the time no litigation. (*Barraclough v. Johnson*, 8 Ad. & Ell. 99; 3 Nev. & P. 233; see *Nicholls v. Parker*, 14 East, 331, n. to *Outram v. Moorewood*.) It is a rule, that evidence of reputation must be confined to general matters, and not touch particular facts; the question in a cause being whether a particular road admitted to exist was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying, at the same time, that he planted it to show where the boundary of the road was when he was a boy: it was held, that such declaration was not evidence either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. (*Regina v. Bliss*, 7 Ad. & Ell. 550. See *Papendick v. Bridgwater*, 5 Ell. & Bl. 166.)

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Evidence of reputation:

If a man opens his land, so that the public pass over it continually, the public, after a user of a very few years, will acquire a right of way; and a party not meaning to dedicate a way, but only to give a licence, should do some act to show that a licence only is intended. The common course is to shut up the way one day in every year. (*The Trustees of British Museum v. Finnis*, 5 Car. & Payne, 460.) The presumption of a dedication may be rebutted by proof of a bar having been placed across the street soon after the houses forming the street were finished; though the bar was soon afterwards knocked down, and the way has been since used as a thoroughfare. (*Roberts v. Carr*, 1 Camp. N. P. C. 262, n.; and see *Lethbridge v. Winter*, *Id.* 263, n.) But a gate being kept across a way is not conclusive that it is not a public way, as the way may have been granted to the public with the reservation of the right of keeping a gate across it to prevent cattle from straying. (*Davies v. Stephens*, 7 Carr. & P. 570; *Rex v. Bliss*, 2 Nev. & P. 464.)

Presumption of dedication of ways to the public.

A permissive user of a way is not inconsistent with a right to resume the way. In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear only that he has suffered a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a licence resumable in a particular event. Thus, where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5s. a year and find cinders to repair the way, and that the inhabitants of the hamlet should lead and lay down the cinders, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years: it was held, that the evidence showed no dedication, but a licence only, resumable on breach of the agreement. (*Barraclough v. Johnson*, 8 Ad. & El. 99; 3 Nev. & P. 233.) A dedication to the public may be pre-

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sumed from a shorter time than is necessary to establish a right of possession to land; and it has been presumed from an user by the public during a period of eight years, and even six years. (*Rugby Charity v. Merryweather*, 11 East, 376.) So where a court on one side of a public street in London was left open to the public, and occasionally used as a communication from one part of the street to another, a dedication to the public was presumed. (*Rex v. Lloyd*, 1 Camp. 268; 3 T. R. 265.) Where a canal company originally erected a bridge for the use of the tenants of particular lands, but for ten years the public had crossed it without interruption: it was held, that it was properly left to the jury to say, whether the company intended or not to dedicate it to the public, and the jury, having so found, the court, in the absence of any misdirection in law, refused to interfere with such finding. (*Surrey Canal Company v. Hall*, 1 Scott, N. S. 264; 1 Mann. & G. 382. See *Rex v. Wright*, 3 B. & Ad. 681.)

If a road has been used by the public for a great number of years, a dedication by the owner of the soil may be presumed, whoever he may be; and it is not material to inquire who the precise owner was, or whether he intended to dedicate the road to the public. (*Reg. v. Tything of East Mark*, 12 Jur. 332; 17 Law J., Q. B. 177; 11 Q. B. 877.) By an inclosure act, commissioners were authorized to set out public and private roads; and it was enacted, that after the commissioners had set out and allotted the parts of the commons and waste lands for the purposes aforesaid, they should allot and award to the lord of the manor, in respect of his right and interest in the soil in the commons and waste lands, such parts thereof as should to them seem meet, not exceeding one-twentieth part of the remaining parts of the commons or waste lands. On an indictment against a tithing of the parish for the non-repair of a road set out by the commissioners as a private road, it was held, that the jury were properly directed to presume from fifty years' uninterrupted usage, an intention of the owner of the soil, whoever he might be, to dedicate it to the public. (*Ib.*) It was held, that the crown, if owner of the soil, might dedicate it to the public. (*Ib.*) The principle is, that when there is satisfactory evidence of such an user of the road as to time, manner and circumstances, as would lead to the inference that there was a dedication by the owner of the fee, if it was shown who he was, it is not necessary to inquire who the individual was from whom the dedication necessarily inferred from such an user first proceeded. (*Reg. v. Petrie*, 4 El. & Bl. 737.)

If a particular class of persons use a pathway, and the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the user after the lapse of twenty years. (*Reg. v. Broke*, 1 F. & F. 514.) A dedication to the public will not be presumed in the case of a wood with a path or track through it leading in different directions where people have wandered at pleasure and made tracks, and in dry weather have used such tracks, which were never repaired, and which in wet weather were hardly passable. (*Chapman v. Cripps*, 2 F. & F. 864; *Schwinge v. Dowell*, *Ib.* 845.) The same evidence of user will raise a presumption of a dedication of a right of way over a sea wall or embankment by the owner of the soil, as in any other case of open and uninterrupted user by the public. (*Greenwich Board of Works v. Maudslay*, L. R., 5 Q. B. 397.)

Acts of tenants  
not binding.

A tenant for ninety-nine years cannot dedicate a way to the public, without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term. (But see *ante*, pp. 27, 28; 4 B. & Ad. 75; *Reg. v. Bliss*, 7 Ad. & Ell. 555; *Barraclough v. Johnson*, 7 Ad. & Ell. 104.) In *Wood v. Veal* (5 B. & Ald. 454), the public had used a way over the *locus in quo* as long as could be remembered; but the land had been under a lease for ninety-nine years during the whole time, and it was left as a question for the jury, whether there had been a dedication to the public before the term commenced, for if not, there could be no dedication except by the owner of the fee, and the lease explained the user as not being referable to a dedication by such owner. Yet there was strong evidence to show that the landlord could not have been ignorant of the user. (8 Ad. & Ell. 104. See *Rex v. Lloyd*, 1 Camp.



260; *Baxter v. Taylor*, 1 Nev. & M. 13; *Bermondsey Vestry v. Brown*, L. R., 1 Eq. 204.) But where a lease was granted of certain ground to be a passage for fifty-six years, evidence of the user of the road by the public three or four years after the expiration of the lease was held to be evidence of a gift to the public. (*Rex v. Hudson*, Str. 909.) Where a public footway over crown land was extinguished by an inclosure act, but used for twenty years afterwards by the public, it was held not to be a dedication to the public, as it did not appear to have been with the knowledge of the crown. (*Harper v. Charlesworth*, 4 B. & Cr. 574.) However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence. (*Rex v. Barr*, 4 Camp. N. P. C. 16; *Davies v. Stephens*, 7 Car. & P. 570. See *Deeble v. Lineham*, 12 Ir. C. L. Rep., N. S. 1.) And notice to the steward is notice to the landlord. (*Rex v. Barr*, *sup.*: *Doe d. Foley v. Wilson*, 11 East, 56.) In order to prove that a way was in fact public, evidence was given of acts of user extending over nearly seventy years; but during the whole period the land crossed by the way had been on lease. The judge told the jury that they were at liberty if they thought proper to presume from these acts a dedication of the way to the public by the defendant or his ancestor, at a time anterior to the land being leased. It was held a proper direction. (*Winterbottom v. Lord Derby*, L. R., 2 Ex. 316. See *Pryor v. Pryor*, 26 L. T., N. S. 759.)

It seems that there may be a partial dedication of a highway to the public; but where the owner of lands had, on the making a new road over his property, given his consent thereto on condition of its being used for coal carts, it was held, that if even by law there could not be a restriction to a public way, the grant amounted only to a licence, which was revocable, and that, after notice, a person using such way with coal carts would be a trespasser. (*Marquis of Stafford v. Coyney*, 7 B. & Cr. 257. See *Roberts v. Carr*, 1 Camp. 262; *Rex v. Inhabitants of Northamptonshire*, 2 Maule & S. 262.) Although the dedication of a way to the public may be *partial* or *limited* as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor, for that would be the reservation of a right inconsistent with the dedication to the public. (*Fitzpatrick v. Robinson and others*, 1 Hudson & Brook, 585. See *Blundell v. Catterell*, 5 B. & Ald. 315; *Lade v. Shepherd*, 2 Str. 1004; *Barraclough v. Johnson*, 3 Nev. & P. 233.) Although there may be a dedication of a way to the public for a *limited purpose*, as for a footway, horseway or driftway, there cannot be a dedication to a *limited part* of the public, as to a parish; and such a partial dedication is simply void, and will not operate in law as a dedication to the whole public. In order to constitute a dedication of a way to the public by the owner of the soil, there must be an intention so to dedicate, of which the user by the public is evidence, subject to be rebutted by contrary evidence if interrupted by the owner. (*Poole v. Huskinson*, 11 Mees. & W. 827; *Vestry of Bermondsey v. Brown*, L. R., 1 Eq. 204.) There can be no dedication to the public of land as a highway, with a reservation of a right of making cuts through the land when wanted for the purpose of drainage. (*Rex v. Leake*, 2 Nev. & M. 595; 5 B. & Ad. 469.) There can be no dedication of a way to the public for a limited time, certain or uncertain; if dedicated at all, it must be dedicated in perpetuity. (*Dames v. Hawkins*, 8 C. B., N. S. 848; 7 Jur., N. S. 262.) A highway may be dedicated to the public, subject to a pre-existing right of user by the occupiers of adjoining land, for the purpose of depositing goods thereon. (*Morant v. Chamberlin*, 6 H. & N. 541; 30 L. J., Exch. 299.) Where an erection or an excavation exists upon land, and the land upon which it exists or to which it is contiguous is dedicated to the public as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk arising from the existing state of things. (*Fisher v. Promse*, 2 B. & S. 770.) If a highway is dedicated to the public with a dangerous obstruction upon it, such as would have

Limited dedication.

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been a nuisance if placed upon an ancient way, no action can be maintained against the person dedicating it for the injury caused thereby. (*Robbins v. Jones*, 15 C. B., N. S. 221; 12 W. R. 248.) There may in law be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time. (*Mercer v. Woodgate*, L. R., 5 Q. B. 26; *Arnold v. Blaker*, L. R., 6 Q. B. 483.)

## Assent of parish.

It was once contended that the assent of the parish through which the highway runs is requisite to give effect to the dedication. (*R. v. St. Benedict*, 4 B. & Ald. 447; *R. v. Mellor*, 1 B. & Ad. 32; *R. v. Edge Lane*, 6 Nev. & Man. 81.) But it seems that the assent of the parish is not requisite. (*R. v. Leake*, 5 B. & Ad. 469.) See 5 & 6 Will. 4, c. 50, s. 23.

## Repair of public ways.

Under the 9th section of the General Inclosure Act, 41 Geo. 3, c. 109, a road continued as well as a road newly made, under the award of commissioners of inclosure, must be declared by justices in special sessions to be fully completed and repaired, before the inhabitants of the district are liable to repair. (*Rex v. Inhabitants of Hatfield*, 4 Ad. & Ell. 156.) Parishes are not liable to the repair of any road or occupation way made at the expense of an individual, or of any roads to be set out as a private drift-way or horse-way in any award of commissioners, unless they are made to the satisfaction of the surveyor of the highways and of two justices of the peace. (5 & 6 Will. 4, c. 50, s. 23.) This provision is not retrospective in respect of roads completely public by dedication at the time of the passing of the act (31st August, 1835); but applies to roads then made and in progress of dedication. (*Reg. v. Westmark*, 2 M. & Rob. 305.)

An ancient public bridle way existed for the greater part undefined over common uninclosed land, the remaining part being through old inclosures. By an award of inclosure commissioners, under a local act, the road, altered in some parts, and defined throughout within narrow limits, was set out as "one public bridle road and private carriage road for the use" of certain private individuals named in the award, and to be kept in repair by them. No order of justices for stopping up or diverting the old road or certificate of the sufficiency of the new road had been obtained: it was held, that the award did not operate under the General Inclosure Act, 41 Geo. 3, c. 109, as a diversion or stopping up of the public bridle road and setting out of a new one, but that the public had the same right of passage as before, and therefore that the parish in which the road lay remained liable to do such repairs, as were requisite to maintain it a public bridle road. (*Reg. v. Criklade*, 14 Q. B. 735; 19 Law. J., M. C. 169, Q. B.; 14 Jur. 690. See *Gwyn v. Hardwicke*, 1 H. & N. 49; 25 L. J., M. C. 97.) See further as to the repair of highways, *Dovaston v. Pyne* (2 Smith's L. C. 146, 6th edit.); *R. v. Stoughton* (2 Wms. Saund. 462, edit. 1871).

## Extinction of public ways.

Where there has been a public king's highway, no length of time during which it may not have been used will prevent the public from resuming the right, if they think proper. (*Rex v. Inhabitants of St. James's*, Selw. N. P. 1264, 13th ed. See 2 B. & Ald. 662; *Rex v. Montague*, 4 B. & C. 598.) The public cannot release their right to a public highway by non-user. (*Daves v. Hawkins*, 8 C. B., N. S. 848; 7 Jur., N. S. 262. See *Freeman v. The Tottenham and Hampstead Junction Railway Company*, 13 W. R. 335.) A prescriptive right of way to a public towing-path on the banks of a navigable tide river, is not destroyed by that part of the river adjoining the towing-path having been converted by statute into a floating harbour, although such towing-path was thereby subject to be used at all times of the tide; whereas before it was only used at those times when the tide was sufficiently high for the purposes of navigation; and such prescription is not destroyed by a clause in the statute whereby the undertakers of the work were authorized to make a towing-path over land, comprising the towing-path in question, on paying a compensation to the owner of the soil. (*Rex v. Tippet*, 3 B. & Ald. 193.) If an act of parliament for enclosing and allotting the commons and waste lands of a parish through which a navigable river flows empower commissioners to set out

such public and private roads and ways as they shall think necessary, and direct that all roads and ways not so set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction. (*Simpson v. Soales*, 2 Bos. & P. 496.)

The 10th and 11th sections of the stat. 41 Geo. 3, c. 109, do not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised before an inclosure act upon land formerly common which had been inclosed, although the ancient way to the well which existed before the inclosure had been extinguished under it. (*Race v. Ward*, 7 Ell. & Bl. 384.) An old footway passed from a public highway over wastes and old inclosures into another public highway. By an award of the commissioners under an act for inclosing the wastes, the part of the waste over which the footway ran was allotted, but the footway was not mentioned in the award, nor was any new way set out therein. No power to stop up ways over old inclosures was given by the particular inclosure act; held, that the old footway was not extinguished by the allotment. (*Thackrah v. Seymour*, 1 C. & M. 18.)

The Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership. (*Rangle v. Midland Railway Company*, L. R., 3 Ch. 806.)

The stopping of the king's highway is an ordinary case of a public nuisance; and in the case of a public nuisance the remedy at law is by indictment; the remedy in equity is by information at the suit of the Attorney-General. In the case of a private nuisance the remedy at law is by action; the remedy in equity is by bill. But where that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special or particular damage, the individual may have his private remedy at law or in equity. (*Soltau v. De Held*, 2 Sim., N. S. 148, 145.) Instances of indictments for public nuisances, caused by the obstruction of highways, will be found in *Reg. v. Train* (2 B. & S. 640); *Reg. v. U. K. Telegraph Co.* (2 B. & S. 647, n.)

Remedy for disturbance of public ways:

By indictment.

An action will not lie for the disturbance of a highway, unless the plaintiff has sustained some special damage. (Co. Litt. 56 a; 5 Rep. 73 a; 2 Bing. 263, 266; *Ross v. Groves*, 5 Man. & G. 618; *Dobson v. Blackmore*, 9 Q. B. 1002; *Blagrove v. Bristol Waterworks Company*, 1 H. & N. 369.)

By action at law.

In an action for obstructing a public way the plaintiff proved no damage peculiar to himself, beyond being delayed on several occasions in passing along it, and being obliged, in common with every one else who attempted to use it, either to pursue his journey by a less direct road, or else to remove the obstruction. Held, that he was not entitled to maintain the action. (*Winterbottom v. Lord Derby*, L. R., 2 Ex. 316.)

A public thoroughfare was stopped, whereby the plaintiff, a bookseller, whose shop was in the thoroughfare, suffered a loss of custom: it was held sufficient special damage to entitle him to his action on the case. (*Wilks v. Hungerford Market Company*, 2 Scott, 446; 2 Bing. N. C. 281; 1 Hodges, 281, overruled in *Ricket v. Metropolitan Railway Company*, L. R., 2 H. L. 175.) In *Iveson v. Moore* (1 Lord Raym. 186), it was held, that the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, was such a damage as would enable a man to maintain an action for the nuisance. (See *Rose v. Miles*, 4 Maule & S. 101; *Rose v. Groves*, 5 Mann. & G. 620, *post.*) As to claiming compensation for injury done to the claimant through the obstruction of public ways by works executed under the powers of the Lands Clauses Act and the Railways Clauses Act, see *Ricket v. Metropolitan Railway Company* (L. R., 2 H. L. 175); *Beckett v. Midland Railway Company* (L. R., 3 C. P. 82).

In an action of trespass for breaking the plaintiff's close, which was set out by abutments, and pulling down certain posts and bars then standing thereon, the defendants pleaded that there was a public footway over the said close, and that the defendants, because the posts and bars obstructed the footway, pulled them down. The replication traversed the public foot-

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way: it was held, that on these pleadings the defendants were entitled to a verdict on proving a right of footway over any part of the close, and were not bound to prove a right of way over the spot where the posts and bars stood. (*Webber v. Sparkes*, 10 Mees. & W. 485; 12 Law J., N. S. 41. See *Wood v. Wedgewood*, 1 C. B. 273, and *Bracegirdle v. Peacock*, 8 Q. B. 174.)

Statutory penalties are imposed on persons committing specified nuisances on a highway by 5 & 6 Will. 4, c. 50, s. 72.

## Remedy for disturbance of public ways in equity.

Where a plaintiff suffers a particular injury from the obstruction of a public way, a bill for an injunction will lie, and the Attorney-General need not be a party. (*Cook v. Mayor of Bath*, L. R., 6 Eq. 177.) The vestry of a parish cannot sustain a suit to restrain the infringement of a public right of way, except as relators on an information by the Attorney-General. (*Vestry of Bermondsey v. Brown*, L. R., 1 Eq. 204.) The disturbance of the pavement of a town by an unincorporated gas company, without lawful authority, for the purpose of laying down gas pipes, is not a nuisance so serious and important that a court of equity will interfere by injunction to prevent it. (*Att.-Gen. v. Cambridge Consumers Gas Company*, L. R., 4 Ch. 71.)

Since the act 25 & 26 Vict. c. 42, the Court of Chancery refused an injunction in respect of a public footway, and made a reference to chambers to ascertain the amount of damages. (*Wedmore v. Mayor, &c. of Bristol*, 7 L. T., N. S. 459; 11 W. R. 136.)

As to the law of highways, see further, Shelford's Law of Highways, 3rd ed.

## Ownership of soil in highway.

The freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure. (2 Inst. 705; *Sir John Lade v. Shepherd*, 2 Str. 1044.) The owner of the soil is entitled to all profits, trees and mines upon or under the highway. (1 Roll. Abr. 392; 1 Burr. 143.) In the 82nd section of the stat. 5 & 6 Will. 4, c. 50, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose. (*Darison v. Gill*, 1 East, 69. See also *Rex v. Mersey Navigation*, 9 B. & C. 95; *Rex v. Thomas*, *Id.* 114.) The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway (*Doraston v. Payne*, 2 H. Bl. 527; *Sterens v. Whistler*, 11 East, 51); or an action of ejectment for land over which there is a public right of way. (*Goodtitle v. Ather*, 1 Burr. 133; *Doe v. Wilkinson*, 3 B. & C. 413. And see *Scales v. Pickering*, 4 Bing. 448.)

The principle of the ownership of the soil being in the owner of the adjoining land is carried so far that a man may be a trespasser on land where the public have a right to pass and repass, where he is on the highway, not for that but for other and different purposes. Though the public have a right of passage over land which is a highway, they have no right to use it except as a highway. (See *Doraston v. Payne*, 2 H. Bl. 527; *Reg. v. Pratt*, 24 L. J., M. C. 113.) To constitute the offence of trespassing upon land in search or pursuit of game, within section 30 of 1 & 2 Will. 4, c. 32, there must be a personal entering or being on land, but such land may be a highway. The defendant whilst on a highway carrying a gun and accompanied by a dog, sent the dog into a cover on one side of the highway, after which a pheasant rose and flew across the highway, and the defendant then being on the highway fired at the pheasant. B. was the lord of the manor and owner of the land on each side of the highway; the land on one side was let to a yearly tenant, B. reserving the right of entry for the purpose of killing game: it was held, that the defendant was properly convicted, under section 30, of committing a trespass by being upon land in the possession and occupation of B., and there in search of game. (*Reg. v. Pratt*, 4 El. & Bl. 860; 1 Dear., C. C. R. 502; 1 Jur., N. S. 681; 24 L. J., M. C. 113.)

The owner who dedicates to public use as a highway a portion of his land parts with no other right than a right of passage to the public, and

may exercise all other rights of ownership not inconsistent with such dedication; and the appropriation, made to and adopted by the public, of a part of the street to one kind of passage and another part to another, does not deprive him at common law of any rights as owner of the land which are not inconsistent with the right of passage by the public. (*St. Mary, Newington v. Jacobs*, L. R., 7 Q. B. 47.)

The right of the owner of land abutting on a highway to the soil of the highway *ad medium filum viæ* is founded on a presumption of law which exists only in the absence of evidence of ownership. (*Beckett v. Corporation of Leeds*, L. R., 7 Ch. 421.) The presumption applies equally to a private as to a public road. (*Holmes v. Bellingham*, 7 C. B., N. S. 329; 6 Jur., N. S. 534; 29 L. J., M. C. 132.)

Where the boundary of property is described as abutting upon a highway, such boundary must be taken (in the absence of evidence the other way) to extend to the middle of such highway. (*R. v. Strand Board*, 4 B. & S. 526; 12 W. R. 828.)

The soil in roads set out under an inclosure act does not by presumption of law belong to the adjoining owners. (*Rex v. Edmonton*, 1 M. & Rob. 24; *Rex v. Wright*, 3 B. & Ad. 681.) Where the herbage of a road becomes vested by the General Inclosure Act, 41 Geo. 3, c. 109, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietor. (*Rex v. Hatfield*, 4 Ad. & Ell. 156.) The ownership of the soil in a road set out under an inclosure act was held to remain in the lord of the manor, for that portion of the soil only is taken from him for which he received compensation and which is allotted to others. (*Per Parke, B., Poole v. Huskisson*, 11 Mees. & W. 827. See *Reg. v. Tything, East Mark*, 12 Jur. 332.)

The General Turnpike Act, 3 Geo. 4, c. 126, does not alter the presumption of law that the soil is vested in the owner of the adjacent land to the centre of the highway, nor vest the soil of turnpike roads in the trustees thereof. If the lord of the manor and owner of close A., adjacent to one side of a highway, and also of close B., adjacent to the opposite side, convey both in one deed to one vendee, the soil of the road passes to the vendee, although the acreage of each of the closes comprised within their fences respectively be stated in the conveyances, unless there be sufficient in the deed to show, as by marks on the indorsed map or plan of the property, that the soil of the road was intended to remain in the vendor. (*Marquis of Salisbury v. Great Northern Railway Company*, 5 C. B., N. S. 174; 5 Jur., N. S. 70; 28 L. J., C. P. 40.)

The ordinary rule of law is, that in the case of the sale of land adjoining a highway the soil of the highway, *ad medium filum viæ*, passes by the conveyance, and the fact that the land is set forth by admeasurement and referred to in a plan, which includes no portion of the highway, does not prevent the operation of such rule. (*Berridge v. Ward*, 10 C. B., N. S. 400; 7 Jur., N. S. 876.)

Strips of land lying along a highway, even though indirectly connected with parts of a waste, may well pass under a conveyance of the adjacent inclosure, though the deed purports to state the quantity of acres within the fences that were therein conveyed, if the words "more or less" were added. (*Dendy v. Simpson*, 7 Jur., N. S. 1058; 9 W. R. 743, Exch. Cham.: *Simpson v. Dendy*, 6 Jur., N. S. 1197; 8 C. B., N. S. 433.)

The presumption at law is, that waste land adjoining a road belongs to the owner of the soil of the adjoining inclosed land, and not to the lord of the manor (*Steel v. Prickett*, 2 Stark. 463; *Scoones v. Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder. (*Doe d. Pring v. Pearsey*, 7 B. & C. 304; 9 D. & R. 908.) The right to land adjoining either side of the road extends to the centre. (*Cooke v. Green*, 11 Price, 736.) The ground of this presumption is, that the road has been granted by the owners of the adjoining land, and that their ownership, therefore, extended to the middle of the road. Where the lord of a manor has conveyed land to A. and afterwards other land to B., and it appears that a narrow strip of land passed by one or other of the conveyances, but it is doubtful by which, no presumption arises in favour of A. from the

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fact that the strip of land lies between a highway and land indisputably comprised in the conveyance to A. (*White v. Hill*, 6 Q. B. 787.)

The presumption of law, that slips of waste lands adjoining a highway belong to the owner of the adjoining inclosed land, may be rebutted by evidence tending to raise a contrary presumption. In an action by a rector, to recover a slip of land lying between the glebe and a highway, in order to rebut the presumption of ownership arising from contiguity, it was proved that the defendant and those under whom he claimed had occupied the spot in question for more than forty years, and during four or five successive incumbencies, without interruption; and that there were slips of land adjoining the piece in dispute, at either end, also lying between the glebe and the road, which were occupied adversely to the rector: it was held, that the whole case on both sides resting on presumption, it was properly left to the jury to say whether or not the evidence given on the defendant's part rebutted the presumption of law on which the plaintiff's case rested. (*Doe d. Harrison v. Hampson*, 4 Com. B. 267.)

The presumptive right of the owner of the adjoining land may be repelled by evidence of acts of ownership by the lord of the manor. (*Anon. Lofft*, 358.) Though *prima facie* the presumption is, that a strip of land lying between a highway and the adjoining close belongs to the owner of the close, as the presumption also is, that the highway itself *ad medium filum viæ* does, such presumption is confined to that extent; for if the narrow strip be contiguous to, or communicate with, open commons or larger portions of land, the presumption is either done away, or considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the narrow strip which communicates with them. (*Grose v. West*, 3 Taunt. 39; *Headlam v. Hedley*, Holt, N. P. C. 463.) Upon a question whether a piece of waste land, between a highway and inclosures, belonged to the plaintiff, the owner of the adjoining inclosure, or to the lord of the manor, it was held, that the lord might give evidence of grants by him of the waste between the road and the other inclosures of other persons at a distance from the spot claimed by the plaintiff, provided such evidence were confined to the road which passed by the spot claimed by the plaintiff. (*Doe d. Barrett v. Kemp*, 7 Bing. 382; 5 Mann. & R. 173; 2 Bing. N. S. 102. See *Stanley v. White*, 14 East, 332.)

By an inclosure act waste lands of a manor were to be allotted in certain proportions. A part of the waste land was not portioned out in the award of the commissioners: it was held, that the freehold of such land remained in the lord of the manor, as there was nothing in the act to transfer such freehold. (*Packe v. Mee*, 9 W. R. 335; *Ewart v. Graham*, 5 Jur., N. S. 778.)

Balks.

In a case where it was contended that balks are by presumption of law the property of the owner of the adjoining soil, *Taunton, J.*, said, "Is there such a presumption? the common instance of a presumption of that kind is in the case of roads. Balks are strips of land lying between lands which are private property; if the presumption be as stated, it is at any rate not so familiarly known." (*Bailiffs of Godmanchester v. Phillips*, 4 Ad. & Ell. 560.) It was held by the court in that case, that in presumption of law balks belong to the owners of the adjacent land, unless the contrary is proved. (*Ib.*)

Ditches.

Where two adjacent fields are separated by a hedge and ditch, the hedge *prima facie* belongs to the owner of the field in which the ditch is not. If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (*Guy v. West*, Selw. N. P. 1218. See as to acts of ownership of a ditch, *Searby v. Tottenham Railway Company*, L. R., 5 Eq. 409.) The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it. (*Per Lawrence, J.*, *Vowles v. Miller*, 3 Taunt.

138. See the judgment of *Holroyd, J.*, 7 B. & C. 307, 308.) If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted. (*Holder v. Coates, M. & M.* 112. See *Waterman v. Soper*, 1 Lord Raym. 737; *Masters v. Pollie*, 2 Roll. R. 141; Anon. 2 Roll. R. 255.)

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## 2. *Private Rights of Way.*

There are four kinds of ways; (Co. Litt. 56 a;)—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way. Although a carriage-way comprehends a horse-way and a foot-way (*Davies v. Stevens*, 7 Carr. & P. 570), yet it does not necessarily include a drift-way. (1 Taunt. 279.) It is said, however, that evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way. (*Ibid.*)

Different kinds of ways.

A way may be granted for agricultural purposes only (*Reynolds v. Edwards*, Willes, 282), or for the carriage of coals only (*Iveson v. Moore*, 3 Ld. Raym. 291; 1 Salk. 15), or for the carriage of all other articles except coals. (*Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Jackson v. Stacey*, Holt, N. P. C. 455.) A reservation in a lease of a right of way on foot, and for horses, oxen, cattle and sheep, does not give any right of way to lead manure. The term "leading" implies drawing in a carriage. A grant conferring a right "to lead manure" would be construed according to the usual mode of leading, that is, by drawing in a cart. In case for disturbance of a way, the plaintiffs claimed a right for themselves, &c., on foot to go, return, &c., and also to lead and carry away manure, but proved only a grant of way on foot and for horses, oxen, cattle and sheep. It was held a variance; for the term "lead," so used, implies drawing in a carriage. (*Brunton v. Hall*, 1 Q. B. 792; 1 Gale & D. 207.) The plaintiffs took issue upon a plea, traversing the whole right claimed in the declaration. The right actually interfered with was that of carrying away manure with a wheelbarrow. It was held, assuming this privilege to be covered by the grant, that the plaintiffs could not, by proving so much of the alleged right, entitle themselves to a verdict on the issue generally. (*Ib.* See 2 Q. B. 963.) Evidence of an user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but the extent of the right is a question for the jury under all the circumstances. If the way is confined to a particular purpose, the jury ought not to extend it; but if it is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all. (*Cowling v. Higginson*, 4 Mees. & W. 245. See *Dave v. Heathcote*, 25 L. J., Exch. 245; 26 *Ib.* 164; *Hawkins v. Carbines*, 27 L. J., Exch. 44; *Ballard v. Dyson*, 1 Taunt. 279; *Jackson v. Stacey*, Holt, N. P. C. 455; *Allan v. Gomme*, 3 P. & Dav. 589, 590.) A finding by the jury of a right of way for carting timber will not support a plea of a right of way for all carts, carriages, horses, and on foot, or even amount to a proof of any one of those rights taken separately so as to admit of the verdict being entered distributively on the issue joined on the plea. (*Higham v. Rabbett*, 5 Bing., N. S. 622; 7 Scott, 827.)

There may be both an occupation way and a public highway over the same road, for it does not on becoming a highway cease to be an occupation way. (*Brownlow v. Tomlinson*, 1 Man. & Gr. 484.) The acquiring a right of way by the public does not destroy a previously-existing right of way over the same line; but the private way must be previously existing. A private right of way cannot be proved by evidence of a public right. A right of way had been granted in 1675; there was evidence that for ten years before the commencement of the action for obstructing the right of way, that part of the way had become public. It was held unnecessary to state in the declaration that such part had become public. (*Duncan v. Louch*, 6 Q. B. 904.) If the owner of land has granted to an individual the easement of an occupation way over it, then the subsequent absolute dedication by him of a footway to the public, in the same place, cannot be presumed, without also presuming, or proving in fact, a release of

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the easement by the individual; for without the release the owner can only be supposed to have given what he himself had, a right of user not inconsistent with the easement. (*Regina v. Chorley*, 12 Q. B. 515.)

Commissioners of partition may award a right of way over the lands of one party to the lands of another party interested in the partition. (*Lister v. Lister*, 3 Y. & Coll. 540.)

A private estate act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased as and for a way, street, square, passage, or sewer, or other conveniences for the general improvement of the estate and the accommodation of tenants and occupiers: it was held, that exclusive private rights of way over land so appropriated for a way might be granted to particular lessees, as such appropriation did not confer a right of user by all the tenants and occupiers. (*White v. Leeson*, 5 H. & N. 53; 29 L. J., C. P. 105; 5 Jur., N. S. 1361.)

## Private rights of way.

A private way is a right which one or more persons have of going over the land of another. This may be claimed by express reservation, or by grant, or as necessarily incident to a grant of land: or it may be claimed by prescription, custom, or by virtue of an inclosure act. (Selw. N. P. 1266, 13th ed.)

## Express reservation of private right of way.

A right of way may be claimed by express reservation; as where A. grants lands to another, reserving to himself a way over such land. (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin (D. 2); and see *Earl of Cardigan v. Armitage*, 2 Barn. & Cr. 197; 3 Dowl. & R. 414.) *Tindal*, C. J., in *Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 967, observed, "A right of way cannot in strictness be made the subject either of exception or reservation. It is neither a parcel of the thing granted, nor is it issuing out of the thing granted, the former being essential to an exception and the latter to a reservation. A right of way *reserved* (using that word in a somewhat popular sense) to a lessor, is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing." (See *Doe d. Douglas v. Lock*, 2 Ad. & Ell. 705; *Wickham v. Hawker*, 7 Mees. & W. 63.) In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees. (*Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 967.) Where a lease not under the seal of a lessee contained a clause excepting and reserving from the demise "the fishing with a pathway for the fishermen"; it was held, that such a right was the subject of a grant and not the subject of a reservation or an exception: and that the clause was void as an exception, and not being under seal could not operate as a grant. (*Corcor v. Payne*, 1 R., 4 C. L. 380.)

## Express grant of private right of way.

A way may be claimed by grant, as where an owner of land grants to another person a way through or over a particular close; (Com. Dig. Chimin, D. 3;) so a covenant by an owner of land that another person shall have and use a way amounts to a grant. (*Holme v. Seller*, 3 Lev. 305.) Where the plaintiff claimed a right of way over the defendant's soil, and it appeared that in the defendant's lease, granting him all ways, without exception or qualification, there was a covenant for contributing with other occupiers of the lessor's property to the keeping up paths, &c. used in *common* by them, and it was proved that the plaintiff had always used the path in question, and that there was no other path to which the covenant could apply, it was held, that it might be inferred that the defendant took the soil demised to him, subject to the plaintiff's right of way. (*Oakley v. Adamson*, 8 Bing. 356; 1 Moore & Scott, 510.) Where certain houses, with a piece of ground, part of an adjoining yard, were leased to a tenant, together with all ways with the said premises or any part thereof *used or enjoyed before*; and at the time of the grant of the lease the whole of the yard was in the occupation of one person, who had always used and enjoyed a right of way to every part of that yard: it was held, that the lessee was entitled to such right of way to the part of the yard demised to him. (*Kooystra v. Lucas*, 5 B. & Ald. 830; 1 Dowl. & Ryl. 506; *Staple v. Haydon*, 6 Mod. 3.) If a right of way is appurtenant

to a piece of land which is demised, the right of way passes also without any special mention of such right. (*Skull v. Glenister*, 7 L. T., N. S. 827.) Where an *underlease* described the ground demised and the ways granted by the words "always thereunto appertaining," a road over the soil of the original lessor was held not to pass by those words, although it might have done so by the words "heretofore used." (*Harding v. Wilson*, 2 B. & Cr. 96.)

In 1728, land was let on a building lease, which expired at Lady-day, 1824. In 1819, the plaintiff, by virtue of a demise from an under-lessee, which expired in 1820, was in possession of a house erected on a part of this land, and under that demise exercised, as all his predecessors had done for more than thirty years, a right of way over a passage on one side of his house as necessary for the use and enjoyment thereof, particularly for repairing the eastern side: the under-lessee's interest expired in 1822; the defendant was in possession of the soil of the passage by virtue of an assignment, in 1791, of the lease of 1728. In 1819, the party possessed of the reversion expectant on the lease of 1728 demised to the plaintiff the house of which he was in possession as above for fifty-seven years and a half, to hold from Lady-day, 1824, together with all the appurtenances to the same belonging, subject to a covenant for repairs. In 1822, the reversioner demised the soil of the passage to the defendant for sixty-one years, to hold from Lady-day, 1824: it was held, that, under the demise of 1819, the plaintiff was entitled to a right of way over the defendant's passage. (*Hinchliffe v. Earl Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650. See *Kavanagh v. Coal Mining Company*, 14 Ir. C. L. R. 82.)

A. was owner of the E. estate, adjoining the sea-shore, and let N., part of the estate, to a tenant, with express liberty to take sea-weed from the shore to manure his lands. N. was a farm lying inland, no part of it being nearer than about two miles from the shore. N., while so occupied, was sold to F., and the lands were described in the conveyance "as the same are presently possessed by the tenant." No express mention was made of any easement to take sea-weed, and there were only the general words "together with all the appurtenances." F. claimed an easement to go and collect the sea-weed adjoining A.'s estate to manure his lands: it was held, there being no express words of conveyance of such an easement, and the period of prescription not having elapsed, the easement did not pass under the words "together with the appurtenances." (*Baird v. Fortune*, 7 Jur., N. S. 926; 10 W. R. 2; 5 L. T., N. S. 2, H. L.)

There being two tenants of adjoining premises held under the same landlord, the tenant of one of the premises acquired a right of way to his vaults through the adjoining premises. The landlord sold both premises at one sale, with a condition that they were to be subject to and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby: it was held, that the vendor, being subject to no liability as to rights of way, the purchaser of one tenement could not enforce a right of way as against the other. (*Daniel v. Anderson*, 8 Jur., N. S. 328; 31 L. J., Chan. 610; 10 W. R. 366.)

Where a testator being seised in fee of two adjoining closes, A. and B., over the former of which a way had immemorially been used to the latter, devised B. with the appurtenances: it was held, that the devisee could not, under the word "*appurtenances*," claim a right of way over A. to B., as no new right of way was thereby created, and the old one was extinguished by the unity of seisin in the devisor. (*Whalley v. Thompson*, 1 Bos. & Pul. 371.) An existing way will pass by the word "*appurtenances*." (*Ib.*)

Where there is an unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension of the right, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In the case of an unity of seisin, in order to pass a way existing in point of user, but extinguished or suspended in point of law, the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" which forms the subject-matter of the conveyance. (*James v. Plant*, 4 Ad. & Ell. 761.)

Where there is unity of seisin, what words will pass ways which existed before the unity of seisin.

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Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass. (*Grimes v. Peacock*, 1 Bulst. 17; *Saundey v. Oliff*, Sir T. Moore, 467; *Whalley v. Thompson*, 1 Bos. & P. 371; *Clements v. Lambert*, 1 Taunt. 295; *Barlow v. Rhodes*, 1 Crompt. & Mees. 439. See *Worthington v. Gimson*, 6 Jur., N. S. 1053; and *Tatton v. Hammersley*, 8 Ex. 279.)

A question has often arisen, where unity of ownership in land and in a right of way over the land has taken place, as to what subsequent grant by the owner is sufficient to convey the continued enjoyment of the easement as well as the land itself. It seems from these decisions, that, inasmuch as the unity of ownership extinguishes the easement, the right of way cannot pass as simply appurtenant to the land to which it was formerly attached, though it continues to exist in point of user. But though it does not exist as a right, it will pass by a conveyance of the land if proper words be used to pass it, as if all ways "used and enjoyed" with the land are conveyed. (*Barlow v. Rhodes*, 1 Cr. & M. 439; *James v. Plant*, 4 Ad. & Ell. 749.) The same rule applies where a conveyance purports to be of all waters, watercourses, privileges, easements, advantages and appurtenances to the premises belonging, or in anywise appertaining to or with the same or any part thereof held, used, occupied or enjoyed, or deemed to be so. (*Wardle v. Brocklehurst*, Ell. & Ell. 1058.)

A., being a tennor of land, built two houses on it; the whole was then released to him in fee, with all ways, easements, advantages and appurtenances thereunto belonging, or therewith usually used, leased, held, occupied or enjoyed. By his will he devised one house, and the appurtenances thereunto belonging, to B., and the other to C., in similar terms. During A.'s ownership of both, the entrance from the high road to the principal door of the house, afterwards devised to B., was by a set-out carriage drive or sweep, entering from a high road passing immediately in front of the house, afterwards devised to C., to B.'s door, and then returning round an oval garden in front of C.'s house, but at a greater distance from it, to the same point of entrance. B.'s house had a coach-house, opening only into the high road, and a back entrance into the same. After A.'s death, C. made a fence across so much of the carriage drive as passed immediately in front of his house and across the oval garden, leaving the further way to B.'s front door by the same carriage drive open. B. brought trespass, claiming the way as appurtenant to his house and garden: it was held, first, that the way as used in A.'s time, during the unity of ownership in him, immediately in front of C.'s house, did not pass to B. with the house devised to him under the word "appurtenances" in A.'s will. (*Pheysey v. Vicary*, 16 M. & W. 484.) And it seems that it did not pass as a way of necessity, whether taken in the strict sense, or as a way without which the most convenient and reasonable mode of enjoying every part of B.'s premises could not be had. (*Ibid.*)

Ways which did not exist before the unity of seisin.

The owner of two adjoining closes, A. and B., who had during the unity of possession made and used for his own convenience for agricultural purposes a way across B. to A., executed a conveyance of close A. to a purchaser, with these general words, "together with all ways, easements and appurtenances thereto appertaining, and with the same now or heretofore occupied or enjoyed." Held, that as there was no roadway to B. over A. before the unity of possession, the right to use it did not pass under the general words of the conveyance. (*Thomson v. Waterlow*, L. R., 6 Eq. 36; followed in *Langley v. Hammond*, L. R., 8 Ex. 161.) If the owner of a house and land makes a formed road over the land for the apparent use of the house, and conveys the house separately from the land with the ordinary general words, it was said by *Mellish*, L. J. (concurring in the opinion expressed by *Bramwell*, B., in *Langley v. Hammond*), that a right of way over such road might pass. (*Watts v. Kelson*, 6 Ch. 174. See also *Geoghegan v. Fegan*, L. R., 6 C. L. 139.)

Implied grant upon severance of tenements.

The doctrine of an implied grant of easements is only applicable to such as are apparent and continuous; and where contiguous premises held under the same title are at the time of the division of title in such an unfinished state that there are no indications of definite ways or windows, &c., there

will be no such implied grant. (*Glave v. Harding*, 27 L. J., Ex. 286.) There is a distinction between easements such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that upon a severance of tenements, easements used as of necessity or in their nature continuous, will pass by implication of law without any words of grant: but with regard to easements which are used from time to time only, they do not pass unless the owner by appropriate language shows an intention that they should pass. The right to go to a well and take water is not a continuous easement. (*Polden v. Bastard*, L. R., 1 Q. B. 161.)

A grant of a private right of way was implied from the description of boundaries in a lease together with the indorsed plan. (*Espley v. Wilkes*, L. R., 7 Ex. 298.)

As a right of way may be created by an express grant, so it may also arise by an implied grant, where the circumstances are such that the law will imply such grant. This right of way has been commonly termed a way of necessity, but it is in fact only a right of way by implied grant; for there seems to be no difference where a thing is granted by express words, and where it passes as incident to the grant by operation of law. (1 Wms. Saund. 323, n. See 4 Maule & S. 387.) A purchaser of part of the lands of another has a way of necessity over the vendor's other lands, if there be no convenient way adjoining; so if a man having four closes lying together sells three, and reserves the middle close, to which he has no way but through one of those sold, although he did not reserve any way, yet he shall have it as reserved to him by the law. (*Clarke v. Cogg*, Cro. Jac. 170; *Jordan v. Attwood*, Owen, 121.) A way of necessity passes by grant or lease of the land, without being expressed; for the land cannot be used without a way. (*Beaudely v. Brook*, Cro. Jac. 189.) A conveyance of land by a trustee, to which there is no access but over the trustee's land, passes a right of way. (*Howton v. Frearson*, 8 T. R. 50.) So if the owner of two closes, having no way to one of them, but over the other, part with the latter without reserving a right of way, it will be reserved to him by operation of law. (*Ib.*) Where property devised or granted is landlocked, and there is no other way of getting at it without being a trespasser, so that it cannot be enjoyed without a way of some sort over the lands of the testator or grantor, it is clear that a way of necessity is created *de novo*. (*Pearson v. Spencer*, 1 B. & S. 583.) On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a right of way over the purchased land necessary to the vendor, such right of way is reserved to the vendor by implication, as a way of necessity. (*Davies v. Sear*, L. R., 7 Eq. 427.)

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it. (*Bullard v. Harrison*, 4 Maule & S. 387. See 1 Wms. Saund. 323, n. 6.)

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient. (*Cobb v. Selby*, 6 Esp. 103.) Unless a tithe owner has a right of way to carry tithe off titheable lands within the parish by grant of the owner of the fee, or by prescription, he has, *prima facie*, only a right to use such road for that purpose as is used at the time by the occupier to carry off the other nine-tenths; and if he has any further right to use any other way from the particular close, because used by the occupier for other agricultural purposes, or for more convenient use of the close, though not for the purpose of carrying off the crop, that right can only exist while such way continues, without being stopped up by the occupier. A farmer, acting *bona fide*, has a right to alter the line of road to his farm, in which case the parson must use the substituted road, unless he can show a right by grant or by prescription. (*James v. Dodds*, 2 C. & M. 266; 4 Tyrw. 101.) Where a man leases lands, reserving the timber, he may enter to show it to a purchaser. (2 Rol. Abr. 74, 1, 41; 1 Rol. Abr. 109, 1, 5.) So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees. (*Liford's case*, 11 Rep. 52, a; Vin. Abr. Incident.) A man having a right to wreck thrown

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on another man's land, has necessarily a right of way over such land to take the wreck. (*Anon.*, 6 Mod. 149.)

In an action for a disturbance of a right of way, it appeared that in 1839 A., being the owner of five closes, two of which, called the Holme Closes, were separated by two of the others from the only available highway, sold the entire property in three lots. M. purchased the Holme Closes, and D. the remaining closes. Over the latter the tenants of A., from the year 1823, used a way for the occupation of the Holme Closes. The deeds of conveyance to the three purchasers were all executed on the same day, but it could not be ascertained in what order of priority they were executed. No special grant or reservation of any particular way was contained in any of them, but in the conveyance to M. there were the usual words, together with all ways, roads, &c., to the closes belonging or appertaining. For several years after the execution of the conveyances, the plaintiff, who occupied the Holme Closes as tenant of M., had used the way in question, but in 1843, the defendant, who had purchased D.'s closes, disputed the plaintiff's right and obstructed the way. It was held, first, that assuming that the conveyance to M. was executed before that of D., the plaintiff was clearly entitled to the way, for where a person having a close surrounded by his land grant the close to another, the grantee has a way over the grantor's land as incident to the grant. (*Pinnington v. Galland*, 9 Exch. 1; 22 Law. J., Exch. 349.) It was held, secondly, assuming that the conveyance to D. was executed before that of M., the plaintiff was, nevertheless, entitled to the way; for while the property in the Holme Closes remained in A. he had that way of necessity as being the most convenient mode of access to his premises, and it passed by his conveyance to M. under the words "all ways to the closes belonging or appertaining." (*Ib.* See *Pyer v. Carter*, 1 H. & N. 916.)

Where a plaintiff derived title to a *locus in quo* under a lease from the owners within the last twenty years (without any reservation of a right of way), and the defendant had within that time occupied part of the *locus* and taken adjoining premises by a subsequent lease from the original lessors: it was held, that he could not set up a right of way over the land by user or of necessity. (*Walter v. Williams*, 2 F. & F. 423.) It seems that no right of way by necessity can exist where the title of the parties is by escheat, even assuming that escheat is equivalent to a grant; the only ground on which the lord of a manor can claim a way of necessity is, that he has no other way. (*Proctor v. Hodgson*, 10 Exch. 824.) Where at the time of the grant in respect of which a right of way was claimed, there was a way from a house into a garden, and that way continued to exist, and the deed contained no reservation of a right of way, it was held, that another way could not be claimed as a way of necessity, on the ground of its being more convenient than the former way. (*Dodd v. Burchall*, 8 Jur., N. S. 1180; 1 H. & C. 113; 31 L. J., Ex. 864.)

## Nature of a way of necessity.

It is settled by modern authority that the ground on which the way of necessity is created is, that a convenient way is impliedly granted as a necessary incident. It is observed by *Parke, B.*, in *Proctor v. Hodgson*, 10 Exch. 824, 828, that the extent of the authority of *Holmes v. Goring*, 2 Bing. 76, is, that though it is a grant, it may be construed to be a grant of such a right of way as from time to time may be necessary. In a recent case the court was not inclined to extend the authority of *Holmes v. Goring* so far as to hold that the person into whose possession the servient tenement comes may from time to time vary the direction of the way of necessity at his pleasure, so long as he substitutes a convenient way. The court held, that the way of necessity, once created, must remain the same way as long as it continues at all. (*Pearson v. Spencer*, 1 Best & S. 584.) The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord. (*Gayford v. Moffatt*, L. R., 4 Ch. 138.)

## Duration of a way of necessity.

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as



he would have done by using the old way the latter will cease to exist. (*Holmes v. Goring*, 2 Bing. 76; 9 Moore, 166; *Reynolds v. Edwards*, Willes, 282. But see *Buckley v. Coles*, 5 Taunt. 311, and the remarks of *Parke, B.*, *Proctor v. Hodgson*, 10 Ex. 828. See also *Pheysey v. Vicary*, 16 M. & W. 491.)

A right of way or a right of passage for water (where it does not create an interest in the land) is an incorporeal right, and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c. It lies not in livery, but in grant, and neither a freehold nor a chattel interest in it can be created or passed otherwise than by deed. (5 B. & Cr. 229. See *ante*, p. 57.) Grants of rights of way are presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made. (5 B. & Ald. 237.) The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave or favour, or under a mistake, was held sufficient to leave to a jury to presume a grant, although the road in question had been extinguished about twenty-six years before, under the award of the commissioners of an inclosure act. (*Campbell v. Wilson*, 3 East, 294.) So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant from the defendant. (*Keymer v. Summers*, Bull. N. P. 74, cited 3 T. R. 157. See also *Livett v. Wilson*, 3 Bing. 115, *ante*, p. 56.) Though an uninterrupted possession for twenty years and upwards be a bar to an action on the case, yet the rule must be taken with this qualification, that the possession was with the acquiescence of the person seised of an estate of inheritance. The mere knowledge of the tenant is not sufficient, otherwise he might collude to the prejudice of his landlord. But presumptions are sometimes made against the owners of lands, during the possession and by the acquiescence of their tenants, in cases of rights of way and of common, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own. (*Daniel v. North*, 11 East, 372.) In every case where the party claiming relies on his want of possession, the question whether he knew or not of the enjoyment is to be determined by the circumstances of the case, and may very properly be left for the consideration of the jury. (*Dawson v. Duke of Norfolk*, 1 Price, 247; *Gray v. Bond*, 2 Brod. & Bing. 667.) The user of a way during the occupation of tenants does not bind the landlord, unless he was aware of it; but if the user has been for a great length of time, it may be presumed that he was aware of it. (*Davies v. Stephens*, 7 Carr. & P. 570.) The knowledge of the owner of the land and his acquiescence may be presumed from circumstances. Thus where the lessees of a fishery had publicly landed their nets on the shore at A. for more than twenty years, and had, at various times, dressed and improved the landing-place, and both the fishery and the landing-place originally belonged to one person, but no evidence was offered to show that he or those who under him owned the shore at A. knew of the landing nets by the lessees of the fishery: it was held, that it was properly left to the jury to presume a grant of the right of landing to the lessees of the fishery by some former owner of the shore at A. (*Gray v. Bond*, 2 Brod. & Bing. 667; 5 Moore, 527.)

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Presumption of grant of way after twenty years' user.

Knowledge of owner of fee.

A private way may be claimed by prescription; as that a man is seised in fee of a certain messuage, and that he, and all those whose estate he has in the same messuage, have from time immemorial had a way (describing it as the case may be) from — to —. A way being only an easement, and not an interest should not be laid as appendant or appurtenant. (Yelv. 159.) Where a particular tenant relies on a prescriptive right, he must, before the act 2 & 3 Will. 4, c. 71, s. 5, *ante*, pp. 21, 22, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee. (2 Salk. 562; Com. Dig. Chimin (D. 2).) Where in trespass *quare clausum fregit*, the defendant prescribed in a *que estate* for a right of way over the *locus in quo*, and it appeared that the

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defendant's land had, within fifty years, been part of a large common, and afterwards inclosed under the provisions of an act of parliament, and allotted to the defendant's ancestor, it was held, that notwithstanding this evidence the right claimed by the defendant's plea might in law exist: and the jury having found that in fact it did exist, the court refused to disturb the verdict. (*Codling v. Johnson*, 9 B. & Cr. 933.) If the lessor enjoy a prescriptive right of way, or any other easement, by virtue of the demised premises, such right will pass to the tenant for life or years. Before the act 2 & 3 Will. 4, c. 71, (see *ante*, s. 5, pp. 21, 22,) the only distinction between a tenant for years and a tenant for life was that the former in pleading could not prescribe in his own right; but he must have asserted the right through his landlord, or the owner of the freehold. (*Cantrell v. Stephens*, Styl. 300; *Damney v. Cashford*, Carth. 482.)

## Custom.

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good; because it is only an easement, but not a profit. (6 Rep. 60 b.; Co. Litt. 110 b.; Cro. Eliz. 180. See 2 H. Bl. 393; *ante*, pp. 30, 31.)

## Inclosure act.

By an inclosure act, it was enacted, that all ways over a certain field, called West Field, allotted to B., should be extinguished from the time of the making and completion of a new road, as therein directed, with a proviso that nothing in the act should extend, or be construed to extend, to deprive A., his heirs or assigns, or his or their agents, &c., of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of rebuilding, repairing, opening or shutting the sluices thereon, or to cleanse the same: it was held, that this reserved to A. his right of way unimpaired over West Field, for the purposes mentioned in the act. (*Adams v. Mortlock*, 7 Scott, 189; 5 Bing. N. C. 236; 3 Jur. 105.)

## Construction of grants of rights of way.

The dean and chapter of Durham, being seised in fee of lands in that county, demised them, in 1832, to W., by indenture between them and him, containing this clause: "Except and always reserved out of this present lease, indenture or grant, the woods, underwoods, and trees now growing or hereafter to grow upon the said demised premises, and the mines, quarries, and seams of clay within and under the same, with full and free authority and power to cut down, take and carry away the said wood and trees, and to dig, win, work, get and carry away the said mines, quarries, and seams of clay, with free ingress, egress and regress, wayleave and passage, to and from the same, or to or from any other mines, quarries, seams of clay, lands and grounds, on foot and on horseback, with carts and all manner of carriages, and also all necessary and convenient ways, passages, conveniences, privileges, and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggonway or waggonways in and over the said premises or any part thereof, paying reasonable damages for spoil of ground to be thereby done, upon the adjudication of two indifferent persons to be chosen by the parties, always excepted and reserved to the said dean and chapter, their successors, grantees or assigns." It was held, that by this clause the only right reserved to the dean and chapter was that of making and granting the right of making ways over the demised lands for the purpose of getting the excepted wood, mines and minerals. (*Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940.) In *Farrow v. Vansittart*, 1 Railw. Ca. 602, 614, the same construction was put upon a clause in one of the dean and chapter's leases, exactly similar to the one above stated. General words reserving a wayleave to the Bishop of Durham for coals, &c. gotten out of any lands, were restrained by the context to lands belonging to the see. (*Midgley v. Richardson*, 14 M. & W. 595. See *Hedley v. Fenwick*, 3 H. & C. 349.)

By a deed dated in 1630 the grantor conveyed in fee farm land in the county of Northumberland, "excepting and reserving out of the grant all mines of coals within the fields and territories aforesaid, together with sufficient wayleave and stayleave to and from the said mines, with liberty of sinking and digging pit and pits. It was questioned whether, under this reservation of a sufficient "wayleave," the coalowner had now a right to make a railway, for the purpose of carrying coals from the mines for shipment, with cuttings and embankments, and fenced in so as to exclude the

owner of the soil. It was held, however, that the right was not confined to such ways as were in use at the time of the grant. (*Dand v. Kingscote*, 6 Mees. & W. 174.) Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as abutting on an intended way, without specifying the breadth: it was held, the sub-lessee was entitled to a convenient way only. (*Harding v. Wilson*, 2 B. & Cr. 96. See *Espley v. Wilkes*, L. R., 7 Ex. 298.) Under a grant of a free and convenient horseway and footway, and for carts and carriages, &c., over to a certain piece of land, "to carry stone, timber, coal, or other things whatsoever," the grantee may lay a framed way along the land for carrying coals as being the most convenient, but the grantee will not be justified in making transverse roads across the land. (*Senhouse v. Christian*, 1 T. R. 560.)

It is not competent to a vendor to create rights unconnected with the use and enjoyment of land and to annex them to it, neither can the owner of land render it subject to a new species of burden so as to be binding in the hands of the assignee. A right of way cannot be so granted as to pass to the successive owners of land as such, in cases where the way is not connected in some manner with the enjoyment of the land to which it is attempted to make it appurtenant. (*Ackroyd v. Smith*, 10 C. B. 164; 14 Jur. 1047; 19 Law J., C. P. 315.) In trespass *quare clausum fregit*, the defendant justified under a supposed right of way conveyed to them by A.; the plea, after stating the conveyance to A. of a certain close and certain plots, pieces or parcels of land, &c., together with all ways, &c., particularly the right and privilege to and for the owners and occupiers of the premises conveyed, and all persons having occasion to resort thereto, of passing and repassing for all purposes in, over, along and through a certain road," alleged an assignment by A. to the defendant of the said lands, tenements, hereditaments, premises and appurtenances "granted by the former deed," and then averred that the trespasses complained of were committed by the defendants, being owners of the said lands, &c. and in the possession and occupation thereof, in using the right of way for their own purposes; the plaintiffs, after setting out the deed upon oyer, demurred specially to the plea on the ground that the defendants claimed a more extensive right than that granted by the deed, and that if the right as claimed was granted by the deed it was not assignable. It was held, that the grant to A. was not restricted to the use of the way for purposes connected with the occupation of the land conveyed, but that the right in question was not one which inhered in the land, or which concerned the premises conveyed, or the mode of occupying and enjoying them, and therefore did not pass to the defendants by the assignment. (*Ib.*) See further as to the construction of grants of rights of way, *Wood v. Stourbridge Railway Company* (16 C. B., N. S. 222; *Watts v. Kelson*, L. R., 6 Ch. 166; *Cousens v. Rose*, L. R., 12 Eq. 366, and the cases quoted *post*, p. 80).

In an action for obstructing a way, granted by a lease from the defendant to the plaintiff, the judge will receive evidence of the state of the premises at the time of granting the lease, and will then put a construction on the lease as to the line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant. (*Osborn v. Wise*, 7 Car. & P. 761.) In order to prove a grant of an occupation way through a lane to the defendant's premises, he offered two deeds, which purported to be grants by the owners of the soil of an occupation way through the lane, to tenants of premises situated on the opposite side of the lane from the defendant's premises: it was held, that the deeds were wrongly admitted for that purpose. (*Reg. v. Chorley*, 12 Q. B. 515. And see *Baird v. Fortune*, 10 W. R. 2.)

Where premises are demised or conveyed "with a right of way thereto," it may be a question for the jury what is a reasonable use of such right. (*Hawkins v. Carbines*, 27 L. J., Exch. 44.)

Evidence.

Mode of user.

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Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload, and turn round and go out again, but through alterations of the premises, could not do so without slightly trenching upon the plaintiff's premises: it was held, that, in the reasonable use of the right of way, the defendant had a right to do this: and that was what a reasonable user was for the jury. (*Ib.*)

The defendant being entitled by immemorial user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly there and partly on the land adjoining. The jury found in effect that the defendant in so doing had used the way *bond fide*, and for the ordinary and reasonable use of field N. as a field. Held, that the mere fact that some of the hay had not been grown on field N. did not make the carrying of it over the plaintiff's land an excess in the user of the right of way. (*Williams v. James*, L. R., 2 C. P. 577.)

Where a lease reserved to the lessor and his assigns a right of way over certain ground for the purpose of rebuilding and repairing any erections or buildings on adjoining premises which belonged to the lessor, and the defendants who claimed under the lessor had erected a dispensary on the adjoining premises, and proposed to use the way as an access to such dispensary, an injunction was granted restraining the user. (*Ardley v. Guardians of St. Pancras*, W. N. 1870, p. 203; 39 L. J., Ch. 871.)

A private right of way over waste land, or a line between two points, is not necessarily a right over every part of the land, and the owner of the soil may inclose on each side of it, if the way can be substantially used as conveniently as before the inclosure. (*Hutton v. Hamboro*, 2 F. & F. 218.)

A. granted to B., his heirs and assigns, occupiers of certain houses abutting upon a piece of land about eleven feet wide, which divided those houses from a house then belonging to A., the right of using the said piece of land as a foot or carriage way, and gave him "all other liberties, powers and authorities incident or appurtenant, needful or necessary to the use, occupation or enjoyment of the said road, way or passage." it was held, that under these words B. had a right to put down a flagstone in this piece of land in front of a door, opened by him out of his house into this piece of land. It was observed by *Chambre, J.*, that the nature of the thing was material in considering the effect of the words. The way was granted for the occupation of a dwelling-house, and the grantee ought to have everything needful for the occupation of his dwelling-house; he ought therefore to have the opportunity of repairing the way in such a manner, that it should not be wet or dirty, when he or his family or his visitors enter. If any inconvenience had been occasioned to the grantor, it might make a difference; but that was not the case here, nor was it to be feared that any right could hereafter be set up in respect of the soil in consequence of this stone having been put down, for the precise extent of the road was pointed out. (*Gerrard v. Cooke*, 2 Bos. & P. N. R. 109.)

A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way. (*Taylor v. Whitehead*, 2 Dougl. 475; *Bullard v. Harrison*, 4 Maule & S. 387; 1 Wms. Saund. 322 a, n. (3); *Duncombe's case*, Cro. Car. 366. See *Robertson v. Gauntlett*, 16 Mees. & W. 289.) But if a highway be impassable, the public are entitled to pass in another line. (*Ib.* See *Shelford's Law of Highways*, pp. 25, 73, 3rd ed.)

Repair of way.

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard v. Cooke*, 2 Bos. & P. N. R. 108; Vin. Abr. Incidents (A.)), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6)), unless by express stipulation or prescription. (1 Saund. 322 a, n.; *Rider v. Smith*, 3 T. R. 766.) The grantee of a private way is to make it. (*Osborn v. Wise*, 7 Car. & P. 764.) By common law he who has the use of a thing ought to repair it, unless the grantor has bound himself to do so. (*Taylor v. Whitehead*, 1 Dougl. 720;

*Pemfret v. Ricroft*, 1 Wms. Saund. 557.) Although at common law the grantee of a way ought to repair it, that is not a condition incident by law to the grant of a right of way; it is not even an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself. (*Per Coleridge, J., Duncan v. Leach*, 6 Q. B. 909, 910. See *Ingram v. Morecraft*, 33 Beav. 49.)

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Where an owner of the soil permits others to pass over it, he is liable for an accident caused by the negligence of himself or his servants to a person lawfully availing himself of such permission, though he would not be liable for an accident caused by the ordinary risks attaching to the nature of the place, or the business there carried on. (*Gallagher v. Humphrey*, 10 W. R. 664.) An owner of land, having a private road for the use of persons coming to his house, gave permission to a builder who was engaged in building on the land to place materials upon the road. The builder availed himself of such permission, by placing a quantity of slates there in such a manner that the plaintiff in using the road sustained damage: it was held that the builder was liable to an action. (*Corby v. Hill*, 4 C. B. (N. S.) 556; 4 Jur. (N. S.) 512; 27 Law J., C. P. 218; *Belch v. Smith*, 7 H. & N. 736.) The possessors of a cutting, and a bridge over the cutting, who allowed the public to use the bridge, were held not liable for the death of a person who fell into the cutting through the defective condition of the bridge. (*Gautret v. Egerton*, L. R., 2 C. P. 371.) See the cases, as to negligence, collected, Gale on Easements, 4th ed. 405, n.

Liability for negligence.

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession. (*Heigate v. Williams*, Noy, R. 119. See *James v. Plant*, 4 Ad. & El. 761, ante, p. 73.)

Extinction of rights of way:

It does not appear to have been decided what is the precise period requisite to extinguish a right of way by mere non-user. Lord Tenterden said, "One of the general grounds of a presumption is, the existence of a state of things, which may most reasonably be accounted for by supposing the matter presumed. Thus the long enjoyment of a right of way by A. to his house or close, over the land of B., which is a prejudice to the land, may most reasonably be accounted for by supposing a grant of such right by the owner of the land; and if such right appear to have existed in ancient times, a long forbearance to exercise it, which must be inconvenient and prejudicial to the owner of the house or close, may reasonably be accounted for by supposing a release of the right. In the first class of cases, therefore, a grant of the right, and in the latter a release of it, is presumed." (*Dodd v. Pentland v. Hilder*, 2 B. & Ald. 791.) *Littledale, J.*, expressed a similar opinion. He said, according to the present rule of law, a man may acquire a right of way, or a right of common (except indeed common appendant) upon the land of another by enjoyment; after twenty years' adverse enjoyment, the law presumes a grant made before the user commenced by some person who had power to grant; but if the party who had acquired the right by grant ceased for a long period of time to make use of the privilege granted to him, it may then be presumed that he has released the right. It is said, however, that as he can only acquire the right by twenty years' enjoyment, it ought not to be lost without disuse for the same period; and that as enjoyment for such a length of time is necessary to found a presumption of a grant, there must be a *similar non-user to raise a presumption* of a release, and this reason may perhaps apply to a right of common or of way. (*Moore v. Rawson*, 3 B. & C. 339.) Although the grant of an occupation way cannot be presumed from a user of less than twenty years, yet it is not necessary, in order to destroy the right to such an easement, that a cesser of the use for twenty years should be proved. (*Reg. v. Chorley*, 12 Jur. 822, Q. B.; 12 Q. B. 515.) A cesser of the use for any period less than twenty years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy such an easement. (*Ib.*) See the remarks of Lord *Chelmsford*, *Crossley v. Lightowler* (L. R., 2 Ch. 482.)

By unity of seisin.

By abandonment.

It was laid down in another case, that where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by dis-

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tinct evidence of interruptions acquiesced in; an unsuccessful attempt on the part of the occupiers of the land, over which the way ran, from time to time, to interrupt such right, will not be sufficient to get rid of it. (*Harrie v. Rogers*, 3 Bligh, N. S. 444—447. See 12 Ves. 265; *Norbury v. Meade*, 8 Bligh, 211, 241.)

The discontinuance for upwards of twenty years of the use of an immemorial right of way to a close, because the occupiers had a more convenient access to it over another close, is not evidence of an intention to abandon the right. (*Ward v. Ward*, 21 Law J., Exch. 334.) *Alderson*, B., observed in this case, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be the consequence of something, which is adverse to the user." A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old highway, afford no evidence of the abandonment thereof. (*Lovell v. Smith*, 3 C. B., N. S. 120.) In this case the plaintiff, having a right of way by prescription more than thirty years previously, agreed with the owner and occupier of the servient tenement, that the use of a portion of that way should be discontinued, and a new one equally convenient substituted for it; *Willes*, J., said, "I do not think that this court means to lay down that there can be an abandonment of a prescriptive easement like this, without a deed or evidence from which the jury can presume a release of it." (*Ib.* pp. 126, 127.) A right of way may be abandoned, and it is always a question of fact, to be ascertained by a jury or by the court from the surrounding circumstances, whether the act amounts to an abandonment or was intended as such. (*Cook v. Mayor of Bath*, L. R., 6 Eq. 179.)

By alteration of  
dominant tenement.

Where the mode of enjoyment of an easement has been more or less altered, and where an attempt has been made to usurp a greater right than the party was entitled to, it appears that in the case of those easements which depend upon repeated acts of man and require no permanent alteration in the dominant tenement as rights of way, the previously-existing right will not be affected by acts of usurpation. (Gale on Easements, 539, 555, 4th ed., and see *Luttrell's case*, 4 Rep. 86 a.)

There does not appear to be any direct authority to show whether, if the use of a place, to and from which a way is by express words reserved or granted, be completely changed, the way can still be continued to be used. It has been held, that if a man has a right of way to a close called A., he cannot justify using the way to go to A. and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell v. King*, 1 Mod. 191; *Lawton v. Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111; *Skull v. Glonister*, 16 C. B., N. S. 81; 12 W. R. 554.) In trespass *quare clausum fregit* it appeared that B., being the owner of the *locus in quo*, and also of certain other land, with houses and a stable, loft and chaise-house, conveyed to A. a part of the premises, consisting of a house and land comprehending the *locus in quo*, reserving to himself, his heirs, &c., occupiers for the time being of a messuage (not conveyed), a right of way and passage over the *locus in quo* to a stable and loft over the same, and the space or opening under the loft and then used as a wood-house, and to the chaise-house standing on the side of the *locus in quo* (the stable, loft, wood-house, and chaise-house not being conveyed), and also the use of the *locus in quo* in common with A., his heirs, &c., and their tenants for the time being, it being expressed to be the intent of the parties that the whole of the yard comprehending the *locus in quo* should be open and undivided, as the same then was, and be used in common by the occupiers of both messuages as the tenants thereof had been accustomed theretofore to use them; afterwards B. built a cottage on the site of the opening under the loft: it was held, 1. That the reservation of the use of the *locus in quo* did not authorize B. to use it for the purpose of passing to the cottage. 2. That the reservation of the right of way was not limited to a right of passage to the space so long as it was used as a wood-house; but gave a way generally to the space so described while it was open. 3. But that B. was not entitled to use that way for the purpose of passing to a newly-erected cottage on that space.



(*Allan v. Gomme*, 11 Ad. & Ell. 759; 3 P. & Dav. 581.) *Denman*, C. J., in giving judgment said, that the case depended upon the legal effect of the reservation. "Upon that we are of opinion that, under the terms of this deed, the defendant is not entitled to have the right of way claimed, but that he is to be confined to the use of a way to a place which should be in the same predicament as it was at the time of the making of the deed. We do not mean to say that he could only use it to make a deposit of wood there, for we consider the words 'now used as a wood-house,' merely used for ascertaining the locality and identity of the place called a space or opening under the loft, and we think he might have the benefit of the way to make a deposit of any articles, or use it in any way he pleased, provided it continued in the state of open ground; but we think that he could only use it for purposes which were compatible with the ground being open, and that if any buildings were erected upon it, it was no longer to be considered as open for the purpose of this deed." (*Allan v. Gomme*, 3 Per. & Dav. 591; 11 Ad. & Ell. 759; see *Osborn v. Wise*, 7 Carr. & P. 761.) *Parke*, B., observed, that in *Allan v. Gomme*, "a more strict rule was laid down than he should have been disposed to adopt, for it was said that the defendant was confined to the use of the way to a place which should be in the same predicament as it was at the time of the making of the deed. No doubt if a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered." (*Henning v. Burnet*, 8 Exch. 192.)

A company and the defendant each purchased lands of W., which were separated by a road over which a right of way was reserved to each (the freehold remaining in W.) with a joint obligation to repair. In the conveyance to the company the land purchased by them was described as containing thirty-one acres or thereabouts, "which, with the abuttals and boundaries thereof, were more particularly described in the map or plan thereof affixed to and forming part of the conveyance, together with full and free liberty, licence and authority for the company, their successors and assigns and tenants, and all persons coming to or going from the same lands and hereditaments, or any part thereof, to use and enjoy, with horses, carts and carriages, or on foot, jointly or in common with others the person or persons for the time being entitled to the like liberties, licences and authorities respectively, the roads or ways leading to and from the same lands and hereditaments as the same roads or ways are described in the said map or plan." At the time of conveyance the land so purchased by the company was separated from the road by a hedge, in which were two gates, one at the upper, the other at the lower end of the road. The company removed the hedge and built a wall with two gates thereon, both at the same distance from the spot where the old gates had stood. The defendant obstructed the access to these new gates by excavating the road to the depth of between four and five feet. It was held, that the defendant was liable to an action at the suit of the company, for that whether the company was justified in altering the position of the gates or not, the company was still entitled to the uninterrupted use of the way as granted to them. (*South Metropolitan Cemetery Company v. Eden*, 16 C. B. 42.) But it seems that the grant was a general grant of a right of way along the road and every part thereof, and was not limited to a way through the old gates. (*Ib.*)

By the 10th section of the General Inclosure Act, 41 Geo. 3, c. 109, the commissioners are directed to set out private roads; and by the 11th section of that act it is declared that all roads, ways and paths, over, through and upon such lands and grounds, which shall not be set out, shall be extinguished. But where a private inclosure act does vary the terms of the above act, if the commissioners in their award do not notice a road running over the inclosed lands, it is, by the operation of that act, extinguished, and the proprietor of the lands over which it runs may stop it up. Thus it was held, that a plaintiff, to whom an allotment was made by a commissioner under an inclosure act, of land over which the defendants had a private

Stopping ways  
under Inclosure  
Acts.



Rights of Way.

right of way before the passing of the act, but which was not noticed or described among those set out by the commissioner, might justify the stopping up of such way, although the award contained no declaration that the road in question was stopped up. (*White v. Reeves*, 2 B. Moore, 23.) As to the construction of local inclosure acts giving powers to stop up roads, see *Logan v. Burton* (5 B. & Cr. 513; *S. C.*, 3 Dowl. & Ryl. 299); *Harber v. Rand* (9 Price, 58); *Rex v. Inhabitants of Hatfield* (4 Ad. & Ell. 156.)

Remedy for disturbance of right of way by action at law.

Action by reversioner.

An action on the case lies for the disturbance of a right of way, created either by reservation, grant or prescription; (Com. Dig. Action on the Case for Disturbance (A. 2); 1 Roll. Abr. 109;) and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use. (*Loughton v. Ward*, 1 Lutw. 111.) A reversioner cannot maintain an action on the case against a stranger for merely entering upon his land held by a tenant on lease, though the entry be made in exercise of an alleged right of way, such an act during the tenancy not being necessarily injurious to the reversioner; for, in order to entitle a reversioner to maintain an action on the case against a stranger he must allege in his count, and prove at the trial, an actual injury to his reversionary interest. (*Baxter v. Taylor*, 4 B. & Ad. 72; *S. C.*, 1 Nev. & M. 11. See *Jackson v. Pesked*, 1 Maule & S. 234; *Alston v. Scales*, 2 Moore & Scott, 5.) A reversioner cannot sue for the obstruction of a right of way, unless the obstruction be such as either permanently injures the estate, or operates in denial of the right. (*Hopwood v. Scholfield*, 2 M. & Rob. 34. See *Young v. Spencer*, 10 B. & Cr. 145.) A declaration in case by a reversioner alleged that the plaintiff was entitled to a right of way for his tenants over a certain close of the defendant, and charged that the defendant wrongfully locked, chained, shut and fastened a certain gate, standing in and across the way, and wrongfully kept the same so locked, &c., and thereby obstructed the way, and that by means of the premises the plaintiff was injured in his reversionary estate; it was held, on motion in arrest of judgment, that the declaration was sufficient, inasmuch as such an obstruction might occasion injury to the reversion, and it must be assumed after verdict that evidence to that effect had been given. (*Kidgill v. Moor*, 9 C. B. 364.) If a road, when made, was such as was authorized by a reservation in a lease, the intention to use it for a purpose not authorized is no ground for an action by the reversioner, though, if the intent were carried into effect, the tenant in possession may be entitled to bring an action of trespass. (*Durham and Sunderland Railway Company v. Walker*, 2 Q. B. 940.)

Where the plaintiff had, under a clause in the special act of a railway company, acquired the use of a siding, which he used as a coal wharf and leased to tenants, and the railway company subsequently denied the plaintiff's right to use the siding, and, with a view to prevent its being used, obstructed the entrance to the siding by carriages constantly kept there, and by other means: it was held that the obstruction was sufficiently permanent to give the plaintiff a right of action as reversioner. (*Bell v. Midland Railway Company*, 10 C. B., N. S. 287; 9 W. R. 612.)

The Railway Clauses Act, 1845, s. 53, takes away the common law right of action for an interference under the powers of a railway company with a private right of way, except when special damage has been sustained. (*Watkins v. Great Northern Railway Company*, 16 Q. B. 961; 20 Law J., Q. B. 391.)

Pleading.

In the Schedule to the Common Law Procedure Act, 15 & 16 Vict. c. 76, the following forms of pleading are given: "That the defendant, at the time of the alleged trespass, was possessed of land, the occupiers whereof, for twenty years before this suit, enjoyed, as of right and without interruption, a way on foot and with cattle from a public highway over the said land to the said land of the defendant, and from the said land of the defendant over the said land of the plaintiff to the said public highway, at all times of the year, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of

the said way." The form of replication to the above plea is, "That the occupiers of the said land did not for twenty years before this suit enjoy as of right and without interruption the alleged way."

It is an elementary rule in pleading, that when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of producing it, or the evidence sustaining the allegation. Thus, in a case very familiar, if a trespass be justified by a plea of highway, the pleader never states how the *locus in quo* became a highway; and if the plaintiff's case is that a *locus in quo*, by an order of justices, award of inclosure commissioners, local act of parliament, or any other lawful means, had ceased to be such at the time alleged in the declaration, he simply puts in issue the fact of its being a highway at that time, without alleging the particular mode by which he intends to show, in proof, that it had before then ceased to be such. (*Williams v. Wilcox*, 8 Ad. & Ell. 331.) In all cases for disturbance of a way, the obstruction ought to be charged in the pleadings in the thing itself to which the party has a right, and if charged generally, the declaration would be bad. Much more, then, when the mode of the obstruction is stated, and that not in the thing where the right is claimed. (*Tebbutt v. Selby*, 1 Nev. & P. 717; 6 Ad. & Ell. 786.) Where in an action for wrongfully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings. (*Ellison v. Iles*, 3 Per. & D. 391; 11 Ad. & Ell. 665.) Where in an action of trespass for disturbing a right of way the plaintiff averred that the defendant used and enjoyed the right of way mentioned in the plea, but that he did so under the plaintiff's leave and licence, the plaintiff is bound to show a licence co-extensive with the right claimed in the plea, and admitted by the replication. (*Colchester v. Roberts*, 4 Mees. & W. 769.) In an action on the case for obstructing a right of way, between two specified termini over a close called the Terrace Walk, the way was claimed as appurtenant to a messuage, in general terms, without reference to any obligation to repair. On the trial of an issue joined on a traverse of the right of way, the easement proved was a right to pass forwards and backwards over every part of the close, and not merely between the termini specified in the declaration; and it was shown that the easement was enjoyed under a grant thereof to D., his heirs, tenants and assigns, and to certain other persons, he, they, and every of them from time to time contributing and paying a rateable share and proportion towards repairing and amending the Terrace Walk: it was held no variance, the easement proved being only larger than the easement alleged, and not different in kind; and it was also held, that the obligation to repair was not in the nature of condition precedent, and need not be alleged in the declaration. (*Duncan v. Louch*, 6 Q. B. 904.)

Where the lessees of a colliery had agreed to grant to the lessees of a neighbouring colliery licence to use a right of way enjoyed by the former, and the owner of the first colliery had granted to the second lessees the same right of way during a term of years, and afterwards by assignment from the first lessees became possessed of the first colliery and the right of way, an injunction was granted to restrain him from removing the materials and destroying the way. (*Newmarch v. Brandling*, 3 Swanst. 99.)

It was stipulated by an agreement between the parties to a suit that the plaintiff, his heirs and assigns, should have full and free permission "to use at all times the roads and ways in and through the defendant's estate." There were two roads traversing the estate, at a further extremity of which, where his land terminated, certain existing obstructions were continued by the defendant, so that the plaintiff, whilst he had the use of the roads over the estate, could not pass beyond it. An injunction was granted to restrain the defendant from making and continuing the obstruction at the extremity of his land. (*Phillips v. Treeby*, 8 Jur., N. S. 999; 3 Giff. 632.)

Where a bill was filed by a lessee to establish a right of way, an objection for want of parties, because the plaintiff's lessor was not before the court, was allowed. (*Poore v. Clark*, 2 Atk. 515.) As to the certainty required in such bills, see *Gell v. Hayward* (1 Vern. 312); *Cresset v. Mitton* (3 Bro. C. C. 481; 1 Ves. jun. 449).

As to the remedy in equity, in the case of a licence for a right of way

Remedy in equity.

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which has been executed, and where expense has been incurred, see *Mold v. Wheatcroft* (27 Beav. 510), and the cases quoted, *ante*, p. 60.

An injunction was granted, restraining the user of a right of way in a manner which was not intended when it was reserved. (*Ardley v. St. Pancras Guardians*, 39 L. J., Ch. 871.)

## (5.) OF WATERCOURSES.

The right of conducting water through one estate for the use and convenience of an adjoining estate, is an incorporeal hereditament of the class of easements, or a prædial service, which was known to the civilians under the name of service *aquæ ductus* (Domat's Civil Law, L. 1, T. 12), and is of use when Seius has a scarcity of water, and requires it for watering his cattle, or his lands, or for making his mill go, or for any other such advantage to his ground. (2 Frederician Code, 144.)

Origin of law governing natural streams.

The ground and origin of the law which governs streams running in their natural course would seem to be this, that the right enjoyed by the several proprietors of the lands over which they flow is, and always has been, public and notorious: that the enjoyment has been long continued—in ordinary cases, indeed, time out of mind—and uninterrupted; each man knowing what he receives and what has always been received from the higher lands, and what he transmits and has always been transmitted to the lower. The rule, therefore, either assumes for its foundation the implied assent and agreement of the proprietors of the different lands from all ages, or perhaps it may be considered as a rule of positive law (which would seem to be the opinion of *Fleta* and of *Blackstone*), the origin of which is lost by the progress of time; or it may not be unfitly treated, as laid down by Mr. Justice *Story*, in his judgment in the case of *Tyler v. Wilkinson* (4 Mason's American Rep. 401), in the courts of the United States, as "an incident to the land; and that whoever seeks to found an exclusive use must establish a rightful appropriation in some manner known and admitted by the law." (*Per Tindal*, C. J., in *Acton v. Blundell*, 13 Mees. & W. 349, 350.)

Natural right of riparian proprietor to the use and to the flow of water in natural streams.

In *Acton v. Blundell* (13 Mees. & W. 348, 349), the court considered the following to be a correct exposition of the law as laid down in *Mason v. Hill* (5 B. & Ad. 1; 2 Nev. & M. 747); and substantially declared by Sir *John Leach*, V.-C., in *Wright v. Howard* (1 Sim. & S. 190). "The rule of law which governs the enjoyment of a stream flowing in its natural course over the surface of land belonging to different proprietors is well established; each proprietor of the land has a right to the advantage of the stream flowing in its natural course over his land, to use the same as he pleases, for any purposes of his own, not inconsistent with a similar right in the proprietors of the land above or below; so that neither can the proprietor above diminish the quantity or injure the quality of the water which would naturally descend, nor can any proprietor below throw back the water without the licence or the grant of the proprietor above." The principles upon which the right to the use of water depends, were thus expressed by Sir *J. Leach*, V.-C., in a luminous judgment:—"Prima facie, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor, without the consent of the other proprietors, who may be affected by his operations. No proprietor can either diminish the quantity of water, which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above." (*Wright v. Howard*, 1 Sim. & Stu. 203; the foregoing remarks were adopted by Lord *Tenterden*, C. J., *Mason v. Hill*, 3 B. & Ad. 312, 313; and see 5 B. & Ad. 18; *Ennor v. Barnell*, 2 Giff. 426, 427.)

The right to have the stream to flow in its natural state, without diminution or alteration, is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably

use it who have a right of access to it; that none have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has a right to the *usufruct* of the stream of water which flows through it. This right to the benefit and advantages of the water flowing past his land is not an absolute and exclusive right to the flow of all the water in its natural state, but it is only a right to the flow of the water and the enjoyment of it, subject to the similar rights of all the proprietors of the banks on each side to the reasonable enjoyment of the same gift of Providence. (*Per Parke, B., Embrey v. Owen*, 6 Exch. 369.)

Of Watercourses.

"The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality." (*Per Erle, C. J., Gaved v. Martyn*, 19 C. B., N. S. 732; 14 W. R. 66.)

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, for what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury." (*Per Lord Kingsdown, Miner v. Gilmour*, 12 Moo. P. C. 156; 7 W. R. 330; adopted by *Martin and Channell, BB., in Nuttall v. Bracewell*, L. R., 2 Ex. 1. See *Att.-Gen. v. Great Eastern Railway Company*, L. R., 6 Ch. 572; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R., 5 H. L. 418.)

In *Williams v. Morland* (2 B. & C. 910), *Bayley, J.*, said, "Flowing water is originally *publici juris*. So soon as it is appropriated by an individual, his right is co-extensive with the beneficial use to which he appropriates it: subject to that right, all the rest of the water remains *publici juris*. The party who obtains a right to the exclusive enjoyment of the water, does so in derogation of the primitive right of the public." See further as to the doctrine of appropriation laid down in the earlier cases, *Earl of Rutland v. Bowler* (Palm. 290); *Bealey v. Shaw* (6 East, 208); *Saunders v. Newman* (1 B. & Ald. 258); *Liggins v. Inge* (7 Bing. 692); *Frankum v. Earl of Falmouth* (6 C. & P. 529). Lord Denman, however, in delivering the judgment of the Court of King's Bench, said: "It appears to us that there is no authority in our law, nor, as far as we know, in the Roman law (which, however, is no authority in ours), that the first occupant, though he may be the proprietor of the land above, has any right by diverting the stream to deprive the owner of the land below of the special benefit and advantage of the natural flow of water therein." (*Mason v. Hill*, 5 B. & Ad. 24.) See *Arknright v. Gell* (5 Mees. & W. 220), where *Parke, B.*, said, "The object of the judgment in *Mason v. Hill* was to set right the mistaken notion which had got abroad in consequence of certain *dicta* in *Williams v. Morland* (2 B. & C. 910), that flowing water is *publici juris*, and that the first occupant of it for a beneficial purpose may appropriate it." And see *Sampson v. Hoddinott* (1 C. B., N. S. 590; 5 W. R. 230), where it was said, "It appears to us that all persons having land on the margin of a flowing stream have by nature certain rights to use the water of the stream, whether they exercise their rights or not." (Adopted by *Wood, V.-C., in Crossley v. Lightowler*, L. R., 3 Eq. 296.)

Appropriation not necessary.

To constitute a watercourse in which rights may be acquired by user, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a proper subject-

Channel must be defined.

Of Watercourses.

matter for the acquisition of a right by user. (*Briscoe v. Drought*, 11 Ir. C. L. R., N. S. 250.) The right of a riparian owner to the lateral tributaries or feeders of the main stream applies to water flowing in a defined and natural channel or watercourse, and does not extend to water flowing over or soaking through land previous to its arrival at such watercourse. (*Broadbent v. Ramsbottom*, 25 L. J., Exch. 115.)

The owner of land has an unqualified right to drain it for agricultural purposes, in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water which otherwise would have come to his land. (*Ramstron v. Taylor*, 11 Exch. 369.) The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source, and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose: it was held, that an action lay by the mill-owner against the person so abstracting the water. (*Dudden v. Guardians of Clutton Union*, 1 H. & N. 627; 26 L. J., Exch. 146. See *Van Breda v. Silberbauer*, L. R., 3 P. C. 84.)

As to what is a defined channel, see *Briscoe v. Drought* (11 Ir. C. L. R., N. S. 250); *Ennor v. Barnell* (2 Giff. 410).

Natural rights  
with regard to  
subterranean  
water:

where course is  
known and de-  
fined;

If the course of a subterranean stream be well known, as is the case with many, which sink underground, pursue for a short space a subterraneous course and then emerge again, it never would be considered that the owner of the soil under which the stream flowed could not maintain an action for the diversion of it, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground. (*Per Pollock, C. B., Dickenson v. Grand Junction Canal Company*, 7 Ex. 300; adopted by Lord *Chelmsford, Chasemore v. Richards*, 7 H. L. C. 349; 7 W. R. 685. See also *Dudden v. Guardians of Clutton Union*, 1 H. & N. 630.)

where course is  
undefined.

The owner of land, through which water flows in a subterraneous course, has no natural right or interest in it which will enable him to maintain an action against a landowner, who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and lays his well dry. *Tindal, C. J.*, intimated no opinion whatever as to what might be the rule of law, if there had been an uninterrupted user of the right for more than the last twenty years; but the court, confining themselves strictly to the facts stated in the bill of exceptions, thought the case was not to be governed by the law which applies to rivers and flowing streams, but that it rather fell within that principle which gives to the owner of the soil all that lies beneath his surface; that the land immediately below is his property, whether it is solid rock, or porous ground, or venous earth, or part soil and part water; that the person who owns the surface may dig therein, and apply all that is there found to his own purposes at his free will and pleasure; and that if, in the exercise of such right, he intercepts or drains off the water collected from underground springs in his neighbour's well, this inconvenience to his neighbour falls within the description of *damnum absque injuriâ*, which cannot become the ground of an action. (*Acton v. Blundell*, 12 Mees. & W. 353, 354.) The same principle was laid down by the House of Lords in *Chasemore v. Richards*, the facts of which case are stated, p. 91, *post*. It was there said: The question then is, whether the plaintiff has such a right as he claims *jure naturæ* to prevent the defendant sinking a well in his own ground at a distance from the mill, and so absorbing the water percolating in and into his own ground beneath the surface, if such absorption has the effect of diminishing the quantity of water which would otherwise find its way into the river Wandle, and by such diminution affects the working of the plaintiff's mill? It is impossible to reconcile such a right with the natural and ordinary right of landowners, or to fix any reasonable limits to the exercise of such a right. Such a right as that contended for by the plaintiff would interfere with, if not prevent, the draining of land by the owner. Suppose, as it was put at the bar in argument, a man sank a well upon his own land, and the amount of percolating water which found a way



into it had no sensible effect upon the quantity of water in the river which ran to the plaintiff's mill, no action would be maintainable; but if many landowners sank wells upon their own lands, and thereby absorbed so much of the percolating water by the united effect of all the wells as would sensibly and injuriously diminish the quantity of water in the river, though no one well alone would have that effect, could an action be maintained against any of them, and, if any, which? for it is clear that no action could be maintained against them jointly. (*Chasemore v. Richards*, 7 H. L. C. 349; see also *Hammond v. Hall*, 10 Sim. 551.) In such a case as *Acton v. Blundell*, the existence and state of the underground water is generally unknown before the well is made; and after it is made there is a difficulty in knowing certainly how much, if any indeed, of the water of the well, when the ground was in its natural state, belonged to the owner in right of his property in the soil, and how much belonged to that of his neighbour, who, in digging a mine or another well, may possibly be only taking back his own. These practical uncertainties make it very reasonable not to apply the rules which regulate the enjoyment of streams and waters above ground to subterraneous waters, especially when the result would be to prevent the full enjoyment of the rights of property in the neighbouring owner, and to prevent him from extracting metals or minerals from his own soil, or making some other beneficial use of it. (*Dickenson v. Grand Junction Canal Company*, 7 Ex. 282.) It is now settled by several authorities that no action will lie against a man who, by digging or cutting drains in his own land, thereby drains his neighbour's land either by intercepting the flow of the water percolating through the pores of the soil, and which but for such digging or draining would have reached his neighbour's land, or by causing the water already collected, in fact, on his neighbour's soil to percolate away from and out of it. (*New River Company v. Johnson*, 6 Jur., N. S. 374, Q. B.; 7 W. R. 179.)

In *Dickenson v. Grand Junction Canal Company* (7 Exch. 282), the Court of Exchequer laid down that an action would lie against a landowner for digging a well, and so preventing subterraneous water from reaching a natural surface stream which it would otherwise have reached, and this whether the water was part of an underground watercourse, or would have reached the stream by percolation through the intervening strata; but this opinion, and the dictum of Lord *Ellenborough* in *Balston v. Benstead* (1 Camp. 463), have been overruled by the decision of the House of Lords in *Chasemore v. Richards* (7 H. L. C. 349), affirming the judgment of the Court of Exchequer Chamber, 2 H. & N. 168.

A local act authorized a company to enter upon lands within a certain manor, and to dig and search for any spring of water, and to convey the water from such springs into the town of South Shields for the use of the inhabitants of the town and the shipping in the harbour. It provided that the company should not take the water from any spring, streams or ponds, so as to deprive the occupiers of lands of water for their own necessary uses and for the cattle depasturing therein. The company had the power to lay down pipes, &c., and the inhabitants with the consent of the company might obtain the water by pipes, &c., to communicate with the company's pipes, at certain charges according to the bore of the pipes. It was held, that the owners or occupiers of lands within the manor were not prevented by the act from sinking wells in such lands, though the effect might be to draw off the water from the company's springs. (*South Shields Waterworks Company v. Cookson*, 15 L. J., Ex. 315.)

The claimant was owner of an estate upon which was a pond fed by natural springs, and the defendants, under the authority of an act of parliament giving rights to compensation under the Lands Clauses Act, made an excavation in adjoining land, the immediate effect of which was to divert the springs and dry up the pond. It was held, that had the act been that of an adjoining proprietor, there would be no right of action, and that there was no right to compensation under section 69 of the Lands Clauses Act. (*Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 11 W. R. 492.) A landowner, however, will be restrained from making a drain in his own land by which water flowing in a defined surface channel through adjoining land



## Of Watercourses.

Natural right of riparian proprietors to divert flood water.

is withdrawn. (*Grand Junction Canal Company v. Shugar*, L. R., 6 Ch. 483.)

At common law a proprietor of land adjoining a river has a right to raise the banks, from time to time as occasion may require, upon his own land, so as to confine the flood-water within the banks, and to prevent it from overflowing his land, with this single restriction, that he does not thereby occasion any injury to the lands or property of other persons. (*Rex v. Trafford*, 1 B. & Ad. 874; *S. C.*, in error, 8 Bing. 204; 1 M. & Scott, 401; 2 Crompt. & Jerv. 265; 2 Tyrw. 201.) The proprietor of lands along which there is a flood stream cannot obstruct its old course by a new waterway, to the prejudice of the proprietor of lands on the opposite side. Thus, a proprietor of land on the bank of a river, who had commenced the building of a mound, which, if completed, would, in times of ordinary flood, have thrown the waters of the river on the grounds of a proprietor on the opposite bank, so as to overflow and injure them, was restrained by a perpetual interdict, in Scotland, from the further erection of any bulwark, or other work, which might have the effect of diverting the stream of the river, in time of flood, from its accustomed course, and throwing the same on the lands of the other proprietor; Lord Chancellor *Lyndhurst* observing, that it was clear, beyond the possibility of a doubt, that by the law of England, such an operation could not be carried on. (*Menzies v. Breadalbane*, 3 Bligh, N. S. 414, 418.) A proprietor of land on the seashore has a right to erect any works he thinks proper, for the purpose of protecting it against the inroads of the sea, though such works may be injurious to a neighbouring proprietor. (*Rex v. Pagham Commissioners of Sewers*, 8 B. & C. 355.) But this principle is not applicable to a riparian proprietor on a tidal river. (*Att.-Gen. v. Lonsdale*, L. R., 7 Eq. 377.)

Natural right of riparian proprietor to purity of water of natural stream.

A riparian proprietor has a right to the natural stream of water flowing through the land in its natural state; and if the water is polluted by a proprietor higher up the stream so as to occasion damage in law, though not in fact, to the inferior proprietor, it gives him a good cause of action against the superior proprietor, unless the latter has gained by long enjoyment or grant a right to pollute. (*Wood v. Waud*, 3 Ex. 748; but see *Weeks v. Herard*, 10 W. R. 557.) The natural right to purity extends to subterranean water. (*Hodgkinson v. Ennor*, 4 B. & S. 229; 11 W. R. 775; *Turner v. Mirfield*, 34 Beav. 390.)

Alienation of natural (or riparian) rights.

If land with a run of water upon it be sold, the water passes with the land. (*Canham v. Fisk*, 2 Cr. & Jer. 126; 2 Tyrw. 155.) It was laid down by *Channell, B.* and *Pollock, C. B.*, that if a riparian proprietor grants to some one, not such a proprietor, a right to abstract water from the stream, the grantee can sue only the grantor for interference. *Bramwell, B.*, said, that in his opinion riparian rights were presumably grantable like other rights of property. (*Nuttall v. Bracemell*, L. R., 2 Ex. 1.)

An allegation that the plaintiff was possessed of mines, lands and premises, and of right ought to have had and enjoy, and still of right ought to have and enjoy, the water of a stream which had been used to flow alongside the lands and premises, is not supported by proof that the plaintiff was a lessee of mines under lands adjoining the stream, with a grant from the surface owner of the use of the water for colliery purposes. (*Insole v. James*, 1 H. & N. 243.)

Acquired rights with regard to water in natural stream.

Every proprietor of lands on the banks of a natural stream has a right to use the water, provided he so uses it as not to work any material injury to the rights of the proprietors above or below him on the stream, and may begin to exercise that right whenever he will. (*Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 Jur., N. S. 243; 26 L. J., C. P. 148.) By usage he may acquire a right to use the water in a manner not justified by his natural rights: but such acquired right has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement. (*Ib.*) Independently of any particular enjoyment which another has been accustomed to have, every person is entitled to the benefit of a flow of water in his own lands, without diminu-

tion or alteration; but an adverse right may exist, founded on the occupation of another; and although the stream be either diminished in quantity, or even corrupted in quality, as by means of the exercise of certain trades, yet if the occupation of the party so taking or using it hath existed for so long a time as may raise the presumption of a grant, the other party, whose land is below, must take the stream subject to such adverse right. Before the stat. 2 & 3 Will. 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament. (*Bealey v. Shaw*, 6 East, 208; *Cox v. Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b. See *Dewhirst v. Wrigley*, 1 C. P. Coop. 329.)

Of Watercourses.

In *Prescott v. Phillips* (cited 6 East, 213; 5 B. & Ad. 23; 2 Nev. & Man. 747), it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious; and that a possession of above nineteen years, which was shown in that case, was not sufficient." (See *Cox v. Matthews*, 1 Vent. 237, cited 5 B. & Ad. 25.)

Prescriptive right to divert acquired by user for twenty years.

Previously to the stat. 2 & 3 Will. 4, c. 71 (*ante*, p. 1—28), the acquiescence of lessees would not bind the landlord, nor that of tenants the reversioner. Thus where A., who was tenant for life with a power of jointuring, which he afterwards executed, and in 1747 gave a licence to B. to erect a weir on a river in A.'s soil, for the purpose of watering B.'s meadow, then A. died and the jointress entered, and continued seised till 1799, when the tenant of A.'s farm diverted the water from the weir, upon which the tenant of B.'s farm brought an action on the case for diverting the water; the court were of opinion that the uninterrupted possession of the water for so many years, with the acquiescence of the particular tenants for life, would not affect the reversioner, although they refused to disturb a verdict which had passed for the plaintiff, inasmuch as it would not conclude the rights of the parties. (*Bradbury v. Grinsell*, 2 Wms. Saund. 516.) Evidence of user for twenty years of a head stock to pen up a rivulet was held insufficient evidence for raising the presumption of a grant to warrant its continuance to the injury of church land; for if the preceding vicar had made such a grant, it would not have bound his successor. (*Wall v. Nixon*, 3 Smith's R. 316. See *Barker v. Richardson*, 11 East, 372.)

The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, and of conveying it to the land of the party diverting it, can be created according to the law of England only by grant, or by long-continued enjoyment from which the existence of a former grant may be reasonably presumed, or by statute. Such an easement exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance, or to ask for damages on its abandonment. (*Per Cockburn, C. J., Mason v. Shrewsbury and Hereford Railway Company*, L. R., 6 Q. B. 587.)

The right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted. (*Rolle v. Whyte*, L. R., 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.)

A right to pollute the water of a stream may be acquired by prescription. (*Baxendale v. M'Murray*, L. R., 2 Ch. 790.) If a prescriptive right can be acquired of draining the sewage of a town into a stream to the injury of a riparian proprietor, it can only be acquired by the continuance of a perceptible amount of injury for twenty years. (*Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R., 1 Ch. 349.)

Right to pollute.

No right to the uninterrupted flow of subterranean water which percolates in an undefined course can be acquired by prescription. (*Chasemore v. Richards*, 7 H. L. C. 349.) The facts of that case appear from the following opinion of the judges, which was acted on by the House of Lords. It appears by the facts that are found in this case, that the plaintiff is the occupier of an ancient mill on the river Wandle, and that for more than sixty years before the present action he and all the preceding occupiers of

Right to uninterrupted flow of subterranean water cannot be acquired by prescription;

Of Watercourses.

the mill used and enjoyed, as of right, the flow of the river for the purpose of working their mill. It also appears that the river Wandle is, and always has been, supplied above the plaintiff's mill in part by the water produced by the rainfall on a district of many thousand acres in extent, comprising the town of Croydon and its vicinity. The water of the rainfall sinks into the ground to various depths, and then flows and percolates through the strata to the river Wandle, part rising to the surface and part finding its way underground in courses which continually vary. The defendant represented the members of the Local Board of Health of Croydon, who, for the purpose of supplying the town of Croydon with water, and for other sanitary purposes, sank a well in their own land in the town of Croydon, and about a quarter of a mile from the river Wandle, and pumped up large quantities of water from their well for the supply of the town of Croydon, and by means of the well and the pumping the Local Board of Health did divert, abstract and intercept underground water, but underground water only, that otherwise would have flowed and found its way into the river Wandle, and so to the plaintiff's mill; and the quantity so diverted, abstracted and intercepted, was sufficient to be of sensible value towards the working of the plaintiff's mill. The question was, whether the plaintiff could maintain an action against the defendant for this diversion, abstraction and interception of the underground water. . . . In such a case as the present, is any right derived from the use of the water of the river Wandle for upwards of twenty years for working the plaintiff's mill? Any such right against another, founded upon length of enjoyment, is supposed to have originated in some grant which is presumed from the owner of what is sometimes called the servient tenement. But what grant can be presumed in the case of percolating waters depending upon the quantity of rain falling, or the natural moisture of the soil, and in the absence of any visible means of knowing to what extent, if at all, the enjoyment of the plaintiff's mill would be affected by any water percolating in and out of the defendant's or any other land? The presumption of a grant only arises where the person against whom it is to be raised might have prevented the exercise of the subject of the presumed grant; but how could he prevent or stop the percolation of water? (*Chasemore v. Richards*, 7 H. L. C. 349.)

but may be acquired by express grant.

Where, however, a grant was made of all streams of water that might be found in certain closes, it was held that the grantor and those claiming under him could not work mines so as to divert underground water from wells in the closes. (*Whitehead v. Parks*, 2 H. & N. 870.)

Prescriptive right to discharge water upon adjoining land.

Although every one in building is bound so to construct his house as not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw the rain water upon the neighbouring land (11 Hen. 7, f. 257); yet a right by user for twenty years and upwards for the owner to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land, has been recognized. (*Thomas v. Thomas*, 2 Cr. M. & R. 34. See *Wright v. Williams*, 1 Mees. & W. 77; *Lady Browne's case*, cited in *Slaney v. Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance (A.); *Baten's case*, 9 Rep. 50, n. (b); Vin. Abr. Nuisance (G. 5).) The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot put up spouts to collect that rain and discharge it upon such land in a body. (*Reynolds v. Clarke*, Ld. Raym. 1399.) If one has a right to enter into the yard of another, and he fixes a spout there to discharge water upon the plaintiff's land, trespass will not lie, but case. (*Reynolds v. Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212.)

Building a roof with eaves, which discharge rain water by a spout into adjoining premises, is an injury for which the landlord of such premises may recover as reversioner, while they are under demise, if the jury think there is a damage to the reversion. (*Tucker v. Newman*, 11 Ad. & Ell. 40.) It was said by Lord Abinger, C. B., "that if water from the spout of the eaves of a row of houses has flowed into an adjoining yard, and been there used for twenty years by its occupiers, that the owners of the houses had not contracted an obligation not to alter the construction so as to impair the flow of water." (*Arkwright v. Gell*, 5 Mees. & W. 283.)

The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the houses shall not be pulled down or altered so as to diminish the quantity of water flowing from the roof. (*Wood v. Wand*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 293, 294.)

A declaration in case stated that the defendant, being possessed of a messuage adjoining a garden of the plaintiff, erected a cornice upon his messuage, projecting over the garden, by means whereof rain water flowed from the cornice into the garden and damaged the same, and the plaintiff had been incommoded in the possession and enjoyment of his garden. It was held, that the erection of the cornice was a nuisance, from which the law would infer injury to the plaintiff; and that he was entitled to maintain an action in respect thereof, without proof that rain had fallen between the period of the erection of the cornice and the commencement of the action. (*Fay v. Prentice*, 1 C. B. 828.) It was held, also, that the declaration was not to be construed as alleging a trespass. (*Ib.*)

The natural rights of a riparian proprietor are limited to natural streams, and do not attach in the case of artificial watercourses. (*Sampson v. Hoddinott*, 1 C. B., N. S. 590.) Prescriptive rights, however, may be acquired in artificial watercourses of a permanent character. Thus it has been laid down that a watercourse, though artificial, may have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and therefore an action will lie, by one riparian proprietor against another, for the pollution and diversion of a watercourse, although it is artificial, and was made by the hand of man. (*Sutcliffe v. Booth*, 32 L. J., Q. B. 136. See also *Beeston v. Weate*, 5 El. & Bl. 986; *Gared v. Martyn*, 19 C. B., N. S. 732; 14 W. R. 62; *Ivimey v. Stocker*, L. R., 1 Ch. 396; *Powell v. Butler*, 1 R., 5 C. L. 309.)

Of Watercourses.

Artificial water-courses of a permanent character.

Where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can be acquired by prescription against the creator of the stream. Thus it was held in *Arkwright v. Gell* (5 M. & W. 203), that a party receiving water drained from a mine has no right to compel the owners of the mine to continue such discharge. The right or interest which the proprietor of the surface where the stream issued forth, or his grantees, would have in such a watercourse, at common law, independently of the effect of user under the stat. 2 & 3 Will. 4, c. 71, was to use it for any purpose to which it was applicable so long as it continued there. An user for twenty years, or a longer time, would be no presumption of the right to the water in perpetuity; for such a grant would in truth be neither more nor less than an obligation on the mine owner not to work his mines by the ordinary mode of getting minerals below the bed drained by that watercourse, and to keep the mines flooded up to that level, in order to make the flow of water constant for the benefit of those who had used it for some profitable purposes. Lord Abinger, C. B., said, "The whole purview of the stat. 2 & 3 Will. 4, c. 71, shows, that it applies only to such rights as would before the act have been acquired by the presumption of a grant from long user. The act expressly requires enjoyment for different periods, 'without interruption,' and therefore necessarily imports such an user as could be interrupted by some one 'capable of resisting the claim,' and it also requires it to be of right. But the use of the water in this case could not be the subject of an action at the suit of the proprietors of the mineral field lying below the level of the Cromford Sough, and was incapable of interruption by them at any time during the whole period, by any reasonable mode; and as against them it was not 'of right,' they had no interest to prevent it; and until it became necessary to drain the lower part of the field, indeed at all times, it was wholly immaterial to them what became of the water, so long as their mines were freed from it. We therefore think, that the plaintiffs never acquired any right to have the stream of water continued in its former channel, either by the presumption of a grant, or by the recent statute, as against the owners of the lower level of the mineral field, or the defendants acting by their authority, and therefore our judgment must be for the defendants." (*Arkwright v. Gell*, 5 Mecs.

Of a temporary character.

No right to uninterrupted flow can be acquired by prescription against creator of stream;

Of Watercourses.

& W. 203. See observations on this case in *Magor v. Chadwick*, 11 Ad. & Ell. 571.) The right of a party to an artificial watercourse, as against the party creating it, must depend upon the character of the watercourse, and the circumstances under which it was created. The flow of water from a drain, made for the purpose of agricultural improvements, does not give a right to the neighbour so as to preclude the proprietor from altering the level of his drain for the improvement of his land. (*Greatrex v. Hayward*, 8 Exch. 291; 22 L. J., Ex. 137.)

nor against a  
superior pro-  
prietor.

Where the owners of a colliery had suffered the water pumped out of their colliery to flow along an artificial channel, it was held, that in the absence of any grant or prescriptive title, no action lay by the owner of land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners of a colliery thus getting rid of a nuisance to their works, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, but that each might take and use what passed through his land, and the proprietor of the land below had no right to any part of that water until it had reached his own land, nor had he any right to compel the owners above to permit the water to flow through their land for his benefit. (*Wood v. Waud*, 3 Exch. 748; 18 L. J., Ex. 305; 18 Jur. 472. See *Wardle v. Brocklehurst*, Ell. & Ell. 1058.) "In *Wood v. Waud* there were several questions brought before the court. One was, whether the plaintiffs had a cause of action against the defendants for diverting the waters of two artificial watercourses. The facts appear to be that those watercourses had been formed for the purpose of draining some coal pits. The water had continued to flow for more than sixty years across part of the defendants' land and then across the plaintiffs'; and there seems no doubt that the colliery owners had acquired a right to discharge the water on the defendants' land as long as they pleased, and the defendants had also acquired a right to discharge the water thus brought on their own land on to the plaintiffs'. But the Court of Exchequer decided, following their previous decision in *Arkwright v. Gell*, that inasmuch as it was obvious that the coal-owners only discharged the water for the purpose of getting rid of it, and therefore only for a temporary purpose, there was no enjoyment as a matter of right in that water as against the coal-owners. And they followed this up much further, for they held that, inasmuch as the proprietor of land below had acquired no right to require the coal-owners to continue to allow the water to flow for his benefit, so he had acquired no right as against the owners of the intermediate land to continue to allow the water which in fact flowed from the coal pits to flow as it had done. 'He has no right,' they say, 'to compel the owners above to permit the water to flow through their land for his benefit; and consequently has no right of action if they refuse to do so.'" (*Per Blackburn, J., Mason v. Shrewsbury and Hereford Railway Company*, L. R., 6 Q. B. 584.)

Right to purity of  
water in artificial  
watercourse.

Where mine owners made an adit through their lands to drain the mine, which they afterwards ceased to work, and the owner of a brewery, through whose premises the water flowed for twenty years after the working had ceased, had during that time used it for brewing; it was held, that he thereby gained a right to the enjoyment of the water in an unpolluted state, and that the owners of other mines who were not connected with, and did not claim under the makers of the adit, could not work their mines so as to pollute the water. (*Magor v. Chadwick*, 11 Ad. & Ell. 586.)

As to whether a person having a mere permission from a riparian owner to take water out of a stream can maintain an action against a wrongdoer for diverting or fouling the stream higher up, see *Whaley v. Laing* (3 H. & N. 675). The Stockport Waterworks Company sued Potter for fouling the water of the river Mersey coming to their works through a tunnel which they had made under a grant from a riparian proprietor. It was held, that they were not entitled to sue. (*Stockport Waterworks Company v. Potter*, 3 H. & C. 800.)



Before the statute 2 & 3 Will. 4, c. 71, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or act of parliament. (*Bealey v. Shaw*, 6 East, 208.) The long enjoyment of a watercourse is the best evidence of right and raises a presumption of an agreement: and proof of a special licence, or that it was limited in point of time, must come from the party who opposes the right. (*Finch v. Resbridger*, 2 Vern. 390; Gill. Eq. C. 3.) The enjoyment of water drawn from a brook along an artificial channel, and acts done by the owner of the dominant tenement upon the servient tenement, which, without the existence of an easement, would be tortious and actionable, may be evidence of a right in the owner of the dominant tenement to the use of the water. (*Beeston v. Weate*, 5 El. & Bl. 986; 25 L. J., Q. B. 115; 2 Jur., N. S. 540.)

An ancient watercourse which had supplied D.'s mill, had been in 1824, and thence until 1826, obstructed by a new road which was made across it, and the supply of water having been thus cut off, a new watercourse was constructed by D. to supply his mill through the lands of A. (through which the original watercourse had passed), and L., in 1853, obstructed the new watercourse. The lands of L. had been in the occupation of tenants from 1827 to 1853. The reversioner did not reside upon them, and the rents were received by a barrister living in Dublin, but who occasionally came to Cork (where the lands were situate) and lodged in the neighbourhood. An action having been brought by L. against D., for removing the obstruction to the watercourse, the latter claiming a title to the flow of the water, and the judge having left to the jury the presumption of a grant to D., and having also told them that they should be satisfied that such grant had been actually executed in fact: it was held, by the majority of the Court of Exchequer Chamber, that there was sufficient evidence to leave to the jury a question of presumption of a grant to D. (*Deeble v. Linehan*, 12 Ir. Com. Law Rep., N. S. 1, Exch. Cham.) It was held also, by the majority of the court, that the jury should not have been required to find that, as a matter of fact, a deed of grant had been actually executed. (*Ib*). Where the defendant had for many years past penned back a stream for the purposes of irrigation, in consequence of which the water had percolated through a porous and gravelly soil into the plaintiff's land; but this percolation had been insensible and unknown by the plaintiff until the land was applied for building purposes, the court held that no right to cause such percolation was acquired by the user, and that the adjoining owner, on receiving injury from it upon erecting a house, might bring an action for it. (*Cooper v. Barber*, 3 Taunt. 99.) Under a canal act, mill owners within a specified distance of the canal were entitled to use the water for the purpose of condensing the steam used for working their engines. In an action against such a mill owner, the declaration charged that he abstracted more water than was sufficient to supply the engine with cold water for the purpose of condensing the steam, and that he applied the water to other and different purposes than condensing steam. The plea alleged an user by him, as occupier of the mill, of the water, as of right, and without interruption for twenty years for other purposes than condensing steam; to wit, for the purpose of supplying the boiler of the engine, and of generating steam for working the engine, and of supplying a certain cistern, to wit, a cistern on the roof of a certain engine house. It was held, that the plea was bad, as the company had no right to grant the water for other purposes than for condensing steam, and that no such right could consequently be inferred from a twenty years' user by the defendant. (*Rochdale Canal Company v. Radcliffe*, 18 Q. B. 287; 18 L. J., Q. B. 297.)

For the nature of the enjoyment requisite for obtaining under the Prescription Act acquired rights with regard to water, see the note to 2 & 3 Will. 4, c. 71, s. 2, *ante*, p. 9.

By a deed between A., the owner of Greenacre, and B., the owner of Blackacre, it was agreed that A. should have, during the first ten days of every month, for the purpose of irrigation, all the water of a stream which flowed through Greenacre into Blackacre, and that at all other times the

Of Watercourses.

Acquisition of rights with regard to water.

Acquisition by enjoyment.

Presumption of grant.

By express grant.



Of Watercourses.

water should be under the control and at the disposal of B. and his assigns, and should be allowed to flow in a free and uninterrupted course towards and into Blackacre, through a channel therein partially described, and that the owner of Greenacre should cleanse and repair the said channel, with liberty for B., his heirs, &c., to do so on his default. It was held, that this deed operated as a grant to B. of an easement of the watercourse therein described at all times except the first ten days of each month, and that he thereby acquired a right in respect of that channel, and that an alteration of this channel was an injury to his right, in respect of which B. might maintain an action, although no actual damage had occurred. (*Northam v. Hurley*, 1 Ell. & Bl. 665; 17 Jur. 672; 22 Law J., Q. B. 183.)

For upwards of twenty years water had flowed through an old drain on the defendant's land, and along an ancient watercourse, and thence along a close of the defendant, called G. B., and had thence contributed to supply the plaintiff's mills, after their erection in 1845. In that year the defendant by deed conveyed to the plaintiff the close G. B., "together with all ways, watercourses, liberties, privileges, rights, members, and appurtenances to the same close belonging or appertaining," subject to the proviso, that it should be lawful for the defendant to use for manufacturing, domestic, or agricultural purposes, any water flowing from or through the contiguous lands of the defendant unto and into the close G. B., returning the surplus, or so much as remained after being used for the purposes aforesaid, into its usual channel at a certain point, so that the water should not be diverted from its then course, but be allowed to flow into the close G. B. The defendant erected a lock-up tank upon his land, and caused the water which arose on his land, near to the close G. B., and which had previously been accustomed to flow along the old drain and ancient watercourse into the close G. B., and he caused the water to be conveyed from the tank to a lower part of his land, to be used by his tenants. This water was used by them for the purposes mentioned in the proviso to the deed, but the surplus could not be returned to the close G. B.: it was held, that, by the deed, the defendant granted to the plaintiff the use of the water, subject only to the use by himself of it as specified in the proviso, and that by locking it up he had diverted it, and was liable to an action for a breach of his covenant by reason of such diversion. (*Ramstron v. Taylor*, 11 Exch. 369.)

A conveyance of land from the defendant to the plaintiff contained the following clause: "Save and except, and always reserved unto the plaintiff, his heirs and assigns, the power to enter upon the land, and to dig and make a covered sewer or watercourse through the land, in order to convey the waste water from the premises of the plaintiff into the river W., on making reasonable compensation to the defendant for any damage or injury which might be occasioned thereby, either to the surface of the ground or the buildings under which the same might be made." The plaintiff having constructed a covered drain or sewer in pursuance of the power, the defendant made an opening in it and drained his premises through it: it was held, that the reservation gave the plaintiff a right to the exclusive use of the sewer. (*Lee v. Stevenson*, 4 Jur., N. S. 950; 27 L. J., Q. B. 263.)

The privilege of a watercourse is not confined to private individuals; it may be vested in a corporation, as where there was a grant to the corporation of Carlisle of water, for the purpose of turning the city mills. (8 East, 487.)

By implied grant  
upon severance of  
tenements.

Where the owner of two or more adjoining houses sells one of them, the purchaser of such house is, without any express reservation or grant, entitled to the benefit of all the drains from his house; and is, on the other hand, subject to all the drains necessary for the enjoyment of the adjoining house. Such necessity is to be considered with reference to the time of the conveyance, and without reference to whether any other outlet could be made for the drainage. An owner of two adjoining properties, consisting of a tan-yard and a house and garden, made a cesspool in a corner of the garden, and a drain to carry the water into it from the tan-yard, which

gradually sloped down towards the garden. Afterwards he sold the two properties to different persons. The conveyances made no allusion to the existence of the drain and cesspool: it was held, that the easement passed by an implied grant with the tan-yard. (*Pyer v. Carter*, 1 H. & N. 916; 26 L. J., Ex. 258. See *Ewart v. Cochrane*, 4 Macq. H. L. C. 117; 10 W. R. 3.) This decision has been questioned by Lord Westbury, who (speaking of the doctrine of implied grant or reservation upon the disposition of one of two adjoining tenements by the owner of both) said that it was correct to state that on the grant by the owner of an entire heritage of part of that heritage, as it was then used and enjoyed, there would pass to the grantee all those continuous and apparent easements which had been and were at the time of the grant used by the owners of the entirety for the benefit of the parcel granted. But he could not agree that the grantor could derogate from his own absolute grant so as to claim rights over the thing granted, even if they were at the time of the grant continuous and apparent easements enjoyed by an adjoining tenement, which remained the property of the grantor. His lordship confined his remarks to cases where the easement claimed had no legal existence anterior to the unity of possession. (*Suffield v. Brown*, 33 L. J., Ch. 249; 12 W. R. 356. See, however, *Watts v. Kelson*, L. R., 6 Ch. 166.) In 1860 the owner of closes A. and B. made a drain from a tank on B. to a lower tank on B., and laid pipes from the lower tank to cattle sheds on A. for the purpose of supplying them with water: and they were so supplied when the owner sold A. to the plaintiff with all waters, watercourses, &c., to the same hereditaments and premises belonging or appertaining, or with the same or any part thereof, held, used, enjoyed or reputed as part thereof, or as appurtenant thereto. The plaintiff had the use of the water after his conveyance until the defendant, a subsequent purchaser of B., stopped it. Held, that the watercourse was a continuous easement necessary for the use of A., and would have passed by implication on the conveyance of A. without any words of grant: and that supposing the easement to be only convenient and not necessary, the general words were sufficient to pass it. (*Watts v. Kelson*, L. R., 6 Ch. 166.)

A grant of the right to pollute a stream was implied in *Hall v. Lund* (1 H. & C. 676; 11 W. R. 271).

As a general rule, it requires a deed to create a right and title to have a passage for water. (4 East, 107; 5 B. & Cr. 233.) As to creating rights with regard to water by parol licence, see *Liggins v. Inge* (7 Bing. 682), and the note on licences, p. 59, *ante*.

As to the acquisition by custom of a right to divert water in Devonshire, see *Bastard v. Smith* (2 M. & Rob. 129); and in Cornwall, *Gaved v. Martyn* (19 C. B., N. S. 732; 14 W. R. 62). For a customary right to pollute water, see *Carlyon v. Lovering* (1 H. & N. 784; 26 L. J., Ex. 251; 5 W. R. 347); and for a customary right to the use of water, see *Harrop v. Hirst*, (L. R., 4 Ex. 43).

Whether a riparian proprietor may use the water of a stream for the purpose of irrigation, if he again return it into the river with no other diminution than that caused by the absorption and evaporation attendant on the irrigation, depends on the circumstances of each particular case. The right of taking of water for such a purpose is a question of degree, and it is impossible to define precisely the limits which separate the reasonable and permitted use of the stream from its wrongful application. If the irrigation take place not continuously but only at intermittent periods, when the river is full, and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is such a reasonable use of the water as is not prohibited by law. (*Embrey v. Owen*, 6 Exch. 372; see *Sampson v. Hoddinott*, 1 C. B., N. S. 603.) The water of a natural watercourse having been used by a mill owner, whose mills were situated above the plaintiff's mills, for manufacturing purposes, and returned again to the stream, except about five per cent. of that used, which had been lost by evaporation: it was held, that this was a sufficient amount of injury to entitle the plaintiffs to a verdict upon the issue of not guilty. (*Wood v. Waud*, 3 Exch. 748; 18 L. J., Ex. 805.)

Of Watercourses.

By licence.

By custom.

Extent and mode of enjoyment of rights with regard to water.

Irrigation.

Of Watercourses.

It was held that the diversion of the water of a river by means of pipes, for the use of a lunatic asylum and county gaol, was a user more extensive than that to which a riparian proprietor as such was entitled. (*Medway Navigation Company v. Earl of Romney*, 9 C. B., N. S. 575; 9 W. R. 482.) A railway company were not allowed to take the water of a river for the purpose of supplying their locomotives. (*Att.-Gen. v. Great Eastern Railway Company*, L. R., 6 Ch. 572.)

Where one riparian proprietor had by means of a water-wheel raised and diverted from the premises of another proprietor, about one-fortieth part of the volume of a stream, it was held, that it was for the jury to consider whether he had thereby inflicted on the other any sensible or material injury. (*Lord Norbury v. Kitchin*, 8 F. & F. 292.)

By an award made by the commissioners under an inclosure act, certain drains were set out, and it was ordered that the owners or occupiers of the land over which such drains respectively passed should make and cleanse, and keep the same of sufficient width and depth to carry off the water intended to run down such drains: it was held, that the plaintiff was not thereby authorized to make a sough or underdrain on his land, so as to cause an increased quantity of water to pass into one of the awarded drains. (*Sharpe v. Hancock*, 8 Scott, N. R. 46.) It was provided by an act of parliament, that it should be lawful for certain inclosure commissioners to set out and make such ditches, watercourses and bridges of such extent and form, and in such situations as they should deem necessary in the lands to be inclosed: and also to enlarge, cleanse or alter the course of, and improve any of the existing ditches, watercourses or bridges, as well in and on the same lands, as also in any ancient inclosures, or other lands in the township as they should deem necessary: held, that the act did not empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain which flowed through the common lands from another township, and thereby to obstruct the drainage of the lands in such other township, to the damage and injury of the owners of such lands. (*Dawson v. Paver*, 5 Hare, 415; 4 Rail. C. 81; 16 L. J., Ch. 274; 11 Jur. 766; affirmed by L. C., 30th July, 1847.)

In a lease of certain premises with their appurtenances, the lessor reserved out of the demise the free running of water and soil coming from any other buildings and lands contiguous to the premises thereby demised in and through the sewers and watercourses made or to be made within, through or under the said premises: held (1), that the reservation extended to water and soil coming from contiguous lands and buildings, whether that water or soil in the first instance actually arose on or from such contiguous lands or buildings or not; and (2), that it only extended to water in its natural condition, and such matters as are the product of the ordinary use of land for habitation, and not to the refuse of tan-pits. (*Chadwick v. Marsden*, L. R., 2 Ex. 285.)

## Extent of right to pollute.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people. (*Crossley v. Lightowler*, L. R., 2 Ch. 478.) Where the sewage of a town had for many years been drained by commissioners under a local act into a stream passing through the plaintiff's land, which was beyond their district, without perceptibly polluting it, but for some years before the filing of the bill, in consequence of the increase of the town, the stream became perceptibly polluted, and continued to increase in impurity; an injunction was granted, restraining the commissioners from draining the town into the stream, so as to pollute the water to the injury of the plaintiff. (*Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R., 1 Ch. 349.)

Defendant, the owner of an ancient paper mill, where the paper had been made from rags, introduced a new vegetable fibre, and carried on the works upon the same scale for making paper from this new material. For more than twenty years before the change the refuse from the mill had been discharged into a stream which ran past the plaintiff's house. Held, that the easement to which the defendant was entitled was to be presumed to be a right to foul the stream by discharging into it the washings produced by the manufacture of paper in the reasonable and proper course of such

manufacture, using any proper materials for the purpose, but not increasing the pollution: and that the onus lay upon the plaintiffs to prove any increase of pollution. (*Baxendale v. M'Murray*, L. R., 2 Ch. 790.)

If one has anciently pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them (*Brown v. Best*, 1 Wils. 174), nor change the channels from a river to the prejudice of another owner. (*Duncombe v. Randall*, Hetl. 32.) It is not necessary that the mode of enjoying a watercourse should always have been precisely the same; for where, in an action for a nuisance to a watercourse, the plaintiff declared on his possession, and stated the mill to be an ancient one, it was held to be no defence, that he had within twenty years somewhat altered the wheels. (*Saunders v. Newman*, 1 B. & Ald. 258.) In which case it was said by Abbott, J., "that the owner is not bound to use the water in the same precise manner, or to apply it at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made from time to time prejudiced the right of the lower mill, the case would be different; but here the alteration is by no means injurious, the old wheel drew more water than the new one." (*Ib.* See *Luttrell's case*, 4 Rep. 87 a.)

A right to a watercourse is not destroyed by the owners altering the course of the stream, and the owner may establish his claim, notwithstanding an interruption within twenty years of his action brought to enforce the right. Where the plaintiff had a right to water flowing from the defendant's land across a lane to his own land, and it appeared that "formerly the stream meandered a little down the lane before it flowed into the plaintiff's land, and that in the year 1835 the plaintiff, in order to render its enjoyment more commodious to himself, a little varied the course, by making a straight cut direct from the opening or spout under the defendant's hedge across the lane to his own premises," and this, it was contended, negatived the right claimed in the declaration, *Tindal*, C. J., said, "If such an objection as this were allowed to prevail, any right, however ancient, might be lost by the most minute alteration in the mode of enjoyment; the making straight a crooked bank or footpath would have this result. No authority has been cited, nor am I aware of any principle of law or common sense upon which such an argument could base itself." (*Hall v. Swift*, 6 Scott, 167; 4 Bing., N. R. 381. See *ante*, p. 20.) Where a person who had a right to send down clean water through a gutter, sent down foul water, so that it was impossible to stop the nuisance without altogether interfering with his enjoyment, it was held that the whole enjoyment might be obstructed. (*Camkwell v. Russell*, 26 L. J., Ex. 34; see *Hill v. Cock*, 26 L. T., N. S. 185.) A right to a watercourse which had been used to supply cattle sheds was held not to be lost by the erection of cottages in the place of cattle sheds. (*Watts v. Kelson*, L. R., 6 Ch. 166.)

If an ancient ditch has at one end anciently opened into a stream, and the owner of a mill on the stream has kept the opening at the end of the ditch closed for twenty years and more, without interruption, that would give the mill-owner such a right to keep it shut up, that the owner of the land adjoining the ditch would not be justified in reopening the communication, although it might appear that the communication between the ditch and stream was ancient. (*Drewett v. Sheard*, 7 Car. & P. 465.) If the owner of a water-mill worked by a ground-shot wheel at a low head of water alter the wheel to a breast-shot wheel, which requires a high head of water, and after that for twenty years and more discontinue the use of the breast-shot wheel, and resume the use of the ground-shot wheel, his discontinuance will cause the mill-owner to lose his right to the high head of water. (*Ib.*) The right to the overflow of water into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds; a substitution of such a nature, and the exercise of the right in a different spot, not being an abandonment of the right. (*Hale v. Oldroyd*, 14 Mees. & W. 789.) The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without some evidence of an intention to abandon it: but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, it was held that any right of fouling a

Of Watercourses.

Alteration in mode of enjoyment.

Extinction by alteration.

Extinction by abandonment.

Of Watercourses. stream attached to them was lost. (*Crossley v. Lightowler*, L. R., 2 Ch. 478.)

By unity of ownership.

It seems that nothing of necessity to a building, *e. g.* a gutter in *alieno solo*, to carry off water, &c., is extinguished by unity of ownership. (*Pheysey v. Vicary*, 16 Mees. & W. 484.) In *Shury v. Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145), which was an action on the case for stopping a watercourse, the court held, that the right to the flow of water is not extinguished by unity of ownership, in which respect it is distinguished from a way. *Whitlock, J.*, says (3 Bulstr. 340), "There is a difference between a way, a common and a watercourse. Bracton (lib. 4, fol. 221—2) calls them *servitutes prædiales*; those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure naturæ*, having taken this course naturally and cannot be averted." (See *Pyer v. Carter*, 1 H. & N. 916.)

Remedies for disturbance of rights with regard to water.

Abatement.

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it. (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41.) An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public. (*Colchester (Mayor, &c. of) v. Brooke*, 7 Q. B. 339.) In an action for breaking the plaintiff's close, and destroying a hatch, the defendant pleaded that the water of the stream ought to have flowed to his mill, and because the hatch prevented its so doing, he pulled it down; evidence may be given as to what a former tenant said as to asking permission to have the water, as this is an act done, and may be proof of an exercise of a right by one side, and of an acquiescence in it by the other. (*Wakeman v. West*, 8 Car. & P. 105.) Plaintiffs by parol licence from L. and the defendant constructed a watercourse, and thereby discharged the water from their own mines across the land of L. and thence across the land of the defendant. Defendant having revoked his licence, upon the plaintiffs' refusal to discontinue using the watercourse, entered upon the land of L. at a spot near the boundary between it and the land of the plaintiffs, and obstructed the watercourse. Defendant, by stopping the watercourse on his own land, would have done less damage to the plaintiffs than was actually done, but more damage to L., and possibly some damage to the public. Held, that the watercourse was obstructed in a reasonable manner, inasmuch as the convenience of the plaintiffs, who after revocation of the licence were wrongdoers, was subordinate to the convenience of innocent third persons and the public. (*Roberts v. Rose*, L. R., 1 Ex. 82.) Where there is excessive user by the owner of the dominant tenement, the owner of the servient tenement, if he abates the nuisance, is bound to do so in the most reasonable manner. (*Hill v. Cook*, 26 L. T., N. S. 185.)

Remedy by indictment.

When the injury from a nuisance in respect of water is an injury to all the Queen's subjects the remedy is by indictment. (*Rex v. Bristol Dock Company*, 12 East, 429.) And where an indictment can be maintained there is no remedy by action without proof of individual damage. But the same principle does not apply where the injury complained of is not one affecting the public generally, but only a particular class or section of persons. (*Harrop v. Hirst*, L. R., 4 Ex. 47.)

Remedy by action.

Proof of actual damage not necessary in actions for diversion and obstruction.

It has been said, that the mere obstruction of the water, which has been accustomed to flow through the plaintiff's lands, does not *per se* afford any ground of action: some benefit must be shown to have arisen from the water going to his lands; or at least it is necessary to show that some deterioration was occasioned to the premises by the subtraction of the water. (*Williams v. Morland*, 2 B. & C. 915; *S. C.*, 4 Dowl. & Ryl. 583.) It is not clear that an occupier of land may not recover for the loss of the general benefit of water flowing through his land, without a special use or damage shown. (*Palmer v. Keblethwaite*, 1 Show. 64; *S. C.*, Skinn. 65; *Glynne v. Nicholas*, 2 Show. 507; *S. C.*, Comb. 43; *Mason v. Hill*, 5 B. & Ad. 26, 27.) Whenever an injury is done to a right, actual perceptible damage is not indispensable as the foundation of an action, but it is sufficient to show the



violation of the right, and the law will presume damage. (*Embrey v. Owen*, 6 Exch. 353.) It seems that actual damage is not now necessary to enable a riparian proprietor to maintain an action for the obstruction or diversion of a natural stream. (*Sampson v. Hoddinott*, 1 C. B., N. S. 590; 5 W. R. 230; 26 L. J., C. P. 148; *Harrop v. Hirst*, L. R., 4 Ex. 43.)

If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each of them being entitled to recover his respective loss. (*Biddlesford v. Onslow*, 3 Lev. 209; *Queen's College v. Hallett*, 14 East, 489; 1 Wms. Saund. 567, ed. 1871; *Jesser v. Gifford*, 4 Burr. 2141; Com. Dig. Action on the Case for Nuisance (B). See *Brown v. Mallett*, 5 C. B. 599.)

Of Watercourses.

Actions by reversioner.

It is no defence to an action by a reversioner, for an injury to the reversion, in not repairing a gutter for the conveyance of water through the plaintiff's land to the defendant's mill, whereby the water oozed through the gutter, and carried away the soil of the close, that the defect in the gutter was occasioned by the plaintiff's tenant; for the owner of the reversion was suing for a permanent injury to his estate, and he could not be met with the answer that the injury arose out of the wrongful act of the tenant, for which the defendant might have maintained an action against him. (*Lord Egremont v. Pulman*, 1 Moo. & Malk. 403.)

In case of an injury to the plaintiff's reversionary interest, by the defendant's obstruction of a watercourse on his land, and thereby sending water upon and under the house and land in the occupation of the plaintiff's tenant, the defendant pleaded, that the obstruction was caused by the neglect of the plaintiff's tenant to repair a wall on the demised land; that, in consequence it fell into the watercourse, and caused the damage; and that within a reasonable time after the defendant had notice, he removed it: the plea was held to be bad, it not appearing by whom, or under what circumstances, the wall which fell into the watercourse was built, or that it was connected with any benefit to be derived from it to any persons claiming reversionary interests in the property. If the defendant was liable, on general principles, to cleanse and open the watercourse, it was no defence for an antecedent injury, that he did so as soon as he had notice of such injury. (*Bell v. Twentymen*, 1 Gale & D. 223; 1 Q. B. 766; and see *Peter v. Daniel*, 5 Dowl. & L. 501; 5 C. B. 568.)

It has been held that an action will lie for the continuance of a nuisance. (*Todd v. Flight*, 9 C. B., N. S. 377; *Reg. v. Bradford Navigation*, 6 B. & S. 631; 13 W. R. 892.) The defendants were owners of the soil of a stream which supplied water to two print-works. A., whilst occupier of both print-works, erected a weir across the stream and thereby diverted the water from one of the works. The plaintiff becoming lessee of the last-mentioned work, and entitled to the water of the stream, removed the weir. A. afterwards, without any authority from the defendants and against their will, replaced the weir. Held, that the defendants were not responsible for the act of A. or for the continuance of the nuisance. (*Saxby v. Manchester and Sheffield Railway Company*, L. R., 4 C. P. 198.)

Action for continuance of nuisance.

A right to take water from a well, by reason of the occupation of a dwelling-house, and for the more convenient occupation thereof, is an interest in land; therefore, where nominal damages had been recovered in an action for disturbing such a right (on an issue traversing that the plaintiff was entitled to the use of the well in manner, &c.), and the judge at Nisi Prius certified that the damages were under forty shillings, it was held, that the plaintiff was entitled to his full costs, under stat. 43 Eliz. c. 6, s. 2. (*Tyler v. Bennett*, 4 Ad. & El. 377. See stat. 3 & 4 Vict. c. 24; *Shuttleworth v. Cocker*, 2 Scott, N. R. 47; *Thompson v. Gibson*, 5 Jur. 390.)

The following form is given in the schedule to the Common Law Procedure Act, 1852: "That the plaintiff was possessed of a mill, and by reason thereof was entitled to the flow of a stream for working the same, and the defendant, by cutting the bank of the said stream, diverted the water thereof away from the said mill."

The expenses of surveying and taking levels, in order to ascertain whether a weir had been improperly raised to the prejudice of the plaintiff's



Of Watercourses.

## Action for pollution.

water-mill, will not be allowed him on taxation. (*Ormorod v. Thompson*, 16 Mees. & W. 860.)

A riparian proprietor has a right of action for pollution of the water of a stream, except a right to pollute has been acquired by user. (*Wood v. Waud*, 3 Exch. 748; *Mugor v. Chadwick*, 11 Ad. & El. 571.)

To an action for polluting a stream and impregnating it with noxious substances, whereby the plaintiff's cattle were unable to drink the water, the defendant pleaded an immemorial right to use the water of the stream for the purposes of his trade of a tanner and fellmonger, and returning it polluted to the stream so used, and also prescriptive rights for twenty and forty years. At the trial it appeared that the defendant and his father and grandfather had for a long series of years carried on the business of tanners at the place in question, using the water of the stream as they wanted it, but that within the last twelve years the tannery business had been considerably enlarged and the business (and consequently the pollution of the stream) increased fourfold. Without leaving anything to the jury, the judge ruled that the defendant was entitled to a verdict on all the issues, except the first and second: it was held, that, whether the pleas were to be understood as claiming an immemorial or a prescriptive right to use the water for the purposes of the tannery, or the more limited right to use the water for the purposes of the business as carried on more than twenty years ago, the verdict was not warranted by the evidence. (*Moore v. Webb*, 1 C. B., N. S. 673.)

A declaration alleged that the plaintiff was possessed of steam-engines and boilers, and used, had and enjoyed the benefit and advantage of the waters of a branch canal to supply the same, and which waters ought to have flowed and been without the fouling or pollution thereafter mentioned; yet the defendant wrongfully discharged into the water of the canal foul materials, and thereby rendered the waters foul, whereby the plaintiff's engines and boilers were injured. The defendant pleaded not guilty, and that the waters of the canal ought not to have flowed and been without the fouling mentioned. An arbitrator, to whom the cause was referred, found that the plaintiff, by permission of a canal company, made a cut from the canal to his own premises, by which water got to those premises, and with which water he fed the boilers of his engines. The defendant, without any right or permission from the company, fouled the water in the canal, whereby the water, as it came into the plaintiff's premises, was fouled, and by the use of it the plaintiff's boilers were injured. Judgment having been given for the plaintiff: it was held, in the Exchequer Chamber, by *Williams, Crowder and Willes, Js.*, that the verdict upon the issue joined on the second plea ought to be found for the plaintiff; by *Wightman, Erle and Crompton, Js.*, that the verdict on that issue ought to be found for the defendant. (*Laing v. Whaley*, 3 H. & N. 675; 4 Jur., N. S. 930; 27 L. J., Ex. 422.) It was held, also, by *Erle, Crowder, Crompton and Willes, Js.*, that the declaration was good after verdict; by *Wightman and Williams, Js.*, that the judgment ought to be arrested. (*Ib.* See *Whaley v. Laing*, 2 H. & N. 476; 26 L. J., Ex. 327.)

Where to an action for carrying on a trade in such a manner as to cause injury to plaintiff by polluting water, defendant relies for defence upon the fact of the trade being carried on in a reasonable and proper manner, the onus of proving that it is so carried on is on defendant, and not on plaintiff, of showing that it is not so carried on. The carrying on of a lawful trade in the usual manner is not necessarily the carrying it on in a reasonable and proper manner. (*Stockport Waterworks Company v. Potter*, 7 H. & N. 160. See *Bamford v. Turnley*, 3 B. & S. 66.)

Where an action had been brought by a person who owned mills situate on a natural stream against the defendants for polluting the water, and the facts were that the defendants had polluted the water by pouring soap-suds, &c., but that such pollution had done no damage to the plaintiff, because the stream was already so polluted by similar acts of mill-owners above the defendants' mills, that the wrongful act of the defendants made no sort of practical difference: it was held, nevertheless, that upon the issue of not guilty the plaintiff was entitled to have that issue found for him. (*Wood v. Waud*, 3 Ex. 748.)

In an action on the case for erecting a cesspool near a well, and thereby contaminating the water of the well, the plea of not guilty puts in issue both the fact of the erection of the cesspool, and that the water was thereby contaminated. (*Norton v. Scholefield*, 9 Mees. & W. 665.)

If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed. (*Alston v. Grant*, 3 Ell. & Bl. 128.)

By 23 & 24 Vict. c. 77, s. 8, any person doing any act whatsoever whereby any fountain or pump is wilfully or maliciously damaged, or the water of any well, fountain or pump is polluted or fouled, is liable, upon summary conviction before two justices, to forfeit 5*l.*, and a further sum, not exceeding 20*s.*, for every day during which such offence is continued after written notice from the local authority in relation thereto; but this provision does not extend to any offence provided against by the 23rd section of the Nuisances Removal Act, 1855.

The cleansing and repairing of drains and sewers is *prima facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such. (*Brent v. Haddon*, Cro. Jac. 555; *Cheetham v. Hampson*, 4 T. R. 319; *Boyle v. Tamlyn*, 6 B. & C. 329.) Therefore a declaration in case for omitting to cleanse and repair drains and sewers, whereby the plaintiff's adjacent premises suffered damage, is bad on general demurrer, if it charge the defendant as the "owner and proprietor" of such drains and sewers, unless it also allege some ground of liability. The words "owner and proprietor" do not necessarily import that the party is occupier, and were used in this declaration in contradistinction to occupier. (*Russell v. Shenton*, 3 Q. B. 449. See *Rex v. Kerrison*, 1 Mau. & S. 435; *Ballard v. Harrison*, 4 Mau. & S. 387; *Tenant v. Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne v. Rogers*, 2 H. Bl. 349; *Rex v. Peddy*, 1 Ad. & E. 822.) If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it. (*Pomfret v. Ricroft*, 1 Saund. 320. See *ante*, p. 80.)

The commissioners of sewers have not such a possession in their works as to enable them to maintain an action of trespass against wrong-doers; therefore when they brought an action of trespass against the commissioners of a harbour for pulling down a dam erected by the former across a navigable stream, and had obtained a verdict, the court above ordered a nonsuit to be entered. (*Duke of Newcastle v. Clark and others*, 8 Taunt. 602.) Commissioners of sewers may now acquire the legal interest and constructive possession of land and works under 3 & 4 Will. 4, c. 22, for amending the laws relating to sewers. See sections 24, 38, 47, 57. The stat. 3 & 4 Will. 4, c. 22, s. 47, enacts, that "the property of and in all lands, tenements, hereditaments, buildings, erections, works and other things, which shall have been, or shall hereafter be purchased, obtained, erected, constructed, or made by or by order of, or which shall be within or under the view, cognizance or management of any commissioners of sewers, with the several conveniences, &c., shall be, and the same are hereby vested in the commissioners of sewers." It was held, that this section had not the effect of vesting in the commissioners of sewers the property in all lands under their "view, cognizance or management." Lord Abinger, C. B., thought the object of the statute was to enable the commissioners for the time being to exercise a proprietary right over such lands as they might purchase under the act; and Parke, B., was of opinion that the effect of the act was, that lands purchased by one set of commissioners might be held also by subsequent commissioners, under whose survey the lands might be, in the nature of a corporation. (*Stracey v. Nelson*, 12 Mees. & W. 535.) The laws relating to sewers are further amended by 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 138.

The plaintiff and the defendant occupied adjoining collieries. A predecessor of the defendant, but with whom he had no privity, committed a

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trespass, and made holes, called "thyrings" in a barrier (of coal belonging to the plaintiff), which separated the two collieries. The defendant, in working his mine, broke down a seam of coal of his own, and the consequence was, that the water flowed from his mine into the plaintiff's through the "thyrings:"—it was held, that there was no duty on the defendant to prevent the water from flowing from his mine into the plaintiff's, and that he was not liable to the plaintiff for the damage occasioned by the inundation. (*Smith v. Kendrick*, 7 C. B. 564; 13 Jur. 362; 18 L. J., C. P. 172. See *Clegg v. Dearden*, 12 Jur. 848; 17 Law J., Q. B. 233.) On the other hand, where the defendant, the owner of an upper mine, pumped water into his mine which flooded a lower mine belonging to the plaintiff, it was held, that the defendant was liable for the damage so occasioned. (*Baird v. Williamson*, 15 C. B., N. S. 376.) These decisions were followed by the House of Lords in a case which arose as to liability for the escape of water from a mine; and it was laid down, that where the owner of land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned. (*Rylands v. Fletcher*, L. R., 3 H. L. 330. See *Carstairs v. Taylor*, L. R., 6 Ex. 217.)

As to the relief in equity in the case of the escape of water into a mine, see *Westminster Brymbo Coal Company v. Clayton* (36 L. J., Ch. 476).

## Relief in equity as to watercourses.

A bill in equity will lie for the establishment of the enjoyment of a watercourse, and for the performance of a covenant to cleanse it. (*Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; Gilb. Eq. C. 3; *New River Company v. Graves*, 2 Vern. 431.) And it was held, that a man who had been in possession of a watercourse sixty years might bring a bill against a mortgagee, who foreclosed the equity of redemption, to be quieted in the possession, although he had not established his right at law. (*Bush v. Western*, Prec. Ch. 530. See *Duke of Dorset v. Girdler*, *Id.* 531.) The diversion of watercourses, or the pulling down their banks, and causing inundation, are nuisances against which a court of equity will protect parties by injunction, and in some cases without first bringing an action at law. (*Martin v. Stiles*, Mos. 144; see 1 Ves. sen. 476; 2 Atk. 302; 3 Atk. 726; 1 Vern. 120, 129.) An injunction may be granted on the ground of danger to property. Where the defendant, having large pieces of water in his park, supplied by the stream flowing to the plaintiff's mill, had at one time stopped the water, and at another time let it out in such quantities as to endanger the mill: although the court will not restrain what has been enjoyed twenty years, yet it will interpose where a different mode of enjoyment, calculated to do mischief, is used; and an injunction was granted for restraining the defendant from using dams, &c., so as to prevent the water flowing in such regular quantities as it had done on a particular day. (*Robinson v. Lord Byron*, 1 Br. C. C. 588; see *Anon.*, 1 Ves. jun. 140; *Orowder v. Tinkler*, 19 Ves. 620.) An injunction was granted before answer to restrain the defendant from removing a bank, which formed the plaintiff's only protection from inundations of the sea, on account of the irreparable injury the plaintiff was likely to sustain. (*Chalk v. Wyatt*, 3 Mer. 688.)

## Obstruction.

An injunction was granted against the obstruction of the flow of water through a goit in the defendant's land to the plaintiff's mill. (*Dewhurst v. Wrigley*, 1 C. P. Coop. 319.) By mining operations the defendant had sunk not only the level of a stream supplying the plaintiff's mill, but also that of the adjoining land. The plaintiff filed a bill for an injunction, but it did not appear that there had been any diminution of the supply of water to the mill: it was held that the bill ought not to be dismissed; and on the defendant undertaking not to work the minerals so as to obstruct the water and the supply thereof along the watercourse, it was retained, with liberty to apply. The court, however, intimated that in default of the undertaking being given, an injunction would be granted. (*Elwell v. Crowther*, 31

Beav. 163.) A riparian owner has a right, irrespective of any actual damage sustained by him, to complain of an obstruction to a stream. (*Lord Norbury v. Kitchen*, 15 L. T., N. S. 501.)

The share of each riparian proprietor on the opposite sides of a river belongs to him in severalty and extends *usque ad medium filum aquæ*: but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream: and a perpetual interdict was granted to restrain such an encroachment. (*Bickett v. Morris*, L. R., 1 H. L. Sc. 47.) Where a riparian proprietor on a tidal navigable river filed an information and a bill to restrain an opposite riparian proprietor from constructing a jetty so as to injure the plaintiff's property and interfere with the navigation, it was held, that, although the plaintiff proved no serious injury to his property, he was entitled to an injunction. (*Att.-Gen. v. Earl of Lonsdale*, L. R., 7 Eq. 377.) A statute which gave a corporation the right to abate obstructions in a river on giving compensation to the owner of the adjoining land was held not to entitle the corporation to file a bill to restrain the erection of a pier in the river. (*Corporation of Exeter v. Earl of Devon*, L. R., 10 Eq. 282.)

The defendant diverted a stream as it passed through his premises, but restored it undiminished as to the quantity of water to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream while on his premises in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's land, was freed to the utmost possible extent from any noxious ingredient with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances the Lord Chancellor dissolved an injunction which had been granted by the Vice-Chancellor, restraining the defendant from diverting and using the water. (*Elmhirst v. Spencer*, 2 Mac. & G. 45.) It was said by Lord Cottenham that the plaintiff before he can ask for an injunction must prove that he has sustained such a substantial injury by the acts of the defendants as would have entitled him to a verdict at law in an action for damages. (*Ib.*) An injunction was granted to restrain a landowner from draining his own land so as to draw off water flowing in a defined surface channel through the adjoining land. (*Grand Junction Canal Company v. Shugar*, L. R., 6 Ch. 488.)

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Diversion.

Pollution.

General grounds upon which equity will interfere.

The grounds upon which a court of equity will interfere by injunction, in the case of pollution of the water of a stream, were thus laid down by Kindersley, V.-C.: "If parties have established such a legal right as the plaintiffs in this case have established, and another person comes and erects works on the same stream above their works, and by his manufacturing process so fouls the water of the stream as seriously and continuously to obstruct the effective carrying on of their manufacture; and if the granting of an injunction will restore or tend to restore those parties to the position in which they previously stood, and in which they have a right to stand; and if the injury complained of is of such a nature that damages will not be an adequate compensation, that is, such a compensation as will in effect, though not in specie, place them in the position in which they previously stood; and if, moreover (for there are several conditions), they use due diligence in vindicating their rights; they have in general a right to come to a court of equity and say, 'Do not leave us to bring action after action for the purpose of recovering damages; but interfere, with a strong hand, and prevent the continuance of the acts we complain of, in order that our legal right may be protected and preserved to us.'" (*Wood v. Sutcliffe*, 2 Sim., N. S. 165.)

Applications to the court to restrain the pollution of a stream should not be made upon trivial matters; but, on the other hand, it does not appear that anything like large or heavy damages must be recovered before the plaintiff can be assisted. (*Per Wood*, V.-C., *Lingwood v. Stowmarket Company*, L. R., 1 Eq. 79.) A riparian proprietor can maintain a suit to restrain the fouling of the water of the river without showing that the fouling is actually injurious to him. (*Crossley v. Lightowler*, L. R., 2

Actual injury not necessary.

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Ch. 478; and see as to actual injury, *Bickett v. Morris*, L. R., 1 H. L. Sc. 47.)

## Previous pollution no justification.

The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one. (*Crossley v. Lightowler*, L. R., 2 Ch. 478. See *Wood v. Waud*, 3 Exch. 748; *Att.-Gen. v. Leeds Corporation*, L. R., 5 Ch. 583.)

## Pollution by sewage of towns.

Commissioners acting under a local act of parliament were restrained from draining a town into a stream so as to pollute the water to the injury of a riparian proprietor. (*Goldsmid v. Tunbridge Wells Improvement Commissioners*, L. R., 1 Ch. 349, where the earlier cases are quoted.) It was said in that case by *Turner*, L. J., "I adhere to the opinion which was expressed by me and by the Lord Chancellor in the *Attorney-General v. Sheffield Gas Consumers' Company* (3 D., M. & G. 304), that it is not in every case of nuisance that this court should interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it." (*Ib.* 355.)

## Injury must be substantial.

The injury must be substantial. (*Lillywhite v. Trimmer*, 15 W. R. 763.) A bill and information filed to restrain a local board of health of a town from discharging sewage into a river were dismissed with costs on the ground that the injury proved was trifling. (*Att.-Gen. v. Gee*, L. R., 10 Eq. 131.)

Where a plaintiff has proved his right to an injunction against a nuisance or other injury, it is no part of the duty of the court to inquire in what way the defendant can best remove it. The plaintiff is entitled to an injunction at once, unless the removal of the injury is physically impossible, and it is the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. But when the difficulty of removing the injury is great the court will suspend the operation of the injunction for a time, with liberty to the defendants to apply for an extension of time. (*Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 146. See *Att.-Gen. v. Borough of Birmingham*, 19 W. R. 561.) Where no order could be made against a highway board to compel them to stop up a sewer which occasioned a nuisance by draining into a stream, an injunction was granted restraining them from allowing any fresh communication to be made with the sewer. (*Att.-Gen. v. Richmond*, L. R., 2 Eq. 306.)

## Acquiescence and delay in case of pollution.

The doctrine of acquiescence, as applied to the right of riparian proprietors to restrain the pollution of a stream by sewage, was considered in *Att.-Gen. v. Corporation of Halifax* (17 W. R. 1088); and as to delay in such a case, see *Att.-Gen. v. Proprietors of Bradford Canal* (L. R., 2 Eq. 71); *Att.-Gen. v. Leeds Corporation* (L. R., 5 Ch. 583).

## Former practice as to granting injunctions in cases of nuisance where plaintiff's legal right denied.

According to the former practice a court of equity would not grant a perpetual injunction against an alleged nuisance where the plaintiff's legal right was denied, without a previous trial at law. (*Att.-Gen. v. Cleaver*, 18 Ves. 211, 218; *Dewhurst v. Wrigley*, C. P. Coop. 319; *Motley v. Downham*, 3 M. & Cr. 1, 14; *Elmhirst v. Spencer*, 2 M. & G. 45. And see the rule with respect to interposing by injunction between public companies or trustees, in cases of apprehended mischief or nuisance, laid down by Lord *Brougham* in *Earl of Ripon v. Hobart*, 3 M. & K. 179.)

## Present practice: court must determine every question of law and fact incident to the relief sought.

Now, however, the Court of Chancery has been empowered to cause questions of fact arising in any suit or proceeding to be tried before itself with or without a jury. (21 & 22 Vict. c. 27, ss. 3, 5.) It has further been enacted, that in all cases in which any relief or remedy, within the jurisdiction of the Court of Chancery, or the Court of Chancery of the county palatine of Lancaster respectively, is or shall be sought in any cause or matter instituted or pending in either of the said courts, and whether the title to such relief or remedy be or be not incident to or dependent upon a legal right, every question of law or fact cognizable in a court of common law, on the determination of which the title to such relief or remedy depends, shall be determined by or before the same court. (25 & 26 Vict. c. 42, s. 1.)



Where questions of fact may be more conveniently tried at assizes, issues may be directed. (Sect. 2.) And there is a proviso that nothing in that act shall make it necessary for a court of equity to grant relief in any suit concerning any matter as to which a court of common law has concurrent jurisdiction, if it shall appear to the court that such matter has been improperly brought into equity, and that the same ought to have been left to the sole determination of a court of common law. (Sect. 4.)

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It seems that since these acts the court must deal with the question of nuisance or no nuisance in the same way as it deals with any other question within its jurisdiction depending on a disputed matter of fact. (*Inohbald v. Robinson*, L. R., 4 Ch. 397; *Roskell v. Whitworth*, L. R., 5 Ch. 463; S. C., before *Bacon*, V.-C., 19 W. R. 804.) And see further, as to the practice under these acts, *Morgan's Chancery Acts and Orders*, 264, 4th ed.; *Daniell's Ch. Pr.* 940, 5th ed.

The object of an interlocutory injunction is to keep matters in the suit *in statu quo* until the hearing of the cause. (*Lawrence v. Austin*, 13 W. R. 981.) An injunction, therefore, which virtually directs the defendant to perform an act, will not, except under very special circumstances, be granted on an interlocutory application before decree. (*Blakemore v. Glamorganshire Canal Navigation*, 1 M. & K. 154.)

Interlocutory application for mandatory injunction.

The effect of an order specifically to repair the banks of a canal and other works has been obtained upon an interlocutory application by an order to restrain a party using and enjoying a canal from impeding the navigation, by continuing to keep the canal, banks, or works out of repair; by diverting the water, or preventing it, by the use of locks, from remaining in the canals, or by continuing the removal of a stopgate. (*Lane v. Newdigate*, 10 Ves. 192.) This case was said to go to the very uttermost verge of all the former cases. Lord *Brougham* agreed with Lord *Lyndhurst* in the opinion, that if the court had this jurisdiction, it would be better to exercise it directly and at once; and that the having recourse to a roundabout mode of obtaining the object seems to cast a doubt upon the jurisdiction. (*Blakemore v. Glamorganshire Canal Navigation*, 1 M. & K. 183.) The tenant of a mine was restrained upon motion from permitting a communication with an adjoining mine to continue open, and water to flow through the same, the intended effect being to compel the defendants to close the communication. (*Earl of Mexborough v. Bower*, 7 Beav. 127.) An interlocutory application for a mandatory injunction was granted to prevent irreparable damage from water escaping into a mine. (*Westminster Brymbo Coal Company v. Clayton*, 36 L. J., Ch. 476.) And see further, *Daniell*, Ch. Pr. 1514, 5th ed.

As to the effect of laches and acquiescence in depriving parties of their remedy by injunction, see *Weller v. Smeaton* (1 Br. C. C. 572; 1 Cox, 102); *Birmingham Canal Company v. Lloyd* (18 Ves. 515; Coop. C. C. 77, 193); *Blakemore v. Glamorganshire Canal Navigation* (1 M. & K. 154).

Laches and acquiescence.

Whenever the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract or agreement, the court may, if it think fit, award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance; and such damages may be assessed in such manner as the court shall direct. (21 & 22 Vict. c. 27, s. 2.)

Damages may be awarded by the Court of Chancery.

Under this provision the question of damages will not be entertained, except in cases where the court has jurisdiction irrespectively of any right to them. (*Daniell*, Ch. Pr. 946, 5th ed.; *Morgan's Chancery Acts and Orders*, 262, 4th ed.)

A contract was entered into between a canal company and the plaintiffs, the owners of paper mills, as to the mode of enjoyment of the waters by which both were supplied. The company did acts in violation of the contract, and proposed to continue them, and a bill was filed for an injunction. Held, that it was no answer to say that the acts proposed would not be injurious, or even to prove that they were beneficial to the plaintiffs; and the court, although no evidence was given of any actual damage done, granted

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a perpetual injunction. (*Dickenson v. Grand Junction Canal Company*, 15 Beav. 260.) Where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction. And, *semble*, the court may so interfere whether the breach has or has not been actually committed, provided the defendant claims and insists on a right to do the act which would constitute such breach. (*Tipping v. Echersley*, 2 K. & J. 264.) A perpetual injunction was granted against heating water contrary to agreement. (*Ib.*) "There is a manifest distinction between cases depending on nuisance and those depending on contract. It is shown by the case of *The Rochdale Canal Company v. King* (2 Sim., N. S. 78), and many other authorities, that where there is a contract the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; but that the main point is whether the contract has been broken." (*Per Rolfe, L. J., Att.-Gen. v. Mid Kent Railway Company*, L. R., 3 Ch. 104.)

The court refused to decree at the suit of the vendor the specific performance of an agreement to purchase the fee simple of certain lands, and also the right to impound the water of a river, and to divert from it a stream of water; because the vendor, though seised in fee of the lands, had only a lease for ninety-nine years of the other subjects of the contract, and had not, as against some of the proprietors of the land on the banks of the river, a right to divert the water; and because the purchaser had entered into a contract for the purpose of erecting a manufactory to be wrought by the water, and twelve years had elapsed between the time of the agreement and the hearing of the cause. (*Wright v. Howard*, 1 Sim. & Stu. 190. See *Shackelton v. Sutcliffe*, 1 De G. & S. 609.)

## Statutory powers.

Persons obtaining from the legislature powers to interfere with the rights of property are bound strictly to adhere to the powers so conceded to them, to do no more than the legislature has pointed out. (*Mayor, &c. of Liverpool v. The Chorley Waterworks Company*, 2 De G., M. & G. 852; and see *Dawson v. Paver*, 5 Hare, 415.) If a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute. (*Att.-Gen. v. Colney Hatch Lunatic Asylum*, L. R., 4 Ch. 146.) See also as to statutory powers, *Att.-Gen. v. Great Eastern Railway Company*, L. R., 6 Ch. 572.

Where water is diverted in a manner or to an extent not authorized by statutory powers, the diversion will not be restrained except at the instance of the Attorney-General, or a person having a private interest in the stream. (*Mayor, &c. of Liverpool v. The Chorley Waterworks Company*, 2 De G., M. & G. 852; *Ware v. Regent's Canal Company*, 3 De G. & J. 212.)

The conservators of river banks, who were empowered by act of parliament to apply the funds under their control (which were raised by a rate upon the proprietors of adjacent lands) in executing all works, &c. necessary for putting the banks into and maintaining the same in a permanent state of stability, were held to be authorized to apply a portion of the fund in watching, and, if necessary, opposing a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. (*Bright v. North*, 2 Ph. C. C. 216; 16 L. J., Ch. 255.)

## Companies.

An act incorporated a company for the purpose of supplying a town with gas. By a subsequent act it was enacted, "that if the company shall at any time cause or suffer to be conveyed or to flow into any stream, reservoir, aqueduct, pond or place of water within the limits of the act, any washing substance or thing which shall be produced by making or supplying gas, they shall forfeit 200*l.*" In 1854, the company erected a gas-tank about forty-five yards from the plaintiff's well. The site was selected by an engineer on behalf of the company, and the tank was erected on solid sandstone, and with proper materials. The company knew that mines in the neighbourhood had been worked, but they did not know that mines had

been under or near to any part of their land. In 1838 there were workings under half the company's land, and from 1848 to 1855 these workings were brought to within about sixty yards of the tank, in consequence of which the floor of the tank cracked, and the washings in it flowed out and percolated to the plaintiff's well, thereby rendering the water in it unfit for domestic purposes: it was held, that the company had suffered the washings to flow into the well, and consequently was liable to the penalty. (*Hipkins v. Birmingham and Staffordshire Gaslight Company*, 6 H. & N. 250; 7 Jur., N. S. 213; 30 L. J., Ex. 60; 5 H. & N. 74; 29 L. J., Ex. 169; 8 W. R. 182; affirmed on appeal, 7 Jur., N. S. 343; 9 W. R. 168.)

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By a navigation act the undertakers were authorized to make and maintain such navigation, and from time to time to alter their dams and weirs for that purpose, and to enter and make works upon lands for the purpose of the undertaking, first making satisfaction to the owners as the commissioners under that act should direct. By a subsequent clause any persons injured by the works were to receive compensation, to be assessed by the commissioners. The commissioners were named in the act, and power was given them to appoint successors from time to time. The navigation was made, and as part of it a dam across a river was enlarged. Subsequently all the commissioners died without having appointed successors. The company afterwards raised the dam to the injury of a mill-owner below. It was held, by *Wightman, Erle and Crompton, Js.*, that the power to alter the dam still existed, even though the mill-owner should no longer have any means of obtaining compensation, as to which they gave no opinion. Lord *Campbell*, C. J., dissented, and held that the compensation clause having been incapable of execution by extinction of the commissioners, the powers which the act had conferred upon the company, to cause injury to other persons, could no longer be exercised. (*Kennet and Avon Navigation Company v. Witherington*, 18 Q. B. 581.)

The statute 10 & 11 Vict. c. 17, consolidates the provisions usually contained in acts authorizing the making of waterworks for supplying towns with water. This act places the taking of streams upon the same footing as the taking lands under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first paying compensation for the same, or making deposit, and giving a bond, in accordance with the provisions of the latter act. (*Ferrand v. Mayor, &c. of Bradford*, 21 Beav. 412; 2 Jur., N. S. 175. See *Purnell v. Wolverhampton New Waterworks Company*, 10 C. B. 576; *Hildreth v. Adamson*, 8 W. R. 470; *Busby v. Chesterfield Waterworks, &c. Company*, 1 El. Bl. & El. 176; *Clowes v. Staffordshire, &c. Company*, 21 W. R. 32.) The statute 26 & 27 Vict. c. 93, consolidates in one act additional clauses frequently inserted in acts relating to waterworks. For a collection of the cases relating to waterworks companies, see *Fisher's Digest*, 8609—8617.

Waterworks companies.

Whether a river be navigable or not is a question of fact for the jury. (*Vooght v. Winch*, 2 B. & Ald. 662.) The flux or reflux of the tide is evidence of a navigable river. (*Miles v. Rose*, 5 Taunt. 705.) The channel of a public river is properly described as a common highway (*Anon.*, 1 Campb. 517, n.), although the analogy between it and a highway on land is not complete in all particulars; and there is no one circumstance which more decisively affixes on a river the character of being public and navigable in this sense of a highway than the flow and reflow of the tide in it. (*Mayor, &c. of Colchester v. Brooke*, 7 Q. B. 373.) A judgment in an action on the case, disaffirming an exclusive right to a river, is strong evidence in another action trying the same right, but not conclusive. On a question whether a creek be a public navigable river or not, instances of persons going up it for the purpose of cutting reeds, and on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence sufficient for the jury to presume it a public river. (*Miles v. Rose*, 1 Marsh. 813; 5 Taunt. 705; 4 Maule & S. 101.) It was held in that case that the cutting of rushes in the creek by strangers, without interruption, was a strong circumstance to show that the river was public, and the fact that pleasure-boats were accustomed to sail up the

Navigable rivers.

## Of Watercourses.

creek was also relied on. But a right to a track path on each side of the river Tees (alternately) for towing without paying any acknowledgment, was found upon a trial at bar. (*Pierce v. Lord Falconberge*, 1 Burr. 292.)

By 13 Geo. 2, c. 36, s. 2, a corporation was empowered to do all things necessary to make the Medway navigable, and the river so to be made navigable and all lands to be by them made use of for the benefit of the navigation were thereby vested in the corporation, their successors, heirs and assigns for ever: it was held that the act conferred upon the corporation such an interest in all the water of the river for the purposes of the navigation as was interfered with by the abstraction of any part by the riparian proprietors, and that it was not necessary that there should be an actual damage to the navigation to entitle the corporation to sue for such abstraction. (*Medway Navigation Company v. Earl Romney*, 9 C. B., N. S. 575; 7 Jur., N. S. 846; 30 L. J., C. P. 263.)

## Right of navigation.

The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. The public right in this respect includes all such rights as, with relation to the circumstances of each river, are necessary for the convenient passage of vessels along the channel. It is therefore no trespass, if a vessel, which cannot reach her place of destination in a single tide, remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding. If property (as oysters) be placed in the channel of a public navigable river, so as to create a public nuisance, a person navigating is not justified in damaging such property, by running his vessel against it if he has room to pass without so doing; for an individual cannot abate a nuisance if he is not otherwise injured by it than as one of the public. And therefore, the fact that such property was a nuisance is no excuse for running upon it negligently. (*Mayor, &c. of Colchester v. Brooke*, 7 Q. B. 389.)

The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it. (*Case v. Midland Railway Company*, 27 Beav. 247; 5 Jur., N. S. 1017; 28 L. J., Chan. 727.) Experiments were directed to be made by a civil engineer in order to ascertain the effect of steam navigation on a canal. (*Ib.*) A perpetual injunction was granted to restrain a canal company from preventing a railway company using steam on the canal, the railway company undertaking not to exceed a speed of three miles an hour. (*Ib.*)

## Extinction of right of navigation.

Although an adverse enjoyment for the space of twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public river navigable by all the Queen's subjects; for no obstruction for twenty years will bar a public right. (*Vooght v. Winch*, 2 B. & Ald. 662; *Weld v. Hornby*, 7 East, 195.) A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud. And where a public road, obstructing a channel once navigable, has existed for so long a time that the state of the channel when the road was made cannot be proved, it is to be presumed that the right of navigation was legally extinguished. (*Rex v. Montague*, 4 B. & C. 598.) The law has made no provision for the clearing of such a highway in the case of the accumulation of silt or any other natural cause by which the channel becomes choked up; and in no such cases the river ceases to be navigable, at least until such causes are by some means counteracted. (*Per Lord Denman*, C. J., *Mayor of Colchester v. Brooke*, 7 Q. B. 374.)

## Obstructions to navigation.

A corporation, being the conservators of a river and the owners of the soil between high and low water mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation. (*Rex v. Lord Grosvenor and others*, 2 Stark. N. P. C. 511.)

The declaration stated, in substance, that the defendant wrongfully placed timber in a certain navigable river, whereby the rightful access to

the plaintiff's public-house was obstructed, and divers persons who would otherwise have come to the plaintiff's house, and taken refreshments there, were prevented from so doing: it was held, that the declaration stated no act on the defendant's part amounting to a public nuisance: but that if it had done so, the plaintiff might nevertheless maintain an action for the particular injury to himself, and that there was a sufficient allegation of special damage. (*Rose v. Groves*, 6 Scott, N. R. 645; 5 Man. & G. 613; 3 Dowl., N. S. 61; Law J. 1842, C. P. 251; 7 Jur. 951.) An action on the case will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland. (*Rose v. Miles*, 4 Man. & S. 101.) A count in case stating that the plaintiff was possessed of a messuage abutting on a public navigable river, and by reason thereof was accustomed, and of right entitled, to have the free use and navigation of the river, for the purpose of passing in boats and conveying goods to the messuage, and convenient access to the messuage from the river; but that the defendant fixed barges, planks, &c. in the part of the river near the messuage, and kept and continued the same, and thereby hindered the plaintiff from having the free use of the river, and passing in boats and conveying goods to and from the messuage, and the plaintiff was thereby put to expense in endeavouring to remove the obstructions, and was obliged to convey the goods in a longer and more inconvenient route, is good, as sufficiently showing a particular injury to the individual. (*Dobson v. Blackmore*, 9 Q. B. 991.) But if the jury negative actual damage, the plaintiff cannot have judgment. (*Ib.*)

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Where a vessel is sunk by accident, and without any default in the owner or his servant, in a navigable river, and remains there under water, no duty is ordinarily cast upon the owner to use any precaution, by placing a buoy or otherwise, to prevent other vessels from striking against it. (*Brown v. Mallett*, 5 C. B. 599.) The owner is therefore not liable to an indictment, or to an action, at the suit of a party sustaining special damage in respect of such omission. (*Ib.*)

One who erects or keeps erected, on the shore of a navigable river between high and low water mark, a work for the more convenient use of his wharf adjoining, which work, either from its original defective construction, or from want of repair, presents a dangerous obstruction to the navigation, is responsible for an injury thereby occasioned to a barge coming to the wharf, without any default on the part of the persons in charge. (*White v. Phillips*, 15 C. B., N. S. 245; 33 L. J., C. P. 83; 12 W. R. 85.) As to the right of persons entitled to land from a navigable river on the bank adjoining, to pass over permanent obstructions, see *Eastern Counties Railway Company v. Dorling* (5 C. B., N. S. 821); *Marshall v. Ulleswater Steam Navigation Company* (L. R., 7 Q. B. 166).

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. If the weir when so first granted obstruct the navigation of only a part of the river, it does not become illegal by the stream changing its bed, so that the weir obstructs the only navigable passage remaining. Where the crown had no right to obstruct the whole passage of a navigable river it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere. (*Williams v. Wilcox*, 8 Ad. & Ell. 314; 3 Nev. & P. 606; *Rolle v. Whyte*, L. R., 8 Q. B. 286, followed in *Leconfield v. Lonsdale*, L. R., 5 C. P. 657.) It is not competent, either to the crown or to a subject, to use the soil of a navigable river for any purpose amounting to a nuisance. (*Att.-Gen. v. Johnson*, 2 Wils. C. C. 87.) Where the defendant, as grantee of the crown, was entitled to the soil of a navigable river at a certain point, it was held that such ownership did not justify him in constructing a jetty which interfered with the navigation. (*Att.-Gen. v. Earl of Lonsdale*, L. R., 7 Eq. 377.)

Of Watercourses.

Ownership of  
soil of navigable  
rivers.

As to purpresture and the remedy in that case, see *Att.-Gen. v. Johnson* (2 Wils. C. C. 87).

The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is vested in the crown, but subject to the right of navigation which belongs by law to the subjects of the realm; and of which the right to anchor forms part; and every grant made by the crown of the bed or soil of an estuary or a navigable river must be subject to such public right of navigation. (*Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192; 13 W. R. 589.) In the case of a navigable river, the presumption is, that the soil is vested in the crown, yet a subject may claim a prescriptive right to a several fishery in an arm of the sea even against the crown. (*Mayor, &c. of Oxford v. Richardson*, 4 T. R. 439. See *Rex v. Smith*, 2 Doug. 411.) But by grant or prescription a subject may have the interest in the water and soil of navigable rivers, as the City of London has been stated to have the soil and property of the Thames by grant (Dav. 56 b; Com. Dig. Navigation (B)); but this has been questioned in some modern cases. (*Att.-Gen. v. Corporation of London*, 8 Beav. 270; 2 Mac. & G. 247; 2 Hall & T. 1; *Att.-Gen. v. Johnson*, 2 J. Wils. C. C. 87.) An act of parliament, passed for the purpose of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose the mere privilege of scouring and cleansing it, which is a mere easement. (*Rex v. The Mersey, &c. Navigation*, 9 B. & C. 114; *Rex v. Thomas*, *Ib.* 95.) The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes. (*Hollis v. Goldfinch*, 1 B. & C. 221.)

The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage. (*Ball v. Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*.)

Soil of rivers not  
navigable.

Where a river is not navigable, the presumption is, that the soil is the property of the owners on each side to the middle of the river, and consequently they are entitled to a co-extensive right of fishing. And if a man is owner of the land on both sides, by common presumption he is owner of the whole river. (Hale, de Jure Maris, cap. 1; *Carter v. Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; *Rex v. Wharton*, 12 Mod. 510.) Where in trespass *quare clausum fregit* the plaintiff claimed the whole bed of the river flowing between his land and the defendant's, the defendant contending that each was entitled *ad medium filum aquæ*; it was held, that evidence of acts of ownership exercised by the plaintiff upon the banks of the river on the defendant's side lower down the stream, and where it flowed between the plaintiff's land and a farm of C. adjoining the defendant's land, and also of repairs done by the plaintiff to a fence which divided C.'s farm from the river, and was in continuation of a fence dividing the defendant's land from the river, was admissible for the plaintiff. (*Jones v. Williams*, 2 Mees. & W. 326.) However, a right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water. (*Lord v. Commissioners of Sydney City*, 12 Moo. P. C. C. 473.)

With respect to rivers that are not navigable, the proprietors of the banks on each side have an interest in the fishery of common right. So that every inland river that is not navigable appertains to the owners of the soil. Where such rivers run between two manors, and are the boundaries between them, one moiety of the river and fishery belongs to one lord, the other to the other lord. (Davies, R. 155.) The use of the banks of the river for more than twenty years by fishermen, who have occasionally sloped and levelled them, is evidence of a grant of a right of landing by the owner of the soil, although both the fishery and landing-place once belonged to the same person, and there was no evidence to show that the former owner, or those who claimed under him, knew that the shore had been so used. (*Gray v. Bond*, 2 Brod. & Bing. 667.)

The soil of the alveus is not the common property of the respective



owners on the opposite sides of a river ; the share of each belongs to him in severalty, and extends *usque ad medium filum aquæ*. (*Bickett v. Morris*, L. R., 1 H. L., Sc. 47.) The right of ownership of a moiety of the bed of the river passes under a conveyance of land on the banks of a river, although the conveyance points to a boundary which would not include any part of the bed. (*Crossley v. Lightowler*, L. R., 3 Eq. 279.) Even where the river is of more than ordinary breadth. (*Dwyer v. Rich*, L. R., 4 C. L. 424 ; and on appeal, L. R., 6 C. L. 144.)

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In the absence of all evidence of particular usage, the extent of the right of the crown to the seashore landwards is *prima facie* limited by the line of the medium high tide between the springs and the neaps. (*Att.-Gen. v. Chambers*, 4 D., M. & G. 206 ; 23 L. J., Ch. 662.)

Rights as to the seashore.

The public at large have no common law right to bathe in the sea, and, as incident thereto, of crossing the shore on foot or with bathing machines for that purpose. (*Blundell v. Catterall*, 5 B. & Ad. 268.) So there is not at common law a general right in the public of entering the seashore for the purpose of taking seaweed. (*Howe v. Stowell*, 1 Alcock & Napier, 348.)

The seashore between high and low water mark may be parcel of the adjoining manor ; (*Constable's case*, 5 Rep. 107 ; Hargrave's Law Tracts, 12 ;) and where, by an ancient grant of the manor, its limits are not defined, modern usage is admissible in evidence, to show that such seashore is parcel of the manor. Thus, evidence of modern acts of ownership was held to have been properly admitted as evidence, to show that grants by King John and King Edward I., of certain lands by the terms of Terra de Gower, "and Dominium de Terræ de Gower," included the sea coast down to low water mark. *Parke*, B., was of opinion, that all ancient documents, where a question arises as to what passed by a particular grant, can be explained by evidence of modern usage. (*Duke of Beaufort v. Mayor, &c. of Swansea*, 3 Exch. 413.) Where a lord of a manor claimed title to the seashore between high and low water, and produced in evidence a deed or grant from the crown of a manor adjacent to the shore, and also proved acts of ownership over the foreshore in himself, and those under whom he claimed; the real question to be left to the jury was, whether the grant, coupled with the evidence of ownership, was sufficient to induce them to believe that the shore in question passed by the grant. (*Att.-Gen. v. Jones*, 6 L. T., N. S. 655, Exch. ; 2 H. & C. 347.) Acts of ownership exercised by the lord of a manor, upon the seashore adjoining, between high and low water mark—such as the exclusive taking of sand, stones and seaweed—may be called in aid to show that the shore is parcel of the manor, where an ancient grant under which the manor appears to have been held, and which professes to grant the manor with "wreck of the sea," "several fishery," and other rights of an extensive description, does not expressly purport to convey "*littus maris*." (*Calmady v. Rowe*, 6 C. B. 861.)

Where a grant of wreck was made by Hen. 2, and confirmed by Hen. 8, to the proprietor of land on the coast, who within forty years had constructed an embankment across a small bog to reclaim sea mud, and had since asserted an exclusive right to the soil, without opposition, it was held, that from such usage anterior usage might be presumed ; and that the usage, coupled with the terms of the grant, served to elucidate it, and to establish the right so asserted. (*Chad v. Tilsed*, 2 Brod. & Bing. 403.) By an act of parliament, reciting that a certain tract of land daily overflowed by the sea, and to which the king in right of his crown claimed title might be rendered productive if embanked, and that his majesty had consented to such embankment, a part of the said land, called Lipson Bay, was granted to a company for that purpose. On one side of the bay was the northern side of an estate called Lipson Ground, forming an irregular declivity, in parts perpendicular, and in parts sloping down to the seashore, and overgrown with brushwood and old trees. The company, in embanking the bay, made a drain on this side, in the same direction with the cliff, cutting through it in parts, but leaving several recesses of small extent between the projecting points. These recesses used to be overspread



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with sea-weed and beach, and were covered by the high water of the ordinary spring tides, but not by the medium tides. It was held, in the absence of proof as to acts of ownership, that the soil of these recesses must be presumed to have belonged to the owner of the adjoining estate, and not to the crown, and did not therefore pass to the embankment company by the act of parliament. (*Lowe v. Govertt*, 3 B. & Ad. 863.)

As to the boundary of a parish which lies on the seashore or extends up to a tidal river, see *Bridgwater Trustees v. Bootle-cum-Linaore*, (L. R., 2 Eq. 4).

## Alluvium.

An information for the purpose of having the title of the crown to alluvium gained from the sea declared and established, is analogous to a bill to ascertain boundaries, and requires in support of it admissions or evidence showing a title in the crown to some lands in the possession of the defendant. (*Att.-Gen. v. Chambers*, and *Att.-Gen. v. Rees*, 4 De G. & J. 55. See *Godfrey v. Little*, 2 Russ. & M. 683.) But where the witness, in support of the information, deposed that the alluvium had been added to the main land, not gradually and imperceptibly, but rapidly; it was held, that a sufficient case had been made for directing issues. (*Ib.*)

It seems that the title to alluvium, arising from artificial causes, does not differ as to the rights of landowners, from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. (*Ib.*) Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord *Chelmsford*, C., said, "The effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it; there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition. (*Att.-Gen. v. Chambers*, 4 De G. & J. 55, see p. 65.)

In *Scrutton v. Brown* (4 B. & C. 485), where the advance of the sea had been gradual and imperceptible, and the high and low water mark had varied in the same degree, it was held, that the freehold of the grantee of the shores and sea grounds shifted as the sea receded or encroached. (See 2 Bl. Com. 262; *Rex v. Lord Yarborough*, 3 B. & C. 91; 2 Bligh, N. S. 147; *The Hull and Selby Railway Company*, 5 M. & W. 327.) Land formed by gradual accretion belongs to the owner of the adjacent soil. (*Doe v. East India Company*, 10 Moore P. C. C. 140.)

## Ferries.

A ferry is the exclusive right to carry passengers across a river or arm of the sea, from one vill to another, or to connect a continuous line of road leading from one township or vill to another, and not a servitude imposed upon a district or large area of land, and is wholly unconnected with the ownership or occupation of land. (*Newton v. Cubitt*, 12 C. B., N. S. 32; 9 Jur., N. S. 544. See *Reg. v. Matthews*, 5 El. & Bl. 546; 1 Jur., N. S. 1204; 25 L. J., M. C. 7.)

In an action for an evasion of an ancient ferry, by carrying passengers across the river near thereto, the court refused to allow the defendant to add a plea, alleging a variety of circumstances to show that from the altered state of the neighbourhood public convenience required that which the defendant had done, holding that the plea was clearly bad, and at the most amounting to not guilty. (*Newton v. Cubitt*, 5 C. B., N. S. 627; 5 Jur., N. S. 847; 28 L. J., C. P. 176.)

A right of ferry is a matter in which the public are interested, and of which therefore reputation is evidence, and so also is a verdict or judgment

of a court of competent jurisdiction, touching the same right, although between other parties. (*Pim v. Currell*, 6 Mees. & W. 234.)

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A custom or usage of keeping an ancient ferry boat was alleged by the parishioners of a parish. (3 Mod. 294.) All common ferries have their origin in royal grant or in prescription which presumes such grant. The owner of the ferry is bound, under pain of indictment, to maintain the ferry at all times for the use of the public. (*Letton v. Goodden*, L. R., 2 Eq. 131.)

## (6.) OF THE RIGHT TO PEWS.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it common to the parishioners; and the disposing of the seats therein the right of the ordinary. (Hob. 69; Gibs. Cod. tit. 9, c. 4.)

General right with regard to pews.

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel unless some other person be in a condition to prescribe for it from time immemorial. The ecclesiastical court, in the exercise of its ordinary authority would allot to him such sitting and protect him against the disturbance of such right. (*Spry v. Flood*, 2 Curt. 357.)

An exclusive title to pews and seats in the body of the church may be maintained in virtue of a faculty, or by prescription, which is founded on the presumption that a faculty had been heretofore granted. All other pews and seats in the body of the church are the property of the parish; and the churchwardens, as the officers of the ordinary, and subject to his control, have authority to place the parishioners therein. No precise rules are prescribed for the government of churchwardens in the use of this power, for its due exercise must depend on a sound judgment and discretion applied to the circumstances of the parish. (*Report of Eccl. Commrs., Feb. 1832*, p. 48.)

By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use in common of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary. (12 Rep. 105; 3 Inst. 202; 3 Hagg. Eccl. Rep. 733.) By the general law, the use of all the pews belongs to the parishioners; they are to be seated therein, in the first instance, by the churchwardens; the power of the latter, however, is subject to the control of the ordinary, who is to see that the churchwardens exercise their authority discreetly, for the proper accommodation of the parishioners at large. This is the law, not merely to be found in ecclesiastical authorities, but is the common law of the land, as laid down by the highest common law authorities. (*Blake v. Usborne*, 3 Hagg. Eccl. R. 733.) It will be sufficient to refer to Lord Coke. (12 Rep. 105; 3 Inst. 202.) The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated. (*Reynolds v. Monkton*, 2 M. & Rob. 384.) The parishioners cannot prescribe to dispose of pews in exclusion of the ordinary. (1 Salk. 167, pl. 7.) Neither the minister nor the vestry have any right whatever to interfere with the churchwardens in seating and arranging the parishioners, as often erroneously supposed; at the same time the advice of the minister, and even sometimes the opinion and wishes of the vestry, may be fitly invoked by the churchwardens, and to a certain extent may be reasonably deferred to in this matter. The general duty of the churchwardens is to look to the general accommodation of the parish, consulting, as far as may be, that of all the inhabitants. The parishioners, indeed, have a claim to be seated according to their rank and station; but the churchwardens are not, in providing for this, to overlook the claims of all parishioners to be seated, if sittings can be afforded them. Accordingly they are bound, in particular, not to accommodate the higher classes beyond their real wants, to the exclusion of their poorer neigh-

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bours, who are equally entitled to accommodation with the rest, though they are not entitled to equal accommodation, supposing the seats to be not all equally convenient. (2 Addams, R. 425, 426.)

The incumbent has no authority in the seating and arranging the parishioners beyond that of an individual member of the vestry, and which his station and influence in the parish naturally give him. He may properly object to a plan which is generally inconvenient, which diminishes the accommodation in the church, which disfigures the building, which renders it dark and incommodious. In every case of this description, it is very proper he should make a representation to the ordinary; but as to the mere arrangement of seats, if the parishioners can settle that among themselves, and to their own satisfaction, and can agree about the expense, there seems but little necessity for the interference of the incumbent; the expense is that of the parishioners; the churchwardens are bound to repair with the consent of the vestry; it is not the vicar, but the vestry which appropriate the seats: the general superintendence and authority in allotting them rests with the ordinary. (1 Phill. R. 233.)

Particular rights.

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. A possessory right is not good against the churchwardens and the ordinary: they may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *cæteris paribus*, the preference over a mere stranger. (1 Phill. R. 324.) The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation. (*Horsfall v. Holland*, 6 Jur., N. S. 278.)

Particular rights  
founded on faculty  
or prescription.

A possessory right is sufficient to maintain a suit against a mere disturber. (*Spry v. Flood*, 2 Curt. 356.) The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty. (1 Phill. R. 324.) Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession. (*Morgan v. Curtis*, 3 M. & R. 389.) On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives. (3 Hagg. Eccl. R. 733.) A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked. (2 Hagg. Eccl. R. 417.)

Prescriptive right  
to pews, how  
proved.

A *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage, they maintained and upheld the right. At all events, if any repairs have been acquired within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right. The *onus* and *beneficium* are supposed to go together; mere occupancy does not prove the right. What might be the effect of very long occupancy, where no repairs have been necessary, does not appear to be decided. It is a common error to suppose that by mere occupancy pews become annexed to particular houses. In country parishes the same families occupy the same pews for a long time, but they still belong to the parish at large; if, however, it is shown that the in-

habitants of a particular house *have repaired*, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. (1 Phill. R. 325-6.) To exclude the jurisdiction of the ordinary from the disposal of a pew, it is necessary, not merely that possession should be shown for many years, but that the pew should have been built and repaired time out of mind. (1 T. R. 428.) The strongest evidence of that kind is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the act 2 & 3 Will. 4, c. 71, was not required. (1 Hagg. Cons. R. 322.) Twenty years' adverse possession seems to bar the right to a pew. (1 Phill. R. 328.)

On application for a faculty to repair and repew a church, a parishioner appeared to the decree and prayed a faculty might not be granted without a proviso that a pew claimed to be held by him by prescription should not be removed or altered. The prescription was denied. It was held, that a *prima facie* title by prescription was established, and that the faculty should be issued with the proviso. (*Knapp v. Parishioner of St. Mary, Willesden*, 2 Rob. Ecc. Rep. 358; 15 Jur. 473.) Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been made within the period of any one living. (*Ib.*)

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund. (*Reg. v. Mayor, &c. of Warwick*, 10 Jur. 262; 15 Law J., Q. B. 306.)

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title, and therefore if they sue in the ecclesiastical court to be quieted in the possession of such seats, the court of K. B. will grant a prohibition; although it seems that such persons cannot establish such a claim even by prescription. (*Byerly v. Windus and others*, 5 B. & C. 1; *S. C.*, 7 Dowl. & Ry. 564. See *Hallack v. University of Cambridge*, 1 Gale & D. 100; 1 Q. B. 593, as to prohibition against granting a faculty.) A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations. (2 Addams, R. 427.) A pew in the body of the church may be prescribed for as appurtenant to a house out of the parish. (*Davis v. Witts*, Forr. R. 14; *Lonsley v. Hayward and another*, 1 Younge & Jerv. 583.) A man may prescribe for a chancel or for an aisle, or for a pew in an aisle, or even in the nave of a church, if he prescribes for that he and those whose estate he has, have always had it, and have always repaired it, even though the estate or house in question be out of the parish. (Per *Kindersley*, V.-C., *Churton v. Fremen*, L. R., 2 Eq. 656.)

Extra-parochial  
persons.

A pew annexed by prescription to a certain messuage cannot, as is often erroneously conceived, be severed from the occupancy of the house, but passes with the messuage, the tenant of which for the time being has *de jure* the prescriptive right to the pew, (1 Hagg. Cons. R. 319; 1 T. R. 430; 3 M. & R. 334; 2 Add. 428,) which cannot be sold nor let without a special act of parliament, (1 Hagg. Eccl. R. 319, 321,) or under the provisions of the Church Building Acts. (See 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11.) Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens. (1 Hagg. Eccl. R. 34.) A person who has permission from the churchwardens to sit in a pew temporarily, and in order, by keeping possession for the future tenant, to carry into effect the conditions of sale of a house with which the pew has for above a century been held under an expired faculty, has no possession on which he can bring a suit for perturbation of seat against a mere intruder, such permission by the church-

Prescriptive right  
to pew cannot be  
severed from oc-  
cupancy of mes-  
suage.

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wardens being illegal, as confirming the sale of the pew. (*Blake v. Usborne*, 3 Hagg. Eccl. R. 726.) Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad. (1 Hagg. Cons. R. 317.) Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprehended by the ecclesiastical courts, and discouraged as often as set up. (1 Hagg. Cons. R. 317.) But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew. (2 Add. 428.)

It was held, that sect. 51 of the local statute 51 Geo. 3, c. 151, which enacts, that the said vestrymen (of St. Marylebone) shall set out and appropriate such a number of seats for the gratuitous accommodation of the poor of the said parish for the time being, and also of such other pews or seats for the use of the parishioners of the said parish as the said vestrymen shall think necessary, proper and convenient, is imperative upon the vestrymen, and empowers them to set out and appropriate the pews (other than those of the poor) without restriction, and not subject to the superintendence of the ordinary. (*Spry v. Flood*, 2 Curt. 362.)

It was held, that by the 52nd sect. of 51 Geo. 3, c. 151, which enacts, that it shall be lawful for the vestrymen of St. Marylebone, if they shall think proper, to let the pews, &c., or any of them, except the pews or seats to be appropriated for the gratuitous accommodation of the poor of the said parish for the time being as before mentioned, to such persons only who shall be inhabitant householders within the said parish, the vestrymen were empowered to let all the pews save those for the poor, and consequently to remove the rector from one of two pews of which he had been in possession from the time of his induction, and to let it to another inhabitant householder. (*Spry v. Flood*, 2 Curt. 364.)

32 & 33 Vict. c. 94, contains provisions for the surrender of pews which are private property, or subject to any trust, to the bishop of the diocese or the ecclesiastical commissioners.

Right to vote in  
respect of pews.

On the construction of private acts it was held that the proprietors of pews did not acquire such a freehold interest in the soil of the church as entitled them to a county vote; but only a right to sit in it to hear divine service, which right was of the nature of an easement. (*Hinde v. Chorlton*, L. R., 2 C. P. 104; *Brumfitt v. Roberts*, L. R., 5 C. P. 224; *Greenway v. Hockin*, *ib.* 235.)

Chancels.

A pew in a chancel may legally belong to a party in respect of the ownership of a house. (*Parker v. Leach*, 4 Moore, P. C. C. 180.)

Immemorial repair of a chapel or lesser chancel, which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it being vested in those who have executed the repairs and exercised the acts of ownership. Such a freehold may be vested in a private person: and the enjoyment of such a chapel or chancel, and the right to its exclusive use is not necessarily annexed to a dwelling-house. (*Chapman v. Jones*, L. R., 4 Ex. 273.) Even though the freehold may not be in the person prescribing, immemorial use and occupation, coupled with reparation, may entitle the lord of the manor by prescription to the perpetual and exclusive use of the chancel, and such a right may be appendant to an estate or house not situate in the parish. (*Churton v. Frowen*, L. R., 2 Eq. 634.)

Remedy for dis-  
turbance of pews.  
Action at law.

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is an action on the case. (*Mainwaring v. Giles*, 5 B. & Ald. 361.) Where the pew is in a chancel, the freehold of an individual, the right to it is triable at common law. (*May v. Gilbert*, 2 Bulstr. 151.) The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury. (*Report of Eccl. Commrs.*, p. 49.) If a man claiming title by prescription to an aisle, chancel, &c., as his freehold, or to a pew or seat in the body of the church,



or in an aisle, &c., as appurtenant to a house in the parish, is disturbed therein by the parson, ordinary, or churchwardens, by a suit in the spiritual court, he may have a prohibition, if he suggest as grounds for it that he or those whose estate he hath, built, or time out of mind repaired, and therefore had the sole use of such aisle, or of such pew or seat; for the party has a right to a trial of the prescription in a temporal court. (See 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher v. Cheslam*, 1 Wils. 17; *Cornen v. Pym*, 12 Rep. 105; *Jacob v. Dalton*, 2 Raym. 1755; *Boothby v. Bailey*, Hob. 69; *Francis v. Lee*, Cro. Jac. 366; *Day v. Beddingfield*, Noy's Rep. 104; *Buxton or Bunton v. Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; Sir T. Raym. 52; *Crook v. Sampson*, 2 Keb. 92; *Brabin v. Tradum*, Poph. 140; 2 Roll. Abr. 287, 288.)

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The uninterrupted possession of a pew in a church for twenty years affords a presumptive evidence of a legal title by prescription, or by a faculty against a wrong-doer. (*Darwin v. Upton*, 2 Wms. Saund. 506, ed. 1871.) But if the right was claimed as appurtenant to an ancient messuage the claim would, before the stat. 2 & 3 Will. 4, c. 71, be rebutted by proof that the pew began to exist within time of legal memory. (*Griffith v. Matthews*, 5 T. R. 296.) In an action on the case for disturbing the plaintiff in the possession of a pew in a church, which the plaintiff and those under whom he claimed had been in the uninterrupted enjoyment of for thirty-six years, but which appeared in evidence to have been an open pew before that period; the judge recommended the jury to presume a title in the plaintiff after so long a possession as thirty-six years, and the Court of King's Bench afterwards, on a motion for a new trial, held the direction of the judge proper. (*Rogers v. Brookes*, 1 T. R. 431, n.) A pew in a parish church was claimed in respect of an ancient messuage; and it was proved, that, so far as living memory extended, the pew in question had been one of three pews adjoining each other, and under one and the same claim of right, viz., in respect of the said ancient messuage: it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all, and therefore as to that in question. (*Pepper v. Barnard*, 12 L. J. (N. S.) Q. B. 361; 7 Jur. 1128.) The pew must be laid in the declaration as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in his enjoyment thereof, but he must prove a prescriptive right or faculty. (*Stocks v. Booth*, 1 T. R. 428.) So where a pew in a chancel, claimed in right of a messuage, was shown to have been erected on the site of old open seats in 1773, and there was no evidence of any faculty on search for one at the proper places; it was held, that the judge rightly directed the jury, that the evidence of the former open state of the seats destroyed the prescription, and left it to them to say whether, upon the evidence merely of long undisturbed possession, any faculty existed; and a new trial was refused. (*Morgan v. Curtis*, 3 M. & Ry. 389.)

The grant of part of the chancel of a church by a *lay impropriator* to A., his heirs and assigns, is not valid in law, and therefore such grantee, or those claiming under him, cannot maintain trespass for pulling down his or their pews there erected. (*Clifford v. Wicks*, 1 B. & Ald. 498.)

But the churchwardens have not, as against the incumbent of a church or chapel, a joint possession of it, so as to disable him from maintaining trespass against them for acts of violence in pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate. (*Jones v. Ellis*, 2 Y. & J. 265.) The perpetual curate of an augmented parochial chapelry has a sufficient possession whereon to maintain trespass for breaking and entering the chapel and destroying the pews. (*Ib.*)

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, who have repaired the seat time out of mind, and an action on the case for a disturbance lies at common law. (*Carleton v. Hutton*, Noy, 78; Gibs. 221.)

Where the action is brought against a stranger, the plaintiff is not bound



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to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew. (*Kenrick v. Taylor*, 1 Wils. 326; *Ashley v. Freckleton*, 3 Lev. 73; see *Fiske v. Roritt*, Lofft, 423; Com. Dig. Action upon the Case for Disturbance (A. 3); Gibs. 197, 198.)

The right to sit in a pew may be apportioned, and therefore where by a faculty, reciting that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house, a pew was granted to him and his family for ever, and the owners and occupiers of the said dwelling-house, which was afterwards divided into two: it was held, that the occupier of one of the two (constituting a very small part of the original messuage) had some right to the pew, and in virtue thereof might maintain an action against a wrong-doer. (*Harris v. Drewe*, 2 B. & Ad. 164.)

Remedy in equity.

It seems that a bill in equity will not lie to be quieted in the possession of a pew, though there is a decree for it before the ordinary. (*Baker v. Child*, 2 Vern. 226.) A bill was filed by a single parishioner against some of the churchwardens of the parish, alleging an intention on the part of the defendants to execute work in the church which would be injurious to himself, and praying an injunction; the plaintiff did not allege that he was a parishioner and that he was in the habit of attending divine service in the parish church. It is questionable whether this is a private nuisance, and whether such a bill can be sustained by a single parishioner against the churchwardens. (*Woodman v. Robinson*, 2 Sim., N. S. 204.) See *Cardinall v. Molyneux*, 7 Jur., N. S. 854, as to proceedings against an incumbent who removed pews and substituted chairs in the church. A prohibition will issue out of Chancery in vacation time upon an *ex parte* application to restrain a spiritual court from trying a claim by prescription to pews in a parish church. (*Re Bateman*, L. R., 9 Eq. 660.)

Burial.

A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church. (Com. Dig. Cemetery (B.)) It seems that the same rules are applicable to vaults as to pews. (*Bryan v. Whistler*, 8 B. & C. 293; *S. C.*, 2 M. & Ryl. 318; see *Francis v. Ley*, Cro. Jac. 366; Gibs. Cod. 542.) As to rights of Burial, see Fisher's Index, tit. Ecclesiastical Law, XXV., Burial.

## (7.) OF THE RIGHT TO LIGHT AND AIR.

Former doctrine  
as to acquiring a  
right to light by  
prescription.

A right to the enjoyment of light and air may commence by mere occupancy. Every man on his own land has a right to all the light and air which will come to him; and he may erect, even on the extremity of his land, buildings with as many windows as he pleases, without any consent from the owner of the adjoining lands. After he has erected his building, the owner of the adjoining land may, within twenty years, build upon his own land, and so obstruct the light which would otherwise pass to the building of his neighbour. But if the light be suffered to pass without interruption during that period to the building so erected, the law implies from the non-obstruction of the light for that length of time, that the owner of the adjoining land has consented that the person who has erected the building upon his land shall continue to enjoy his light without obstruction, so long as he shall continue the specific mode of enjoyment which he had been used to have during that period. It does not, indeed, imply that the consent is given by way of grant, for light and air, not being to be used in the soil of the land of another, are not the subject of actual grant; but the right to insist upon the non-obstruction and non-interruption of them more properly arises by a covenant which the law would imply not to interrupt the free use of the light and air. (*Per Littledale, J.*, 3 B. & Cr. 340. See 2 B. & Cr. 691.)

The enjoyment of lights for twenty years, without any obstruction from the party entitled to object, has been long held to be a sufficient foundation for raising the presumption of an agreement not to obstruct them. (2 B. & C. 686; *Darwin v. Upton*, cited 3 T. R. 159; 2 Wms. Saund. 175.)

In whatever way precisely the right to enjoy the unobstructed access of light and air from adjoining land may be acquired (a question of admitted nicety), still the act of the owner of such land, from which the right flows, must have reference to the state of things at the time when it is supposed to have taken place; and as the act of the one is inferred from the enjoyment of the other owner, it must in reason be measured by that enjoyment. The consent, therefore, cannot fairly be extended beyond the access of light and air through the same aperture (or one of the same dimensions and in the same position), which existed at the time when such consent is supposed to have been given. It is considered that convenience and justice both require this limitation; if it were once admitted that a new window, varying in size, elevation or position, might be substituted for an old one, without the consent of the owner of the adjoining land, it would be necessary to submit to juries questions of degree, often of a very uncertain nature, and upon very unsatisfactory evidence. And in the same case, a party, who had acquiesced in the existence of a window of a given size, elevation or position, because it was felt to be no annoyance to him, might be thereby concluded as to some other window to which he might have the greatest objection, and to which he would never have assented, if it had come in question in the first instance. The case of *Chandler v. Thompson*, (3 Camp. 80,) is not at all inconsistent with this reasoning. (*Per Patteson, J., Blanchard v. Bridges*, 4 Ad. & Ell. 191, 192.) There may appear to be some hardship in holding that the owner of a close who has stood by, without notice or remonstrance, while his neighbour has incurred great expense in building upon his own adjoining land, should be at liberty, by subsequent erections, to darken the windows, and so destroy the comfort of such buildings. Yet there can be no doubt of his right to do so at any time before the expiration of twenty years from their erection, and this with good reason, for it is far more just and convenient that the party, who seeks to add to the enjoyment of his own land by any thing in the nature of an easement upon his neighbour's land, should first secure the right to it by some unambiguous and well-understood grant of it from the owner of that land, who thereby knows the nature and extent of his grant, and has a power to withhold it, or to grant on such terms as he may think proper to impose, than that such right should be acquired gradually as it were, and almost without the cognizance of the grantor, in so uncertain a manner as to create infinite and puzzling questions of fact to be decided by litigation. If a party, who has neglected to secure to himself the unobstructed enjoyment of light and air to a new window by previous express licence or covenant, relies for his title to them upon anything short of an acquiescence of twenty years, the *onus* lies upon him of producing such evidence as leads clearly and conclusively to the inference of a licence or covenant. And if a deed be not necessary for that purpose, it is obviously advisable to have it. (*Blanchard v. Bridges*, 4 Ad. & El. 194, 195.)

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Light and Air.

It seems that the prescriptive right to light now depends upon the statute, and is not to be rested on any presumption of grant. (*Tapling v. Jones*, 11 H. L. C. 290, *ante*, p. 15.) See 3 & 4 Will. 4, c. 71, s. 3, *ante*, p. 14, and the cases there quoted as to the mode of acquiring a prescriptive right to light under the statute.

Present doctrine.

Where a lease of a house was granted to the plaintiff, who was described therein as a diamond merchant, and the owners of adjacent premises subsequently purchased the reversion, an injunction was granted (partly on the principle of express contract existing between landlord and tenant) to restrain the purchasers of the reversion from building a party-wall, so as to obscure the plaintiff's ancient lights. (*Hertz v. The Union Bank of London*, 1 Jur., N. S. 127; 2 Giff. 286.) Where a landlord, who had granted a lease of premises including ancient lights and appurtenances to A. in consideration of improvements which had been made by A. in the premises leased (which improvements included new lights), granted a lease of the adjoining premises to B., and B. was building so as to block up the lights of A.: it was held, that the landlord could not have blocked up such lights, and that his lessee B. could stand in no better position, and the

Express contract  
between landlord  
and tenant.

Of the Right to  
Light and Air.

Implied grant of  
right to light upon  
severance of  
adjoining tene-  
ments.

court granted an injunction as against B. (*Davies v. Marshall*, 1 Drew. & Sm. 557).

As a man cannot derogate from his own grant, it is well established, that where the same person possesses a house, having the actual use and enjoyment of certain lights, and also possesses the adjoining land, and sells the house to another person, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct or interrupt the enjoyment of those lights. (*Palmer v. Fletcher*, 1 Lev. 122; *Kelk v. Pearson*, L. R., 6 Ch. 813.) A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.: it was held, that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A.: though the windows were not twenty years old at the time of the alteration. (*Coutts v. Gorham*, 1 M. & M. 396; see *Cox v. Matthews*, 1 Ventr. 237; *Jacomb v. Knight*, 11 W. R. 585.) So where the owner of a house divided it into two tenements, and demised one of them to the defendant: it was held he was liable to an action on the case for obstructing the windows in the house at the time of the demise, although of recent construction, and there was no stipulation against the obstruction. (*Riviere v. Bower*, 1 Ry. & M. 24.) And upon the same principle, where several adjoining portions of land, on which the building of houses had been commenced, were sold, and by the conditions of sale were to be finished according to a particular plan within the space of two years: it was held, that a purchaser of one of the lots could not, by erecting an additional building at the back of his house, obstruct the light from the windows of another purchaser, who has built his house according to the plan; (*Compton v. Richards*, 1 Price, 27;) for the lots were sold under an implied condition, that nothing should be done by which the windows for which spaces were then left might be obstructed. (*Ib.*) And where the plaintiff purchased a house A., and the defendant at the same time purchased the adjoining land, upon which an erection of one storey high had formerly stood, although in the conveyance to the plaintiff his house was described as bounded by building ground belonging to the defendant: it was held, that the defendant was not entitled to build a greater height than one storey, if by so doing he obstructed the plaintiff's lights. (*Swansborough v. Coventry*, 9 Bing. 305; *S. C.*, 2 M. & Scott, 362.)

No reservation of  
right to light im-  
plied upon sale of  
land by owner of  
the adjoining  
house.

Where, however, a person having a house on his land, the windows of which have existed for more than twenty years, sells a portion of his land, the purchaser may erect any buildings he pleases upon the land so sold to him, however much they may interfere with the light coming to the windows of the vendor's house. (*Curriers' Company v. Corbett*, 2 Dr. & Sm. 360.)

In 1855, the owners in fee of a house and adjoining land granted to trustees a lease of the land for ninety-nine years, and they covenanted to build upon it according to a plan. In 1856, the owners conveyed the reversion in fee of the lands to the trustees; in 1857, the owners conveyed the house in fee to a person under whom the plaintiff obtained possession. The defendant subsequently, with the authority of the trustees, built upon the land so as to obstruct the light and air which, for upwards of twenty years, had come to the windows of the plaintiff's house. If he had built according to the plan in the lease, the obstruction would not have been to the same extent. Until the lease was granted, there had never been any severance either in the title to, or possession or occupancy of, the land and house, and the same had been occupied and used together by the proprietors for upwards of fifty years: it was held, that the plaintiff could maintain no action against the defendant for building on the land so as to obstruct the light and air which formerly came to the windows of the plaintiff's house. (*White v. Bass*, 7 H. & N. 722. See *Tenant v. Goodwin*, 2 Ld. Raym. 1098; *Roswell v. Prior*, 6 Mod. 116; *Canham v. Fisk*, 2 Cr. & Jerv. 128.)

Where a purchaser takes with notice of adjoining windows he is thereby put upon his inquiry as to whether they are privileged or not, and if privileged it is immaterial whether as modern windows by grant, or as ancient by prescription. (*Miles v. Tobin*, 16 W. R. 465.)

"The right conferred or recognized by the statute 2 & 3 Will. 4, c. 71, is an absolute indefeasible right to the enjoyment of light without reference to the purpose for which it has been used." (*Per Lord Cranworth, Yates v. Jack*, L. R., 1 Ch. 298; *Calcraft v. Thompson*, 15 W. R. 387.) "I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have that amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling-house, if it were a dwelling-house; or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air to such an extent as to render the house substantially less comfortable and enjoyable. Since the statute, as before the statute, it resolves itself simply into the same question, a question of degree, which would be for a jury, if this were an action at law, to determine; but which it is for us as judges of fact as well as law to determine for ourselves as best we may, when we are determining it in chancery." (*Per James, L. J., Kelk v. Pearson*, L. R., 6 Ch. 811.)

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Nature and extent of the right to light.

The principle as to ancient lights is, that the owner of the dominant tenement cannot substantially depart from the mode of user. He cannot change the position of his lights, nor increase the original aperture into which windows have been put; but if he has, in using his right, contracted to any given extent the original opening by windows of antique and clumsy structure, he may, without affecting his right, replace those windows of an improved structure, that let in more light and air. (*Turner v. Spooner*, 1 Drew. & Sm. 467; 7 Jur., N. S. 1068; 30 L. J., Chanc. 801; 9 W. R. 684.)

Where a man has been in the enjoyment of an extraordinary user of light for twenty years, that will establish the right against all persons who have reasonable knowledge of it. It was not necessary to say whether the right would be established against those who had no knowledge of it. (*Lanfranchi v. Mackenzie*, L. R., 4 Eq. 430.) As to the acquisition of light for the purpose of a diamond merchant's business, see *Hertz v. Union Bank of London*, 2 Giff. 686.

Extraordinary amount of light.

If an ancient window be enlarged, the owner of the adjoining land cannot lawfully obstruct the passage of light to any part of the space occupied by the ancient window, although a greater portion of light be admitted through the unobstructed part of the enlarged window than was anciently enjoyed, for the original aperture remains privileged as before the enlargement. (*Chandler v. Thompson*, 3 Campb. 80. See 4 Ad. & Ell. 192.) But a party may so alter the mode in which he has been permitted to enjoy this kind of easement as to lose the right altogether. (*Garratt v. Sharpe*, 3 Ad. & Ell. 325; 4 Nev. & M. 834.) And if a building, after having been used for twenty years as a malt-house, is converted into a dwelling-house, it is entitled in its new state only to the same degree of light which it possessed in its former state. (*Martin v. Goble*, 1 Campb. 322. See *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 427.) So where an old house is pulled down, and a new one built, the lights in the new house must be in the same place, of the same dimensions, and not more in number, than in the old house. (*Cherrington v. Abney*, 2 Vern. 646.)

Alteration of ancient lights.

It was laid down in several cases that where an owner of the dominant tenement has exceeded the limits of the right which he has acquired to the access of light and air, by altering his ancient lights, or by opening additional windows, he has not necessarily lost or suspended his admitted right; but the alterations or the opening of the additional windows justify the owner of the servient tenement in obstructing the ancient lights, if the doing so is unavoidable in the exercise of his right to obstruct the new lights. (*Renshaw v. Bean*, 18 Q. B. 112; *Hutchinson v. Copestake*, 9 C. B., N.

Effect of altering ancient lights or opening new lights, upon the right to ancient lights.

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S. 863; *Binckes v. Pash*, 11 C. B., N. S. 324; *Davies v. Marshall*, 1 Dr. & Sm. 557.) And accordingly it was held in equity that in such a case an injunction would not be granted to restrain the obstructions, except upon the terms of the plaintiff blocking up the new windows and restoring the ancient windows to their old position. (*Cooper v. Hubbuck*, 30 Beav. 160; *Weatherley v. Ross*, 1 H. & M. 349.)

*Tapling v. Jones.*

It has, however, since been laid down by the House of Lords that the right to obstruct light possessed by the owner of a servient tenement is simply his right of building on his own land, and the opening of new windows by the owner of the dominant tenement neither confers nor enlarges such right. Where, therefore, the owner of a dominant tenement, whilst preserving one ancient window, altered old windows and opened new windows upon the same side of his house, so that the owner of the servient tenement was obliged in obstructing the new and altered lights, also to obstruct the ancient lights, it was held that such obstruction was illegal from the beginning. (*Tapling v. Jones*, 11 H. L. C. 290; 34 L. J., C. P. 342; 13 W. R. 617.)

It was said by Lord Romilly, M. R., that *Tapling v. Jones* unquestionably decided that no alteration of an ancient light would justify the owner of the servient tenement in obstructing what remains of the ancient light, so as to exempt him from his liability to pay damages for such obstruction. But he held that a court of equity would not interfere by injunction to prevent such obstruction. (*Heath v. Bucknall*, L. R., 8 Eq. 1.) It has since, however, been held by *Giffard*, L. J., that the doctrine of *Tapling v. Jones* applies to the equitable as well as to the legal remedy. (*Staight v. Burn*, L. R., 5 Ch. 163.)

Unity of ownership.

An union of the ownership of the dominant and of the servient tenements for different estates does not extinguish an easement of this description, but merely suspends it so long as the union of ownership continues, and upon a severance of the ownership the easement revives. (*Simper v. Foley*, 2 J. & H. 555.)

Abandonment of right.

Completely shutting up windows with brick and mortar for above twenty years will destroy the privilege of light. (*Lawrence v. Obee*, 3 Campb. 514.) And the right to the use of light and air, which a party has appropriated to his own user, may be lost by mere non-user even for a less period than twenty years, unless an intention of resuming the right within a reasonable time be shown when it ceased to be used. Thus, where a person, entitled to ancient lights, pulled down his house, and erected a blank wall in the place of a wall in which there had been windows, and suffered such blank wall to remain about seventeen years, and the defendant erected a building against it, when the plaintiff opened a window in the same place where there had formerly been a window in the old wall: it was held, in an action for obstructing the light of the new window, that it must, at least, be shown that at the time of the erection of the blank wall, and the apparent abandonment of the former lights, it was not a perpetual, but a temporary abandonment of the enjoyment, with an intention to resume it within a reasonable time. (*Moore v. Rawson*, 3 B. & C. 336; 5 D. & R. 234. See *Cook v. Mayor of Bath*, L. R., 6 Eq. 177.) And it was said by *Littledale*, J., that if a man pulls down a house, and does not make any use of the land for two or three years, or converts it into tillage, he may be taken to have abandoned all intention of rebuilding the house, and consequently, that his right to the light has ceased. But if he builds upon the same site, and places windows in the same spot, or does anything to show that he did not mean to convert the land to a different purpose, then his right would not cease. (*Ib.* 341.)

The plaintiff was owner of a house in which there were ancient windows. His predecessor blocked them up, and they continued blocked up for nearly twenty years. The defendant purchased the adjoining land, and proposed to build upon it. The plaintiff, by way of asserting the right to the light, re-opened his ancient windows. The defendant obstructed them. On the trial of an action for this obstruction, the judge directed the jury that, if the right to light had once been acquired, it continued unless lost: and he directed them, if they thought the right had once been



acquired, to find for the plaintiff, unless they thought his predecessor had, in blocking up the windows, manifested an intention of permanently abandoning his right to the light, or unless they thought that the windows had been kept so closed as to lead the defendant to alter his position in the reasonable belief that the windows had been permanently abandoned. The plaintiff having had a verdict: it was held that the defendant had no ground to complain of this as a misdirection. (*Stokoe v. Singers*, 8 Ell. & Bl. 31; 3 Jur., N. S. 1256; 26 L. J., Q. B. 257.) It was questioned whether the manifestation of an intention to abandon the windows communicated to the owner of the land would destroy the right, until the owner of the land altered his position in reliance thereon. (*Ib.*)

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As a general rule, a person who is injured by a private nuisance may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Penruddock's case*, 5 Rep. 100 b), but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance. (*James v. Hayward*, 1 W. Jones, 221, 222.) If a person builds a house so near that of another that it stops his lights, or shoots water upon his house, the person injured may enter upon the owner's soil and pull the house down, provided no person be therein. (*Rex v. Rosewell*, 2 Salk. 459. See *Perry v. Fitzhume*, 8 Q. B. 757; *ante*, p. 54.) As to the replication *de injuriâ* in an action of trespass for such an entry, see *Thompson v. Eastwood*, 8 Exch. 69.

Remedies for dis-  
turbance of right  
to light.

Abatement.

When a party has acquired a right to the use of light, an action on the case lies for obstructing it. (9 Rep. 59 a; *Boury v. Pope*, 1 Leon. 168.) In order to sustain such an action, it is not necessary to show a total privation of light. If the plaintiff can prove that by reason of the obstruction he cannot enjoy the light in so free and ample a manner as he did before, it will be sufficient. (*Cotterell v. Griffiths*, 4 Esp. N. P. C. 69.) To sustain an action on the case for darkening the plaintiff's windows, it is not sufficient that a ray or two of light should be obstructed. The question is, whether, in consequence of the obstruction, the plaintiff has less light than before, to so considerable a degree as to injure the plaintiff's property in point of value or occupation. (*Pringle v. Wernham*, 7 Carr. & P. 377; *Wells v. Ody*, *Ib.* 410.) Where one party has the enjoyment of light, and alterations are made in the adjoining buildings, the diminution of light, as a ground of action against the party building, must be such as makes the premises to a sensible degree less fit for the purposes of business or occupation. (*Parker v. Smith*, 5 Carr. & Payne, 438; *Kelk v. Pearson*, L. R., 6 Ch. 814.) "In order to give a right of action and sustain the issue, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done." (*Per Best*, C. J., *Back v. Stacey*, 2 C. & P. 465. See the remarks upon this statement of the principle by *Wood*, V.-C., *Dent v. Auction Mart Company*, L. R., 2 Eq. 245; and by Lord *Chelmsford*, *Calcraft v. Thompson*, 15 W. R. 387.)

Action at law.

Rights to air and light are bestowed by Providence for the common benefit of man, and so long as the reasonable use by one man of this common property does not do actual and perceptible damage to the right of another to the similar use of it, no action will lie. A man cannot occupy a dwelling and consume fuel in it for domestic purposes without in some degree impairing the natural purity of the air; he cannot erect a building or plant a tree near the house of another, without in some degree diminishing the quantity of light he enjoys; but such small interruptions give no right of action, for they are necessary incidents to the common enjoyment by all. (*Per Parke*, B., *Embrey v. Owen*, 6 Exch. 372, 373.)

A reversioner may maintain an action for obstructing lights, for if he were prevented from suing for such an injury during the continuance of the lease, he might have great difficulty in proving his right when he came into possession. (*Shadwell v. Hutchinson*, 1 Mood. & Malk. 350. See 3 Taunt. 139.) The ground upon which a reversioner is allowed to bring his action for obstructions apparently permanent to lights and other easements which belong to the premises is, that if acquiesced in, they would become evidence

Actions by re-  
versioner.



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of a renunciation and abandonment. (*Bower v. Hill*, 1 Bing. N. C. 555. See 1 Wms. Saund. 346, b, n.; *Raine v. Alderson*, 6 Scott, 691; 4 Bing. N. C. 702. See *ante*, pp. 84, 101.) And in *Young v. Spencer*, Lord *Tenterden* said that it seemed to be clearly established, that if anything be done to destroy the evidence of title, an action is maintainable by the reversioner, (10 B. & C. 145,) who may in all cases bring an action where a stranger does an act injurious to the inheritance, and rendering it of less value. (*Jesser v. Gifford*, 4 Burr. 2141.) And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery. (2 B. & Ad. 97.) A declaration for an injury to the reversionary interest of the plaintiff by obstructing ancient lights is sufficient if it show an obstruction which may operate injuriously to the reversion, either by its being of a permanent character, or by its operating in denial of the right. (*Metropolitan Association, &c. v. Petch*, 5 C. B., N. S. 504; 27 Law J., C. P. 830.)

Against whom  
actions may be  
brought.

The owner of the inheritance of a house may maintain an action against his own lessee for obstructing lights. (*Thomlinson v. Brown*, Say, R. 215; see also 4 Burr. 2141; 3 Leon. 109.) Such an action may be brought not only against the party who first erected the nuisance, but also against his lessee or assignee for continuing it; (*Roswell v. Prior*, 12 Mod. 635; *S. C.* 2 Salk. 460; 1 Ld. Raym. 713. See also Carth. 456; 1 Keb. 994;) but after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given, (12 Mod. 640; Carth. 455,) unless a continuance of the nuisance be laid in the declaration. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen who performed and the clerk who superintended the works, are liable to an action. (*Wilson v. Peto and Hunter*, 6 B. Moore, 47.)

Actions against  
companies.

By a railway act it was provided, that nothing in the act contained should authorize the company to take, injure or damage, for the purposes of the act, any house or building which was erected on or before the 30th November, 1835, without the consent in writing of the owner or other person interested therein, other than such as were specified in the schedule to the act, unless the omission therefrom proceeded from mistake, &c. A subsequent clause contained provisions for settling all differences which might arise between the company, and the owners or occupiers of any lands which should be taken, used, damaged or injuriously affected by the execution of any of the powers granted by the act, and for the payment of satisfaction or compensation, as well for damages already sustained as for future, temporary or perpetual, or any recurring damages: it was held, that the company were liable, in an action on the case, to the reversioner of a house erected before the 30th November, 1835, and not specified in the schedule, for damage done to it by the obstruction of its lights by a railway station erected by the company under the act, and by the dust, &c. drifted from the station and embankment into the house, and that the plaintiff was not bound to come in under the compensation clause. (*Turner v. Sheffield and Rotherham Railway Company*, 10 Mees. & W. 425; 3 Railw. C. 222; see Shelford on Railways, p. 252, 3rd ed.)

Compensation can be recovered under the Lands Clauses Consolidation Act, 1845, for diminution of light. (*Eagle v. Charing Cross R. Co.*, L. R., 2 C. P. 638.)

Remedy in equity.

The Court of Chancery will grant an injunction to restrain the owner of a house from making any erection or improvements, so as to darken or obstruct the ancient lights or windows of an adjoining house. (*Back v. Stacey*, 2 Russ. 121; *Morris v. Lessees of Lord Berkeley*, 2 Ves. sen. 452.) The foundation of the jurisdiction to interfere by injunction in these cases is such material injury to the comfort of those who dwell in the neighbouring house, as to require the application of a power to prevent as well as to remedy an evil, for which damages more or less would be given at law, but the court will not interfere upon every degree of darkening ancient lights, nor in every case where an action may be maintained. (*Att.-Gen. v. Nichol*, 16 Ves. 338.) Courts of equity will restrain the erection of build-

ings which would cause irreparable injury, as loss of health, loss of trade or destruction of the means of existence, without waiting the slow process of establishing the legal right, when delay itself would be wrong; but the plaintiff is bound to show not only a legal right to the enjoyment of the ancient lights, but that if the building of the defendant is suffered to proceed, such an injury will ensue as warrants the court to interpose. (*Wynstanley v. Lee*, 2 Swanst. 335, 336.) But although it be perfectly clear that the plaintiff is entitled to succeed in an action of trespass, a court of equity will not interfere by injunction where the nature or degree of injury is not such as to require that extraordinary relief. (*Att.-Gen. v. Fishmongers' Company*, 1 Dick. 104.)

"There are many obvious cases of new buildings darkening those opposite to them, but not in such a degree that an injunction could be maintained or an action on the case, which, however, might be maintained in many cases which would not support an injunction." (*Per Lord Eldon, Att.-Gen. v. Nichol*, 16 Ves. 343; adopted in *Dent v. Auction Mart Company*, L. R., 2 Eq. 245, and *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 426.) "This court certainly would not interfere by way of injunction in a case in which no damages could be recovered at law. Perhaps it may be said that this court would not so interfere in a case in which, although damages might be recoverable at law, the amount to be recovered would be trifling and inconsiderable: but as this is a question on which, as applying to cases of nuisance, there has not been an unanimity of opinion in the court, I leave that point untouched. I think that at all events a plaintiff coming to this court for its interference in a case of this nature is bound to show that the obstruction to the light and air, which he calls upon the court to prevent, is such as will render the house occupied by him, if not of less value, less fit, or at least substantially less comfortable, for the purposes of occupation." (*Per Turner, L. J., Johnson v. Wyatt*, 2 De G., J. & S. 25. See *Kelk v. Pearson*, L. R., 6 Ch. 809; *Luscombe v. Steer*, 15 W. R. 1189.)

An injunction was refused, on the ground that the plaintiff had not proved substantial injury, in *Radcliffe v. Duke of Portland* (3 Giff. 702); *Johnson v. Wyatt* (2 De G., J. & S. 18); *Jacomb v. Knight* (11 W. R. 812); *Curriers' Company v. Corbett* (13 W. R. 1056); *Clark v. Clarke* (L. R., 1 Ch. 16); *Robson v. Whittingham* (*ib.* 442); *Lanfranchi v. Mackenzie* (L. R., 4 Eq. 421); *Sparling v. Clarkson* (17 W. R. 518). And it was said that the court would not, in an ordinary case, restrain the erection of a building the height of which above an ancient light is not greater than the distance from the light. (*Beadel v. Perry*, L. R., 3 Eq. 465.) The possibility of future injury is not a ground for granting an injunction. (*Jackson v. Duke of Newcastle*, 3 De G., J. & S. 275.)

Injunctions have been granted upon evidence being given of substantial injury in *Gale v. Abbott* (10 W. R. 748); *Stokes v. City Offices Company* (11 Jur., N. S. 560); *Yates v. Jack* (L. R., 1 Ch. 295); *Dent v. Auction Mart Company* (L. R., 2 Eq. 238); *Maguire v. Grattan* (16 W. R. 1189). And a plaintiff who in an insignificant degree obscured the light and air to his own dwelling was held not to be thereby disentitled to an injunction. (*Arcedeckne v. Kelk*, 2 Giff. 683; *Staight v. Burn*, L. R., 5 Ch. 163. See also *Dyers' Company v. King*, L. R., 9 Eq. 438.)

As to whether there is any distinction between the right to light and air in regard to town houses and country houses, see *Clarke v. Clark* (L. R., 1 Ch. 16); and the remarks on that case in *Dent v. Auction Mart Company* (L. R., 2 Eq. 238); *Martin v. Headon* (*ib.* 425); *Kelk v. Pearson* (L. R., 6 Ch. 809).

A mandatory injunction will only be granted to prevent extreme or very serious damage. (*Durell v. Pritchard*, L. R., 1 Ch. 244. See *Isenberg v. East India House Estate Company*, 3 De G., J. & S. 263; *Sparling v. Clarkson*, 17 W. R. 518.) It was doubted by *Turner, L. J.*, whether a mandatory injunction would be granted ordering the removal of works already completed. (*Curriers' Company v. Corbett*, 13 W. R. 1056. See *Lawrence v. Austin*, 13 W. R. 981; *Durell v. Pritchard*, L. R., 1 Ch. 244; *Viscountess Gort v. Clark*, 16 W. R. 569; *Dunball v. Walters*, 35 Beav. 565). A mandatory injunction was refused in *Calcraft v. Thompson* (15 W. R. 387).

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When Court of  
Chancery will  
interfere by way  
of injunction.

Injunction refused  
where no evidence  
of substantial  
injury.

Injunction granted  
where evidence of  
substantial injury.

Mandatory in-  
junction.

Of the Right to  
Light and Air.Former practice  
where plaintiff's  
legal right denied.

Where the defendants completed their building after bill filed a mandatory injunction was granted. (*Kelk v. Pearson*, L. R., 6 Ch. 809.)

Where the plaintiff's legal right was denied an injunction would not be granted, according to the former practice, until the plaintiff had established his right at law; but where the circumstances of the cases required it, an injunction was granted on the terms of the plaintiff proceeding to a speedy trial. (*Att.-Gen. v. Nichol*, 3 Mer. 687; *S. C.*, 16 Ves. 338; *Att.-Gen. v. Bentham*, 1 Dick. 277; 1 Ves. sen. 543; *Wynstanley v. Lee*, 2 Swanst. 337; *Chalk v. Wyatt*, 3 Mer. 688; *Sutton v. Lord Montford*, 4 Sim. 599; and see *Potts v. Levy*, 2 Drew. 272.)

Present practice.

The practice has, however, been changed by 21 & 22 Vict. c. 27, and 25 & 26 Vict. c. 42, under which the Court of Chancery must determine every question of law or fact incidental to the relief sought. And it seems that since these acts the court must deal with the question of nuisance or no nuisance as it deals with every other question within its jurisdiction depending on a disputed matter of fact. See the acts stated *ante*, p. 106.

Damages awarded  
by the Court of  
Chancery.

Damages may now be awarded by the Court of Chancery under 21 & 22 Vict. c. 27, s. 2. (*Ante*, p. 107.) But it is discretionary with the court whether it will award damages or leave the plaintiff to obtain them at law. (*Durell v. Pritchard*, L. R., 1 Ch. 244.) The court considered the question of damages and determined that the plaintiff was not entitled to them. (*Johnson v. Wyatt*, 2 De G., J. & S. 18.) An inquiry as to damages was directed in *Isenberg v. East India House Estate Company* (3 De G., J. & S. 263); *Martin v. Headon* (L. R., 2 Eq. 425); *Senior v. Parson* (L. R., 3 Eq. 330); *Lyon v. Dillimore* (14 W. R. 511); *Webb v. Hunt* (14 W. R. 725).

Who can obtain  
relief in equity.

The court will restrain the interference with ancient lights, although the plaintiff is not the occupier of the house interfered with, and may have no intention of occupying it. (*Wilson v. Townend*, 1 Dr. & Sim. 324; 6 Jur., N. S. 1109; 30 L. J., Ch. 25; 9 W. R. 30.) A tenant from year to year may file a bill for an injunction to protect the right to the access and use of light; but the injunction will be limited to the period of the continuance of his tenancy. (*Simper v. Foley*, 2 Johns. & H. 555.) A tenant from year to year under notice to quit may obtain an injunction. (*Jacomb v. Knight*, 11 W. R. 812.) And a tenant whose lease had expired when the bill was filed, but who had agreed with the agent of the lessor for a renewal. (*Gale v. Abbott*, 10 W. R. 748.) But where a tenant under an agreement for a lease filed a bill to restrain his lessor from obstructing the ancient lights in the premises, but did not ask to have the agreement specifically performed, an injunction was refused. (*Fox v. Purcell*, 3 Sm. & Giff. 242.) A reversioner can obtain an injunction. (*Mercers' Company v. Auction Mart Company*, L. R., 2 Eq. 238.) But an injunction will not be granted where the title to the property sought to be protected has not been accepted by the plaintiff. (*Heath v. Mayden*, 13 W. R. 199.)

Covenant.

As to the interference of a court of equity to restrain the erection of additional buildings when a covenant to that effect had ceased to be applicable according to the spirit and intent of the contract, see *Duke of Bedford v. Trustees of British Museum*, 2 M. & K. 552.

Acquiescence and  
delay.

If an adjoining owner knowingly permits a messuage and premises to be rebuilt of an increased size and height, with the alteration of ancient lights, and the opening new lights upon an additional floor, he cannot object to them after they have been completed, or assert a right to raise a party-wall, and build upon his own property so high as to render the new buildings less accessible to light and air, than they were at the completion of the work. (*Cotching v. Bassett*, 32 Beav. 101: a case depending on the old law as to alteration, *ante*, p. 123.) In *Dann v. Spurrier*, the court proceeded upon the doctrine that it will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title; and the circumstance of looking on is, in many cases, as strong as using terms of encouragement; a lessor knowing and permitting those acts, which the lessee would not have done, and the other must conceive that he would not have done, but upon an expectation that the lessor would not throw an objection in the way of the enjoyment. It must however

be proved, by strong evidence, that the party acted upon that sort of encouragement. (*Dann v. Spurrier*, 7 Ves. 235, 236.)

Of the Right to  
Light and Air.

A plaintiff complained of an obstruction of the light and air to his ancient windows; of the raising and erecting of walls and buildings, whereby the smoke and vapour from the plaintiff's chimneys were prevented from being carried off; and that the defendant had deprived his house of the support which he was entitled to. The defendant pleaded, by way of equitable defence, that the grievances were occasioned by the pulling down and rebuilding of the defendant's house; that the plaintiff had notice, and that the old building was pulled down, and the new one erected, and large sums of money were expended thereon by the defendant, with the knowledge, acquiescence, and consent of the plaintiff, and on the faith that the plaintiff so knew of, acquiesced in, and consented to the so pulling down and rebuilding. The plaintiff replied, that he acquiesced and consented upon the faith of false representations made to him by the defendant and her agents, that the grievances would not result from or be produced by, the pulling down and rebuilding:—it was held, that the plea afforded a good defence on equitable grounds. (*Davies v. Marshall*, 10 Q. B., N. S. 697; 31 L. J., C. P. 61.) It was held, also, that the replication was a good equitable answer to the plea. (*Ib.*)

An injunction to restrain the obstruction of ancient lights was refused on the ground of delay. (*Cooper v. Hubbuck*, 30 Beav. 160; *Cocks v. Romaine*, 14 L. T., N. S. 390.) As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson v. Wyatt*, 2 De G., J. & S. 18; *Turner v. Mirfield*, 34 Beav. 390.

The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window. (*Chandler v. Thompson*, 3 Campb. 80; see 9 Rep. 58 b; *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69.) The intrusion upon a neighbour's privacy even by opening a new window overlooking the adjoining property, is not a ground for interference either at law or in equity. (*Turner v. Spooner*, 1 Drew. & Sm. 467. See also *Re Penny and South-Eastern R. Co.*, 7 Ell. & Bl. 660; and the remarks of Lord Westbury in *Tapling v. Jones*, 11 H. L. C. 290.)

Privacy.

An injunction was refused where the application proceeded on a particular right to a long enjoyment of a prospect. (*Att.-Gen. v. Doughty*, 2 Ves. sen. 453. See *Squire v. Campbell*, 1 M. & Cr. 459.) So the building of a wall which merely intercepts the prospect of another, without obstructing his lights is not actionable. (*Knowles v. Richardson*, 1 Mod. 55; 2 Keb. 611, 642.) A covenant, however, not to obstruct a prospect will be enforced in equity. (*Piggott v. Stratton*, 1 De G., F. & J. 33; *Western v. Macdermott*, L. R., 2 Ch. 72.)

Prospect.

The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business. (*Smith v. Owen*, 35 L. J., Ch. 317; 14 W. R. 422; *Butt v. Imperial Gas Co.*, L. R., 2 Ch. 158.)

View of shop  
window.

The owner of a house has a right at common law to wholesome and untainted air, unless the business which creates a nuisance has been carried on for such a length of time as will raise a presumption of a grant from the neighbouring owners in favour of the party who causes the nuisance. (*Elliottson v. Feetham*, 2 Bing. N. C. 134; 2 Scott, 174.) Nothing less than an user of twenty years will afford such presumption. (*Bliss v. Hall*, 5 Scott, 500; *Crump v. Lambert*, L. R., 3 Eq. 413.) A right to the unobstructed passage of air through a window may be acquired by prescription at common law. (*Aldred's case*, 9 Coke, 58. See *Gale v. Abbott*, 10 W. R. 748; *Dent v. Auction Mart Co.*, L. R., 2 Eq. 252.) But a right to the unobstructed passage of air to a windmill cannot be acquired by prescription under the statute. (*Webb v. Bird*, 13 C. B., N. S. 841.)

Rights with regard  
to air.

An action will lie for pollution of air. (*St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642; 13 W. R. 1083.) And the Court of Chancery will restrain such a nuisance. (*Tipping v. St. Helen's Smelting Co.*, L. R.,

Remedies for pol-  
lution of air, at  
law and in equity.

Of the Right to  
Light and Air.

1 Ch. 66; *Crump v. Lambert*, L. R., 3 Eq. 409. See *Scaine v. Great Northern R. Co.*, 12 W. R. 391.)

What constitutes a nuisance was thus defined by *Knight Bruce*, V.-C.: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" (*Walter v. Selfe*, 4 De G. & Sm. 322, adopted by *Kindersley*, V.-C., in *Soltau v. De Held*, 2 Sim., N. S. 183, and Lord *Romilly*, in *Crump v. Lambert*, L. R., 3 Eq. 413.)

Where a man, by an act on his own land, such as burning bricks, causes so much annoyance to another in the enjoyment of a neighbouring tenement, as to amount *prima facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land. (*Bamford v. Turnley*, 8 B. & S. 66; 10 W. R. 803, overruling *Hole v. Barlow*, 4 C. B., N. S. 334.) See *Carey v. Ledbetter*, 13 C. B., N. S. 470; *Luscombe v. Steer*, 15 W. R. 1191; and *St. Helen's Smelting Co. v. Tipping*, 11 H. L. C. 642, where Lord *Westbury* distinguishes the cases where material injury is done to property, and those where personal discomfort is produced.

A bill was filed by five several occupiers of houses in a town to restrain the erection of a steam engine, which would be a nuisance to each of them. It was held, that each occupier had a distinct right of suit, and that they could not sue as co-plaintiffs, for as each had a separate nuisance to complain of, that which was an answer to one might not be an answer to the other. (*Hudson v. Maddison*, 12 Sim. 416.)

An injunction was granted to restrain brick burning, which interfered with the comfort and enjoyment of a mansion and with ornamental trees, which excluded the view of unsightly objects, and where such trees were in some cases destroyed, and in many instances injured by brick burning. (*Beardmore v. Tredwell*, 3 Giff. 683; 31 L. J., Chan. 892.) Injunctions to restrain brick burning were also granted in *Walter v. Selfe*, 4 De G. & Sm. 315; *Boreham v. Hall*, W. N. 1870, p. 57; *Roberts v. Clarke*, 18 L. T., N. S. 49, and see *Luscombe v. Steer*, 14 W. R. 1191.

An injunction to restrain the emission of smoke and noxious vapours was granted in *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600. And it has been held that it is no answer to a complaint by a manufacturer of a nuisance to his trade, to say that the injury is felt only by reason of the delicate nature of the manufacture. (*Cooke v. Forbes*, L. R., 5 Eq. 166.) Nor does the fact of the plaintiff having come to the nuisance, disentitle him to equitable relief. (*Tipping v. St. Helen's Smelting Co.*, L. R., 1 Ch. 66.)

As to whether an injunction will be granted as a matter of course where a verdict has been obtained at law, see *Imperial Gas Light and Coke Co. v. Broadbent*, 7 H. L. C. 600; *Crump v. Lambert*, L. R., 3 Eq. 409; *Luscombe v. Steer*, 15 W. R. 1191.

Acquiescence.

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage. Though a party may be disentitled by acquiescence to an injunction to stop another's manufactory, which is noxious to the neighbourhood, yet it does not consequently follow that the latter is entitled to an injunction to prevent the party who has acquiesced from recovering damages at law. Equity may leave both parties to their legal rights. (*Bankart v. Houghton*, 27 Beav. 425.) An injunction to prevent, on the ground of acquiescence, a party injured by copper works, from enforcing a judgment recovered by him for damages at law was refused with costs. (*Ib.*) See also, as to the effect of acquiescence in such a case, *Williams v. Earl of Jersey*, Cr. & Phil. 91; *Savile v. Kilner*, 26 L. T., N. S. 276.



## LIMITATION OF ACTIONS AND SUITS.

3 &amp; 4 WILLIAM IV. CAP. 27.

*An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto.* [24th July, 1833.]

I. *Limitation of time for the recovery of land or rent.*

1. *Interpretation clause, 3 & 4 Will. 4, c. 27, s. 1.*
2. *Period of limitation fixed, and when right first accrues, ss. 2—15.*
3. *Savings in case of disabilities, ss. 16—19.*
4. *Concurrent rights, s. 20.*
5. *Operation of the statute in case of estates tail, ss. 21—23.*
6. *Limitation of time as to suits in equity, ss. 24—27.*
7. *Limitation of time between mortgagor and mortgagee, s. 28.*
8. *Limitation of time as to church property and advowsons, ss. 29—33.*
9. *Abolition of real and mixed actions, &c., ss. 36—39.*
10. *Limits of act, ss. 43—44.*

II. *Limitation of time for the recovery of money charged on land, legacies, arrears of dower, rent and interest, 3 & 4 Will. 4, c. 27, ss. 40—42.*III. *Of the limitation of actions on specialties, 3 & 4 Will. 4, c. 42.*IV. *Of the limitation of actions on simple contract, 21 Jac. 1, c. 16; 9 Geo. 4, c. 14.*

## I. LIMITATION OF TIME FOR THE RECOVERY OF LAND OR RENT.

1. *Interpretation Clause.*

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "land" (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*c*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*d*), and whether freehold or copyhold, or held according to any other tenure; and the word "rent" shall extend to all heriots (*e*), and to all services and

3 & 4 Will. 4,  
c. 27, s. 1.

Meaning of the  
words in the act.

"Land."

"Rent."



3 & 4 Will. 4,  
c. 27, s. 1.

Person through  
whom another  
claims.

"Person."

Number and  
gender.

Construction of  
statutes of limi-  
tation generally.

Subjects not in-  
cluded in this act.

Tithes.

suits for which a distress may be made (*f*), and to all annuities and periodical sums of money charged upon or payable out of any land (*g*) (except moduses or compositions belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*h*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*i*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

(*a*) The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost, and in all well-regulated countries the question of possession is held to be an important point of policy. (*Trustees of Dundee Harbour v. Dougall*, 1 Macq. H. L. C. 321, *per* Lord *St. Leonards*.) The several statutes of limitations being all *in pari materia* ought to receive an uniform construction notwithstanding a slight variation in phrase, the object and intention being the same. (*Murray v. East India Company*, 5 B. & Ald. 206, 215, *per* Abbott, C. J.) All these acts being, as they were emphatically termed by Lord *Kenyon*, statutes of repose, are to be liberally and beneficially expounded. (*Per Dallas*, C. J., in *Tolson v. Kaye*, 6 Moore, 558; 3 Bro. & B. 217.) See the maxims "*Interest reipublicæ ut sit finis litium*" (Broom's Legal Maxims, 343, 5th ed.) and "*Vigilantibus non dormientibus jura subveniunt*" (Broom, 892).

Turnpike tolls are not within this act; and consequently more than six years' arrears of interest may be recovered on a mortgage of turnpike tolls notwithstanding the 42nd section of the act, a share of the tolls of a turnpike road not coming within the meaning of the word *land* as defined by the first section of this act. (*Mellish v. Brooks*, 3 Beav. 22; 4 Jur. 739.) But quarries and limestone land do come within that word. (3 Ir. Law Rep. 521.) The limitation prescribed by the 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of a rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by this statute. (*Manning v. Phelps*, 10 Exch. 59; 24 Law J., Exch. 62.)

The word "rent" has an ambiguous meaning, being either the estate in the rent or the rent reserved under a lease. It has been confined in sect. 2 to the former meaning alone, so that a mere non-receipt of rent under a lease for more than twenty years does not deprive the lessor of his right to rent under the lease. (*Grant v. Ellis*, 9 M. & W. 113.) Lord *St. Leonards* said, *rent*, in the sense in which it is spoken of in the second section, means rent of inheritance, and it does not mean rent reserved by lease for example, or rent in the common and customary form of a render for property. (*Dean of Ely v. Bliss*, 2 De G., M. & G. 459. See p. 472.)

The word "tithes," like rent, has an ambiguous meaning, signifying either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes (other than tithes belonging to a spiritual or eleemosynary corpora-

tion sole,) are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. Therefore a person who has received no tithes for twenty years cannot recover the possession of them from another, who has for twenty years received those tithes from the tenant. (*Dean of Ely v. Cash*, 15 M. & W. 617; *Dean of Ely v. Bliss*, 5 Beav. 574; 2 De G., M. & G. 459. See *Lord Shannon v. Hodder*, 2 Brady, Adair & Moore, 223, n.) The effect of time as between tithe-owner and occupier is determined by 2 & 3 Will. 4, c. 100. (See *Salkeld v. Johnston*, 1 Mac. & Gor. 242; 18 L. J., Ch. 493; 1 H. & T. 329, where Lord Cottenham expressed his opinion that under that act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes. See 2 Ex. 256; 2 C. B. 749.) The cases on the construction of that act are collected, Shelford on Tithes, 391—398, 3rd ed., and Supplement, 47—86.

3 & 4 Will. 4,  
c. 27, s. 1.

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of 3 & 4 Will. 4, c. 27. The time for recovering lands belonging to such a corporation is prescribed by 3 & 4 Will. 4, c. 27, s. 29, *post*.

Tithe rent-charge not belonging to a spiritual or eleemosynary corporation sole appears to be within the meaning of the word "rent" in sect. 2. It has been held in Ireland that tithe rent-charge is not by virtue of this act extinguished by non-payment. (*Shiel v. Incorporated Society*, 10 Ir. Eq. R. 411.) See however Darb. & Bos. Stat. Lim. 212. Whether tithe rent-charge belonging to a spiritual or eleemosynary corporation sole is within the act is an open question. (See Darb. & Bos. Stat. Lim. 377.)

Tithe rent-charge.

As to the recovery of arrears of tithes and tithe rent-charge, see note to sect. 42, *post*.

Arrears of tithes  
and tithe rent-  
charge.

(b) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed. (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91.) *Hereditaments* are of two sorts, *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land. (Co. Litt. 4; 2 Bl. Com. 17.) An *incorporeal* hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same. (*Ib.* 20.) Many of the latter are not within this act, but the periods of limitation for several incorporeal rights are prescribed by the stat. 2 & 3 Will. 4, c. 71 (*ante*, pp. 1—28).

Hereditaments.

(c) *Ecclesiastical* corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons, parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22.)

Different kinds of  
corporations.

*Eleemosynary* corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed. (1 Bl. Com. 471.) These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the *name* of a college. (*Per Holt*, Skinn. 484.) There are many hospitals not incorporated in which the succession is kept up by

3 & 4 Will. 4,  
c. 27, s. 1.

trustees. (10 Rep. 31, 35.) There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy." (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20.) And such are many corporations of trustees or governors of free schools. (See 1 Kyd on Corporations, 25—27.) All these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, (1 Ld. Raym. 6,) and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies. (1 Bl. Com. 471.) Each university of Oxford and Cambridge is a *lay* corporation and not eleemosynary, as particular colleges are, although some salaries are attached to some of their officers. (*Rex v. Vice-Chancellor of Cambridge*, 3 Burr. 1652. See Shelford on the Law of Mortmain and Charities, 8—34.)

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of an hospital, the dean and chapter of a cathedral church. (10 Rep. 29 b; 11 Rep. 69 b.)

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole. (Co. Litt. 43.) So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar. (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20.) Corporations are as liable to the operation of prescription as private persons. (*Dundee Harbour Trustees v. Dougall*, 1 Macq. H. L. C. 317.)

Meaning of the  
term "freehold."

(d) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel. (Co. Litt. 43 b; 1 Burr. 108.) An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person." (Watk. on Conv. by Morley and Coote, 63; Prest. on Estates, 200—203. See observations on an Estate of Freehold, by Manning, 2 Jur. 459.) All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests, (1 Prest. on Estates, 203,) which may subsist in both corporeal and incorporeal hereditaments. (Noy's Maxims, by Bythewood, 142, 357; Bac. Abr. Executors (H. 3).) Chattels real are such as concern the realty, as terms for years in land, the next presentation to a church, (Dyer, 135 a,) estates by statute-merchant, statute-staple, elegit, or the like. (Co. Litt. 118 b.) By the common law no estate of inheritance or freehold is comprehended under the word chattels.

Heriots.

Heriot service.

Heriot custom.

(e) Heriot is defined to be the best beast, or other thing, due to the lord on the death or alienation of his tenant. Heriots are usually divided into two sorts, heriot *service*, and heriot *custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; (*Lanyon v. Carne*, 2 Saund. 166;) the latter arise upon no special reservation whatever, but depend merely upon immemorial usage and custom. (Co. Cop. s. 24.) Heriot *service* may be recovered either by seizure, (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192,) or by distress within the manor. (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11.) Any goods belonging to another, found upon the lands charged with heriot service, may be distrained. (Bro. Har. 6; Cro. Car. 260; *Austin v. Bennet*, 1 Salk. 356.) A heriot due by the *custom*

of a manor may be payable on the death of every tenant of an estate of inheritance, or for life or years, (21 Hen. 7, 13 & 15; Keilw. 80; Bro. Har. 5,) or at will. (*Hix v. Gardiner*, 2 Bulstr. 196.) As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it. (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker v. Gage*, 1 Show. 81.) If the lord of a manor is entitled to five beasts as heriots on the death of a tenant, and he select seven, this selection will not vest in him the property in any five of them. And if the best beast may be claimed as a heriot, the property in any particular beast will not vest in the lord before selection of it. (*Abington v. Lipscomb*, 6 Jur. 257; 1 Q. B. 776. See stat. 4 & 5 Vict. c. 35; 6 & 7 Vict. c. 23; 15 & 16 Vict. c. 51; 21 & 22 Vict. c. 94, providing for the commutation of manorial rights in respect of copyholds. See further as to heriots, Shelford on the Law of Copyholds and the Supplement thereto, pp. 119—133; 2 Watk. on Cop. c. 6; 2 Saund. Rep. 168, n.; Cruise, Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold (K 18), (K 27); Scriven on Cop. 370—391, 4th ed.; *Croome v. Guise*, 4 Bing. N. C. 148; 5 Scott, 453.) A heriot may be due by custom on the death of a tenant in respect of a tenement of free lands held in fee simple of a manor. (*Damarrell v. Protheroe*, 10 Q. B. 20.)

3 & 4 Will. 4,  
c. 27, s. 1.

The decision of the court, that the twenty years within which an action must be brought for the recovery of rent runs from the day on which the last payment of rent was made, will lead to some difficulty in the case of heriots and other similar rights which become due at uncertain intervals, and also in the possible though not very probable case of a rent reserved, payable every twenty years, or a longer interval. In reference to such cases, it was observed by *Parke, B.*, "if the twenty years are to be calculated from the last payment, a party, it was argued, will lose his right without any default or laches whatever, when the rent is payable at intervals greater than twenty years, and it is shortened to less than a year where it is payable every twenty years; and no doubt great difficulty may exist in dealing with such cases. But as to heriots, probably the answer to this objection may be, that in a case similar to that now before us, the word 'rent' would not include heriots; for though, by the interpretation clause, the word 'rent' is made to include heriots, yet that is only where the nature of the provision or the context does not exclude such a construction; and it may be that the injustice pointed out would afford grounds for holding, that in the clause now under consideration, the word 'rent' does not include heriots. A similar observation may be made upon the case of rents payable at greater intervals than twenty years, and this may be considered either as falling under the general enactment in the second section, so that each particular heriot or amount of rent due may be recovered within twenty years, or is not provided for by the statute at all, and is left in the same condition as if the act had not passed." (*Owen v. De Beauvoir*, 16 Mees. & W. 566. See *De Beauvoir v. Owen*, 19 Law J., Exch. 177.)

When time begins  
to run.

In trover for a heriot, it was proved by entries in the court rolls of a manor, that down to the year 1804 the land in respect of which the heriot was claimed was freehold land, held of the lord by heriot, quit rent, relief, &c. On the death of a tenant, in 1804, a heriot was seized. In 1824 the next tenant died, but there was no entry of any seizure of a heriot on that occasion, or of any reason for the omission. In 1826, the present lord came into possession; and in 1847, upon the death of the next tenant, the heriot now claimed was seized. Since 1804 no quit rent or relief appeared to have been demanded or paid, nor any service of any kind rendered to the lord of the manor. It was held, that the lord's right of action was not barred by the second section of this act, and that there was no ground for presuming that the tenure of the lands had been changed or even that the heriot had been released by the lord. It seems that the right to the quit rent was barred by the statute. (*Earl of Chichester v. Hall*, 17 Law T. 121, Q. B.) See the discussion of these cases in Darb. & Bos. Stat. Lim. 208, 224, where an opinion is expressed, that rents due at long and uncertain intervals and heriot service are within the meaning of the word 'rent' in sect. 2 of this act, and are liable to be extinguished thereby, but that heriot

3 & 4 Will. 4,  
c. 27, s. 1.

Negligence in  
exacting acknow-  
ledgments for  
fines.

Different kinds of  
rents.

Rent-service.

Rent-charge.

Rent-seck.

custom is wholly unaffected by the act; and further, that in the case of heriot service time begins to run from the moment of a heriot being due and unpaid.

In the absence of evidence adverse to the rights of the lord of a manor, the court will not presume the enfranchisement of land shown to have been copyhold in 1717 from mere negligence by the lords in exacting the small acknowledgments for fines, &c., which were then commuted. *Wood, V.-C.*, said it was not a case to which any statute of limitations applied. (*Turner v. West Bromwich Union*, 9 W. R. 155.)

(f) A rent (*reditus*) is properly, a sum of money or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising. (2 Bl. Comm. 31; Gilb. on Rents, 9, &c.) There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck. (Litt. s. 213.) *Rent-service* is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feudal oath of fidelity. (Co. Litt. 142.) For if a tenant holds his land by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent, these pecuniary rents being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or in arrear, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. (Litt. s. 215.) A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be in arrear or behind, it shall be lawful to distrain for the same. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it. (Co. Litt. 143.) *Rent-seck* (*reditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by deed, but without any clause of distress. (2 Bl. Comm. 42.) Either a rent-service disconnected from the reversion (*Ards v. Watkin*, Cro. Eliz. 637, 651), or a rent-charge may be divided by will or by deed, operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind. (*Rivis v. Watson*, 5 Mees. & W. 255. See *Colborne v. Wright*, 2 Lev. 289.)

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor (2 Inst. 19), which cannot be departed from or varied. Those of the freeholders are frequently called *chief* rents (*reditus capitales*); and both sorts are indifferently denominated *quit-rents* (*quieti reditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation. (Co. Litt. 143.) For a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee-simple instead of the usual method, for life or years. (2 Bl. Comm. 43.) An opinion is expressed by Mr. Hargrave (Co. Litt. 143 b, n. 5), that the true meaning of *fee-farm* is a perpetual farm or rent, the name being founded on the *perpetuity* of the rent or service, and not on the *quantum*; and that the term is not applicable to any rents except *rent-service*, where he differs from Mr. Douglas, who had thought that a *fee-farm* was not necessarily a rent-charge, but might also be a rent-seck. (*Bradbury v. Wright*, Dougl. 627, n. 1.) These are the general divisions of rent; but the difference between them (in respect of the remedy for recovering them) is now abolished.

Remedy by dis-  
tress for recover-  
ing rents-seck  
given by 4 Geo. 2,  
c. 28, s. 5.

By stat. 4 Geo. 2, c. 28, s. 5, the same remedy was given by distress, and by impounding and selling the same, in cases of rents-seck, rents of assize, and chief-rents, which had been duly answered or paid for the space



of three years within the space of twenty years before the first day of that session of parliament (January, 21, 1731), or should be thereafter created, as in case of rent reserved upon lease. Unless the case is brought within this section, a rent-seck cannot be recovered by distress. (*Bradbury v. Wright*, Dougl. 627.) It is not, however, necessary that the three years mentioned in the statute should be *continuous*; it is sufficient if, for the space of three *whole* years within twenty years before the passing of the act, the rent was paid, though those years may not be consecutive. (*Musgrave v. Emerson*, 10 Q. B. 326.)

3 & 4 Will. 4,  
c. 27, s. 1.

A tenant by elegit has a right to distrain without attornment. (*Lloyd v. Davies*, 2 Exch. R. 103.) An action of debt lies on an express covenant for the payment of a freehold rent charged on land conveyed in fee. (*Varley v. Leigh*, 2 Exch. R. 446.) *Rolfe*, B., guarded himself against expressing an opinion that debt will lie for rent in consequence of the abolition of real actions by 3 & 4 Will. 4, c. 27, s. 36. (*Ib.* p. 450.) It is clear, if a lessee for years assign his term, reserving a rent, with no clause of distress, not having any reversion, he cannot distrain for the rent either by the common law or by the statute (— *v. Cooper*, 2 Wils. 375; *Parmenter v. Webber*, 2 B. Moore, 656. See 4 Taunt. 720; 8 Taunt. 593; *Langford v. Selmes*, 3 K. & J. 220), although he may re-enter on the breach of a condition. (*Doe v. Bateman*, 2 B. & Ald. 168.) A. being seised in fee, leased premises to B. for sixty-one years, and afterwards granted a lease to C. of the same premises to commence at the expiration of the sixty-one years: it was held, that A. had not parted with his reversion by the lease to C., so as to take away his right to distrain for rent due from B. under his lease. (*Smith v. Day*, 2 Mees. & W. 684.) A rent-charge granted for life by a tenant for years is good as a chattel interest, and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears. (*Saffery v. Elgood*, 1 Ad. & Ell. 191.) An agreement for a future lease, at a rent certain, is not a sufficient reservation of rent, and will not constitute a demise; and where a party is let into possession under such an agreement, the lessor cannot distrain, but must resort to his action of use and occupation. (*Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & Ald. 322.) Where a party, entitled to a term in land, let the land by parol to another, at a weekly rent, for the whole of such term, and it is the intention of the parties to create the relation of landlord and tenant, use and occupation may be brought for the whole of such term, although the lessee has given a week's notice to quit before the expiration of the term, and has quitted accordingly. Such a demise will not be deemed an assignment, against the intention of the parties, though nothing be left in the party demising. (*Pollock v. Stacey*, 9 Q. B. 1033.)

Distress for rents.

It was said by *Patteson*, J., that the language of the first section of this act cannot limit the sense of the term rent. An interpretation clause does not restrain the meaning. (7 Q. B. 979.) Where a tenant holds premises by the service of cleaning the parish church, without any pecuniary render, such service is a "rent" for which a distress may be made, within the meaning of the Limitation Act, 3 & 4 Will. 4, c. 27, ss. 1, 8. (*Doe d. Edney v. Benham*, 7 Q. B. 976, 981.) So the service (under the like circumstances) of ringing the church bell at stated hours from Michaelmas to Christmas. (*Doe d. Edney v. Billett*, 7 Q. B. 976, 983.) It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money;" and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it. (*Doe d. Edney v. Benham*, 7 Q. B. 982.)

Rents for which a  
distress may be  
made, within  
3 & 4 Will. 4, c. 27.

Where the overseer of a township claimed lands which they had allowed



3 & 4 Will. 4,  
c. 27, s. 1.

a poor inhabitant to occupy rent free, he keeping up a grindstone upon the land for the convenience of the parish, the enjoyment of this privilege by the parishioners, for upwards of twenty years, whilst the lands were occupied by persons paying no rent, does not defeat the title of such persons under this statute. *Parke, B.*, expressed an opinion that whatever the origin of that duty or liability might have been, there was nothing in it which, in his opinion, conferred upon it the character of rent, or "profits of land" within the third section of the act. (*Doe d. Robinson v. Hinde*, 2 M. & Rob. 441.) This case was first tried before Lord *Denman*, C. J., who held that the keeping a grindstone was rent, but on discussion of the case afterwards in court, it was argued, that to meet the provision of the statute there should have been a service for which a distress might be made. (7 Q. B. 978.)

Right of executors  
to distrain.

It was held, that the executor of a person who was seised in fee of land, and demised it for a term of years, reserving a rent, could not distrain for arrears of rent accrued in the testator's lifetime; for the latter was not a tenant in fee-simple of a rent, within the meaning of the stat. 32 Hen. 8, c. 37, s. 1. (*Prescott v. Boucher*, 3 B. & Ad. 849. See the cases on this subject collected and reviewed in 2 Wms. on Executors, 866 *et seq.*) But by stat. 3 & 4 Will. 4, c. 42, ss. 37, 38, the executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for the arrearages due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. (Sect. 37.) And such arrearages may be distrained for after the determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined: provided such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; and all powers and provisions in the several statutes, made relating to distresses for rent are made applicable to the distresses so made as aforesaid. (Sect. 38.)

Distress after end  
of term.

Before stat. 8 Ann. c. 14, s. 6, rent accruing before the expiration of a tenancy could not be distrained for after the tenancy expired, though the tenant continued in occupation. Therefore, where proceedings are taken upon an avowry at common law for rent in arrear, and not under the statute, it must be alleged and proved that the tenancy continued up to the time of the distress. (*Williams v. Stiven*, 9 Q. B. 14.)

Right to distrain  
for annuity given  
by will.

It has been decided, that a distress may be taken for arrears of a rent-charge created by will, although the testator does not in terms give a power to distrain, such power being a consequence drawn by law from the rent-charge. (*Rodham v. Berry*, K. B., April, 1826; *Watk. Conv. by Cov.* 248, n. (a).) Where there was a devise of lands to A. for life, remainder to B. in fee, charged with the payment of 20*l.* a year to C. during her life, to be paid by A. as long as she should live, and after A.'s decease to be paid by B.: it was held, that the annuity was a charge on the estate, and that C. might distrain for the arrears, although the will contained no power of distress. (*Buttery v. Robinson*, 3 Bing. 392; 11 Moore, 262.) A rent for equality of partition is not a rent-service, but a rent-charge of common right, and therefore may be distrained for. (Litt. s. 253.)

Rents not in  
general issuable  
out of incorporeal  
hereditaments.

Rent cannot as a general rule issue out of an incorporeal hereditament, so as to warrant a distress, which can only be made in respect of a fixed ascertained rent reserved out of land. (2 Barn. & Ad. 389.) A rent could not formerly be reserved out of an advowson in gross, tithes, or any other *incorporeal* hereditament. (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22.) A rent cannot be reserved out of a rent; (2 Roll. Abr. 446; Keilw. 161;) nor out of a mere privilege or easement in land. (*Buzzard v. Capel*, 8 B. & Cr. 141.) Part of a rent may be granted, although it cannot be reserved out of an *old* rent. (2 Ves. sen. 178.)

Exceptions to the  
rule.

The king, however, may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant. (Co. Litt. 47 a; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22.) And the grantee of fee-farm rents from the crown might exercise the same power. (1 P. Wms. 306.) A rent may be reserved upon a grant of an estate in remainder or reversion, for the

remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears. (2 Roll. Abr. 446.)

3 & 4 Will. 4,  
c. 27, s. 1.

A lease by a bishop of *tithes only*, rendering the ancient rent, was held void against the successor, because there was no remedy for the rent by distress or assize. (*Tanlintine v. Denton*, Cro. Jac. 111; *Dean and Chapter of Windsor v. Gover*, 2 Wms. Saund. 230.) But by stat. 5 Geo. 3, c. 17, all leases for one, two or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls or other incorporeal hereditaments without any lands by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital or any other person who is enabled by statute to make such leases of any *corporeal* hereditaments, are as effectual against the lessors and their successors, as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. It is perfectly clear that, in point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only. Therefore where, by an instrument not under seal, A. agreed to let to B. on lease the rectory of L., and the tithes arising from the lands in the parish of L., and also a messuage used as a homestead for collecting the tithes, at a yearly rent of 200*l.*, the rent being in arrear, A. distrained, and B. having brought trespass, it was held, that the distress was altogether unlawful, because the agreement, not being under seal, did not operate as a demise of tithes, and no distinct rent was reserved for the homestead. (*Gardiner v. Wilkinson*, 2 Barn. & Ad. 336.)

Lease of tithes.

By stat. 32 Hen. 8, c. 2, s. 4 (10 Car. 1, sess. 2, c. 6, Irish,) no person should make any avowry or cognizance for any rent, suit or service, and allege any seisin of any rent, suit or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have above fifty years next before the making of the said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created by deed, the commencement whereof could be shown (Co. Litt. 115 a; 8 Rep. 64), or by act of parliament (*Faulkner v. Bellingham*, Cro. Car. 80), or by will (*Collins v. Goodall*, 2 Vern. 235), as to which there was no prescribed period of limitation, either at law or in equity. (*Cupit v. Jackson*, M'Clel. 495; 13 Price, 721. See *White v. James*, 4 Jur., N. S. 1214; and *Stackhouse v. Barnston*, 10 Ves. 467; *Foster's case*, 8 Rep. 128; *De Beauvoir v. Owen*, 19 Law J., Exch. 182.) So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment. (10 Ves. 467.) But mere length of time, short of fifty years, the period fixed by the stat. 32 Hen. 8, c. 2, and unaccompanied with other circumstances, was not of itself sufficient ground to presume a release or extinguishment of a quit rent. (*Eldridge v. Knott*, Cowp. 214, cited 10 Ves. 467, 468.)

Old limitation  
act as to rents.

As to the use of the word "rent" in this statute, see *Doe v. Angell*, 9 Q. B. 528, quoted in note to sect. 9, *post*.

(g) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor. (2 Bl. Comm. 40.) The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the real. (Co. Litt. 2 a; 114 b, 20 a.)

Annuities.

An annuity charged upon land is by this clause included in the word "rent" as used in the act. An annuity charged by will on lands, with a power of distress in default of payment after twenty days, was held to be extinguished by sect. 2, twenty years after the first right to distrain accrued after the testator's death. (*James v. Salter*, 3 Bing. N. C. 544.) Six years' arrears only of such an annuity can be recovered under sect. 42, in proceedings other than an action on a specialty. (*Francis v. Grover*, 5 Hare, 89.) But if such an annuity be secured by specialty, twenty years' arrears can be recovered, under 3 & 4 Will. 4, c. 42, s. 3, in an action on the specialty. (*Strachan v. Thomas*, 12 Ad. & El. 536.)

Annuities charged  
on land.

3 & 4 Will. 4,  
c. 27, s. 1.

Annuities not  
charged on land.

An annuity given by will and not charged upon land, is within the provision as to legacies in sect. 40. (*Ashwell's Will*, Johns. 112.) Lord *St. Leonards* seems to be of opinion that such an annuity would be extinguished if no payment were made for twenty years. (R. P. Stat. 138, 2nd ed.) But it has been suggested that time must be reckoned separately with regard to each payment, and that the annuity would not be extinguished by non-payment for twenty years. (Darb. & Bos. Stat. Lim. 126.) Such an annuity has been decided not to be within sect. 42. (*Roch v. Callen*, 6 Hare, 531.) If such an annuity be secured by bond or covenant, the non-payment of each instalment is a distinct breach, and time runs, under 3 & 4 Will. 4, c. 42, s. 3, against each as it becomes due. (*Amott v. Holden*, 18 Q. B. 593.)

A terminable annuity for ten or twenty years is within the act. (*Uppington v. Tarrant*, 12 Ir. Ch. R. 269.) A gross sum of money charged upon lands, to be paid by yearly instalments, and secured by power of distress, is within this and the 42nd section. (*Ib.* 262.)

Escheat.

(h) An *escheat* was in its nature feudal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seignory, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an escheat. (*Burgess v. Wheate*, 1 Eden, 191.)

Escheat is founded on the principle that the blood of the person last seised *in fee* is by some means utterly extinct and gone; and since none can inherit his estate, but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance must fail. (2 Inst. 64; Wright's Ten. 115.) Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where, until the stat. 3 & 4 Will. 4, c. 106, s. 9, (see *post*,) he died without any relations of the whole blood. An escheat may also arise from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he becomes incapable of inheriting, and, until recently, of transmitting anything by heirship. (See 3 & 4 Will. 4, c. 106, s. 10, and note, *post*.) On the subject of escheat, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman v. Att.-Gen.* (2 Sim. & Stu. 498; 3 M. & K. 492); and the note to *Att.-Gen. v. Sands* (Tudor, L. C. Conv. 664, 2nd ed.)

Persons.

(i) The poor of a parish are a class of persons within the meaning of the word "persons" in this section, in a case where the rents of property are applicable for the benefit of such poor. (*St. Mary Magdalen College, Oxford v. Att.-Gen.*, 6 H. L. C. 189; 3 Jur., N. S. 675; 26 L. J., Ch. 620.) The Attorney-General, whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land, within the meaning of this act, he is only part of the machinery by which the rights of others are sought to be enforced. (*Ib.* See *Att.-Gen. v. Magdalen College, Oxford*, 18 Beav. 223; sect. 24, *post*.)

Crown, when  
bound by acts of  
parliament.

The king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used in an act of parliament, whether affirmatively or negatively, (11 Rep. 68,) is not bound in his public capacity by the general words of an act of parliament, unless named; (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall v. Maule*, 4 Ad. & Ell. 284; *Rex v. Wright*, 1 Ad. & Ell. 434; *In re Cuckfield Burial Board*, 19 Beav. 153, and the cases cited in the note thereto; *Re Bevan*, 14 W. R. 147;) except where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, when the king is bound, though not particularly named. (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32. See Bac. Abr. Prerogative (E).) But where a statute is general, and its effect would be to deprive the king of any prerogative, right, title or interest, he is not bound unless specially named, (11 Rep. 68,) and was held not to be within the Statute of Limitations, (Br. St. Lim. 67,)

nor the statute of 13 Edward 1, st. 1, c. 5, which makes plenarty for six months a good plea in *quare impedit*. (11 Rep. 68; Plowd. 244.)

3 & 4 Will. 4,  
c. 27, s. 1.

As the king is not particularly named in this act, it is conceived that he is not included in the words "body politic;" and that the period of limitation as to rights of the crown is not altered by it. It was said by Lord Romilly that this statute does not affect suits by the Attorney-General to recover property belonging to the crown. (18 Beav. 246.) The king comes expressly within the provisions of the prescription act, 2 & 3 Will. 4, c. 71, (see *ante*, pp. 1, 6,) and the stat. 2 & 3 Will. 4, c. 100, for shortening the time required in claims of modus or discharge from tithes.

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced. (See Co. Litt. 119 a, n. (1); 3 Inst. 188.) And by statute 9 Geo. 3, c. 16, it is provided, that the king shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. This statute was extended to Ireland by 48 Geo. 3, c. 47, as to which see *Tuthill v. Rogers*, 6 Ir. Eq. R. 429; 1 J. & Lat. 36.

Statutes of Limitation as to rights of crown to realty.

21 Jac. 1, c. 2.

9 Geo. 3, c. 16.

Where it appeared in evidence that although the tithes in question had been constantly leased, neither the crown or its lessees had received any tithes, or compensation in lieu of them, since 1715, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil* from 1729 to the time of the institution of the suit, were sufficient proof that they had been "duly in charge," so as to protect the claim of the crown from the operation of the statute. But the court doubted whether the mere act of granting leases of the tithes, none having been received by the crown or its lessees since the year 1715, would have been sufficient to keep up the title of the crown, if the tithes had not been constantly kept in charge. (*Att.-Gen. v. Lord Eardley*, 8 Price, 73; *S. C.* Dan. 271; 3 E. & Y. 986. See 3 Inst. 189, as to the meaning of "being in charge.")

The stat. 9 Geo. 3, c. 16, is amended by 24 & 25 Vict. c. 62; and by the 1st section of the latter act, the crown shall not hereafter sue any persons for real property (other than liberties or franchises) which such persons or their ancestors have held or taken the profits by the space of sixty years before the commencement of suit, by reason only that the same real property, or the rents thereof, have been in charge to the crown, or stood *insuper* upon record within the said space of sixty years. The crown shall not, for the purposes of the act 9 Geo. 3, c. 16, be deemed to have been answered the rents of real property which shall have been held, or of which the rents shall have been taken by any person by the space of sixty years before the commencement of any action, as mentioned in that act, by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the crown, or some other person under whom the crown claims or shall thereafter claim as aforesaid, or of any manor which shall have been duly in charge to the crown or stood *insuper* of record. (24 & 25 Vict. c. 62, s. 3.)

24 & 25 Vict. c. 62.

Where an entire manor or other district has been in charge to the crown within sixty years, acts done in different parts of it by different persons, such as the erection and occupation of lime-kilns for burning limestone found within the district, and of cottages for the purpose of such occupation and the sale of lime so produced, do not amount to such an adverse possession as to displace the title of the crown to the district, although they may have been continued for above sixty years. (*Doe d. Will. 4 v. Roberts*, 12 Mees. & W. 520.)

Adverse possession against the crown.

The statute 9 Geo. 3, c. 16, does not give a title, it only takes away the right of suit of the crown, or those claiming from the crown, against such

3 & 4 Will. 4,  
c. 27, s. 1.

21 Jac. 1, c. 14.  
Practice in crown  
suits.

Evidence in  
crown suits.

Chose in action  
vested in the  
crown.

as have held an adverse possession against it for sixty years. (11 East, 495.) Although it was held that possession of crown land, commencing at least fifty-five years ago, by encroachment on the crown in the time of the lessor of the plaintiff's father, maintained by the father till his death nineteen years before the action, and afterwards continued for two years by his widow, when the defendant obtained possession, would have been sufficient evidence for the jury to presume a grant from the crown to the lessor's father, if the crown had been capable of making such a grant, in order to support a demise in ejectment from the eldest son and heir of such first possessor, against the defendant, who had no apparent title, and whose possession was not defended by the crown, nor found to be by licence from it. (*Goodtitle d. Parker v. Baldwin*, 11 East, 488.) But the grant was not presumed in this case, because it would have been against the express provisions of an act of parliament. (*Ib.* 495.)

By stat. 21 Jac. 1, c. 14, s. 1, it is enacted, "that wheresoever the king, his heirs or successors, and such from or under whom the king claimeth, and all others claiming under the same title under which the king claimeth, hath been or shall be out of possession by the space of twenty years, or hath not or shall not have taken the profits of any lands, tenements or hereditaments, within the space of twenty years before any information or intrusion brought or to be brought to recover the same: that in every such case the defendant or defendants may plead the general issue, if he or they so think fit, and shall not be pressed to plead specially; and that in such cases the defendant or defendants shall retain the possession he or they had at the time of such information exhibited, until the title be tried, found, or adjudged for the king." Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession *in fact* against the crown. Therefore, after such an adverse possession by a subject for twenty years, the crown could only recover land by information of intrusion; consequently ejectment would not lie at the suit of the grantee of the crown, notwithstanding the rights of the crown are not barred by the statute of limitations. (*Doe d. Watt v. Morris*, 2 Scott, 276; 2 Bing. N. R. 189.) Rules have been made for assimilating the mode of procedure to that in ejectment and trespass on the common law side of the Court of Exchequer as nearly as may be, consistently with the rights and prerogatives of the crown, and the provisions of the stat. 21 Jac. 1, c. 14, the mode of procedure to remove persons intruding upon the Queen's possession of lands, shall be distinct from that to recover profits or damages for intrusion. (See Rules on Revenue side of the Court of Exchequer, made in pursuance of 22 & 23 Vict. c. 21, 22nd June, 1860, Nos. 21—38; 1 Chitty's Statutes, 1341; and also 28 & 29 Vict. c. 104, s. 31, *et seq.*)

The title of the crown to lands, of which it has been out of possession for twenty years, may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the crown. (*Att.-Gen. v. Parsons*, 2 Mees. & W. 23.) As to inquests of office, see now 28 & 29 Vict. c. 104, s. 52.

An ancient extent of crown lands, found in the office of Land Revenue Records, and purporting to have been made by the steward of the crown lands, is evidence of the title of the crown to lands therein mentioned, and stated to have been purchased by the crown of a subject. Documents deposited in the office of her Majesty's land revenue records and inrolments, pursuant to the stat. 2 Will. 4, c. 1, may be proved by examined copies, in a suit brought to establish the title of the crown, or its lessee, to lands to which such documents relate; and that, although the original purport to be the rental of a former *grantee* of the crown. Expired leases by the crown of lands or mines, tendered in evidence as acts of ownership by the crown, are so proveable by examined copies, although the originals may not have been inrolled within six months after their execution, pursuant to the statute 10 Geo. 4, c. 50, s. 63. (*Doe d. Will. 4 v. Roberts*, 13 Mees. & W. 520.)

Although the statute of limitations does not bind the crown, yet where the claim of the crown is only a derivative right, it must stand in the same



situation as its principal. Therefore, the statute of limitations may be pleaded to a *scire facias* issued by the crown against the drawer of a bill of exchange, which was barred in the hands of the crown debtor, upon the ground that the crown is only entitled to its debtor's right, and cannot create or reserve a right, if none existed, or it has become barred; and that as the crown debtor could not have recovered if the statute had been pleaded, so neither could the crown, standing in the same situation as its debtor. (*Rez v. Morrall*, 6 Price, 24.) But where a right has vested in the crown before the statute has run against the former owner, the rights of the crown are not barred or affected by the statute of limitations, as the crown is not within its operation. (*Lambert v. Tayler*, 4 Barn. & Cress. 138. See *Tayler v. Att.-Gen.*, 10 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the crown. *In re Robson*, 2 Phil. C. C. 64; *In re Baron de Bode*, 1b. 85. See 23 & 24 Vict. c. 81, as to petitions of right and the orders thereon, 8 Jur., N. S. 283, Part II.)

The statutes of limitation which affect the rights of the Duke of Cornwall are 7 & 8 Vict. c. 105, ss. 71—88; 23 & 24 Vict. c. 53; and 24 & 25 Vict. c. 62; as to which, see Darb. & Bos. Stat. Lim. 413; Brown's Law of Limitation, 251, 415.

But though the crown was not bound by the statute of limitations, yet a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, because it is not probable a grant should have existed without its being upon record; but they presume the fact for the purpose and from a principle of quieting the possession. (*Corporation of Hull v. Horner*, Cowp. 102, 215.) Thus grants from the crown of markets and the like, after an uninterrupted enjoyment of twenty years, (11 East, 419,) have been presumed. So an enfranchisement of a copyhold may, upon sufficient evidence, be presumed against the crown. (*Roe d. Johnson v. Ireland*, 11 East, 280.) So where the title of a family to an advowson was evidenced by deeds and conveyances for a period of nearly 140 years, and there had been three presentations by them and none by the crown, it was held, that a grant from the crown might be presumed. (*Gibson v. Clark*, 1 Jac. & Walk. 159. See 3 T. R. 158.)

King Charles 1, by letters patent, granted certain mills, &c., subject to a fee-farm rent, with a proviso, that if the mills should at any time thereafter be in decay, &c., his majesty and his successors should have a right of re-entry. Subsequently, under the provisions of 22 Car. 2, c. 6, the fee-farm rent was sold. It did not appear that the right of re-entry had ever been specially granted or released. It was held that, having regard to the sale of the fee-farm rent, no right of re-entry capable of being enforced remained in the crown; and that such right did not pass to the purchaser of the rent. (*Flower v. Hartopp*, 12 L. J., N. S., Ch. 507; 7 Jur. 613.) In a case where Charles 1 had granted the soil between high and low water marks along the coast of the county of Southampton, but no possession had been taken of the spot in question under the grant until 1784, the crown having remained in possession for upwards of 150 years after the grant, this was held to create a presumption against it, and the parties not having been in possession more than nineteen or twenty years, no title was gained by adverse possession against the crown. (*Parmeter and others v. Att.-Gen.*, 1 Dow. 316.) An objection to a title that two fee-farm rents, created by letters patent by James 1, were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the crown of the rent from the year 1706, and no proof of any previous claim. (*Simpson v. Gutteridge*, 1 Madd. 609.)

Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held to be conclusive proof of ownership against purchasers from the crown, relying upon a parliamentary survey and the court rolls of a manor, to show that the right to the property had formerly been in the crown. (*Att.-Gen. v. Lord Hotham*, 1 Turn. & Russ. 210.) But although grants on record have been presumed, there seems to be no instance of the presumption of an inrolment of a deed which was made essential by statute. (*Doe v. Waterton*, 3 B. & Ald. 149, 151; *Wright v. Smythies*, 10 East, 409.) It might be otherwise if some foundation were

3 & 4 Will. 4,  
c. 27, s. 1.

Statutes of limitation as to rights of Duke of Cornwall.

Presumption of grants from the crown.

Presumption of inrolments and registration.



3 & 4 Will. 4,  
c. 27, s. 1.

laid for raising a presumption by showing that there was a chasm in the records corresponding with the date of the supposed conveyance. (*Allen v. Walker*, 1 Jac. & Walk. 619.) The registry of a deed of lands in a register county will not be presumed. (*Doe d. Beauland v. Hirst*, 11 Price, 475.) An inrolment of a tithe award was presumed where the usage of paying tithe was shown. (*Macdougall v. Purrier*, 2 Dow & Cl. 135, cited 8 Q. B. 580.)

Port duties.

It seems that where port duties are claimed under a grant from the crown, which appears from the evidence to be inrolled, but which is not produced by the plaintiff, the jury ought not to be directed to presume such grant upon mere evidence of usage. (*Brune v. Thompson*, 4 Q. B. 543.) As to the presumption that a claim for port duties had a legal origin, see *Foreman v. The Free Fishers of Whitstable* (L. R., 4 H. L. 266), and cases there cited.

Presumption of  
an act of parlia-  
ment.

After a long possession the court will, in some cases, even presume an act of parliament in order to protect a right. (*Att.-Gen. v. Exelme Hospital*, 17 Beav. 366.) Upon the *dicta* of certain judges, that even an act of parliament might be presumed, if necessary, in support of an ancient usage, it was observed by Lord *Denman*, C. J., that even such a strong presumption might not be unreasonable, where the usage has been such as nothing but an act of parliament could legalize, and has prevailed in those obscure ages, in which not only the records of parliament may have been negligently kept, but even the form of parliament itself is scarcely to be discerned. But no judge would venture to direct a jury that they could affirm the passing of an act of parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found on the parliament roll, in the journals of either house of parliament, in any records of the courts of law, in the numerous treatises of enlightened authors, devoting unwearied industry and the greatest accuracy on similar inquiries, or in the history of the country. (*Reg. v. Chapter of Exeter*, 12 Ad. & E. 532, 533. See further, 1 Taylor, Ev. 144, 5th ed.)

By stat. 3 & 4 Will. 4, c. 99, ss. 12, 13, quit rents and other rents payable to the crown in respect of any honors, manors, lands, and hereditaments in England or Wales, are placed under the management of the Commissioners of Woods and Forests and Land Revenues; and the Lord High Treasurer, or the Commissioners of the Treasury, are empowered, by warrant under his or their hands, to remit, release or discharge all or any of the same rents, and the arrears thereof. (See 10 Geo. 4, c. 50; 2 Will. 4, c. 1.)



## 2. Period of Limitation fixed, and when Right first accrues.— Twenty Years.

No land or rent  
to be recovered  
but within twenty  
years after the  
right of action  
accrued to the  
claimant, or some  
person whose  
estate he claims.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no person shall make an entry or distress, or bring an action to recover any land or rent, but within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to some person through whom he claims, or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same (*k*).

This section  
governs cases not  
included among  
instances in  
sect. 3.

*James v. Saller.*

(*k*) This section governs cases which fall within its general words, even though not included among the instances given in sect. 3. A testator charged an annuity on land, payable quarterly, with a power of distress if the annuity should be in arrear for twenty days next after any quarterly day of payment. The testator died in 1804, and on the 17th March, 1835,

the defendants distrained for 870*l.* for twenty-nine years' arrears of the annuity, ending at Christmas, 1834. It appeared that the right to make a distress for the annuity first accrued to the annuitant, on the expiration of the twenty days next after the first quarterly payment subsequent to the testator's death, that is, at the very latest, some time in April, 1805. It also appeared that there was no payment or receipt of the annuity by the annuitant before the distress was put in in March, 1835, for it was for the whole of the arrears since the testator's death. The second issue on the case arose upon a plea in bar, framed upon the second section of stat. 3 & 4 Will. 4, c. 27. The facts brought the case within the second section, unless the third section did in terms exclude from the operation of the second the claim of any person whose right to a rent is derived under a will, by reason of the words "other than a will" in the third section (*post*). The court, in the first instance, expressed an opinion that the case was excluded from the operation of the second section, by reason of its not being comprehended within the third, which third section was thought to contain an enumeration of the instances to which only the second section could be held to be applicable; and the court held that the annuitant was not barred by the lapse of twenty years, and the non-payment of the annuity. (*James v. Salter*, 2 Bing. N. C. 505.) Upon further consideration, the court changed their former opinion. *Tindal*, C. J., in giving judgment, said "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second." And it was accordingly held that the claim to the annuity was barred by the lapse of twenty years since the right to distrain first accrued. (*James v. Salter*, 3 Bing. N. C. 544. See pp. 553—555; 4 Scott, 168; 5 Dowl. P. C. 496.)

3 & 4 Will. 4,  
c. 27, s. 2.

By this section the right of entry is taken away, unless an entry be made within twenty years of the right first accruing, where the party is not entitled to the benefit of the 15th section, which has now generally ceased to operate. (*Holmes v. Newlands*, 11 Ad. & El. 44; 3 P. & D. 128; *Newlands v. Holmes*, 8 Q. B. 679.)

Where a lord had seized copyholds *quousque*, and had held them for nearly forty years, and the heir of the former tenant filed a bill to compel admittance by the lord, it was held that this was a suit to recover land within this section, and that the right of the heir was barred. (*Walters v. Webb*, L. R., 5 Ch. 531.) An action at law for an assignment of dower is barred in twenty years by this section, and a suit in equity for the same purpose is barred in the same time. (*Marshall v. Smith*, 5 Giff. 37.)

Actions and suits  
to recover land  
within this  
section.

A plaintiff admitted to be in possession and seeking to displace the title under which the defendants claim, on the ground that it is barred by the 3 & 4 Will. 4, c. 27, s. 2, need not show what that title was and how it was barred; but a general allegation, so as to bring the case within that section, is sufficient. (*Jones v. Jones*, 16 M. & W. 699.)

Where a lessor permits his lessee, during the continuance of the leases, to pay no rent for twenty years, the lessor is not therefore barred by the stat. 3 & 4 Will. 4, c. 27, s. 2, from recovering the premises in ejectment, but the case comes within the latter branch of the third section. (*Doe d. Davey v. Ozenham*, 7 Mees. & W. 131. See *post*.)

In *Paget v. Folley* (2 Bing. N. R. 679; 3 Scott, 135), *Tindal*, C. J., said, "This statute was proposed to include other rents of the same nature as those to which the act, according to its title and preamble, was intended to apply, rather than conventional rents reserved on a lease." It was not necessary, however, to decide the point in that case, for the reason which will hereafter appear. (See *post*.) The Real Property Commissioners seem also to have contemplated an assimilation of limitation for land and

Rent within this  
section.

3 & 4 Will. 4,  
c. 27, s. 2.

*Grant v Ellis.*

all rents, other than conventional rents between landlord and tenant. (See 1 Real Prop. Rep. p. 50.)

The word "rent" in the second section of the act does not include rents reserved on leases for years, but is confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like. (*Grant v. Ellis*, 9 M. & W. 113.) Mere non-receipt therefore of rent under a lease, for more than twenty years, does not deprive the lessor of his right to rent under the lease. (*Id.*) A lessee of premises for one hundred and twenty-five years from the 25th of March, 1782, by a lease dated the 21st of July, 1787, and which contained clauses of distress and re-entry, demised the same to a lessee for one hundred and twenty years from the 25th of March last past. Twenty-two years' arrears of rent accrued due to the representatives of the lessor in the last-mentioned lease: it was held, that although the original lessee had no reversion expectant on the determination of the lease of the 21st of July, 1787, yet that the rent reserved by the lease was a conventional equivalent for the right of occupation, and that therefore the right of the representatives of the original lessee to the rent during the residue of the term was not barred by this section. (*Re Turner*, 11 Ir. Ch. Rep., N. S. 304.) It is now clearly established that so long as the relation of landlord and tenant under a lease in writing subsists as a legal relation, the landlord's right to rent is not barred by non-payment, for however long a time. (*Per Lord Cranworth, Archbold v. Scully*, 9 H. L. Ca. 360.)

An additional rent in the nature of a penal rent reserved by indenture of demise between landlord and tenant was held not to be within the second section of 3 & 4 Will. 4, c. 27. (*Daly v. Lord Bloomfield*, 5 Ir. L. R. 65.) As to the use of the word "rent" in the statute, see further, *Doe v. Angell* (9 Q. B. 328, quoted under sect. 9, *post.*)

Issue in tail barred  
by this section.

An ordinary tenant in tail would, by virtue of the first and second sections, lose his right after twenty years' want of possession in the time of his ancestor. (*Earl of Abergavenny v. Brace*, L. R., 7 Ex. 172.)

But where by a private act of 2 & 3 Ph. & M. certain lands were limited to E. N. and others successively in tail male, with limitations over, and an ultimate limitation to the crown; and it was provided that "no feoffment, discontinuance, fine or recovery, with voucher or otherwise, or any other act or acts thereafter to be made, done, suffered or acknowledged of the premises or any part or parcel thereof," by E. N. or the other persons named, "or by any of them, or by any of their heirs male of their several bodies, should bind or conclude or put from entry" the crown "or any of the heirs in tail;" a lease for three lives was made in 1781 by the heir in tail male of E. N., then in possession, of part of the lands so settled: the lease expired in 1832, and since that time the land had been held by the defendant, and those through whom he claimed, without payment of rent or acknowledgment of the title of the tenants in tail for the time being. In 1868 the plaintiff became entitled to the entailed lands as heir in tail male of E. N.: it was held that he was not barred by this statute from recovering the lands comprised in the lease. (*Earl of Abergavenny v. Brace*, L. R., 7 Ex. 145.)

Limitation of real  
actions before  
3 & 4 Will. 4,  
c. 27.

32 Hen. 8, c. 2.

By the common law there was no stated or fixed period within which it was necessary to commence actions, but afterwards certain remarkable events were from time to time selected for that purpose as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and

formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the stat. 21 Jac. 1, c. 16, and the limitation of time for suing out such writ was fifty years. This writ was maintainable by one in remainder for an intrusion made after the determination of an estate *pur auter vie*; and a demandant who claimed under a devise might maintain the writ. (*Peircey*, dem., *Gardner*, ten., 3 Bing. N. C. 748.) Dignities were held not to be within the Statute of Limitations, and even an adverse possession and exercise of a dignity by persons not entitled to it, for a period of eighty-five years, was resolved by the House of Lords not to bar the real claimant. (In the barony of Willoughby of Paiham, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202.) But offices with fees and profits are within them. (Lords' Journ. vol. 36, p. 295.) An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin but upon his grant. (Bro. St. Lim. 26; see *ante*, p. 139.) So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter, as they did not count upon a seisin of any ancestor or predecessor, but upon their own possession. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years. (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions, (B).)

3 & 4 Will. 4,  
c. 27, s. 2.

The stat. 21 Jac. 1, c. 16, sects. 1 and 2 (repealed by 26 & 27 Vict. c. 125), limited the period for all writs of formedon to twenty years, and enacted that no persons should at any time thereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same, and, in default thereof, such persons so not entering, and their heirs, should be disabled from such entry after to be made.

Limitation of  
right of entry.  
21 Jac. 1, c. 16.

The provisions of the statutes 32 Hen. 8, c. 2, and the 21 Jac. 1, c. 16, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6, by making the limitation in a writ of right on the seisin of the party's ancestors sixty years, and in a possessory action upon possession of ancestors fifty years, and in an action upon the party's own seisin or possession twenty years, and in an avowry or cognizance for rent, suit or service, forty years. Actions of formedon and *scire facias* on fines and recoveries were limited to twenty years after the title or cause of action accrued, and an entry upon lands must be made within twenty years after the title accrued, with an exception in favour of persons being infants, *feme covert*s, *non compos mentis*, imprisoned, or beyond seas, who should sue within ten years after the removal of the disability.

By the stat. 21 Jac. 1, c. 16, s. 1, no entry could be made, and therefore no ejectment maintained, but within twenty years after the title of entry first accrued, with the exception of persons under disabilities. There were two periods from which the term of twenty years limited by that statute was to be computed, one with respect to the rights of persons entitled in possession, and the other with respect to the rights of persons entitled to future interests. Less difficulty arose with respect to the latter, because it can easily be proved when such rights would have come into possession by the determination of the preceding estates; but the former period was to be computed from the time when the *wrongdoer* acquired the possession of the freehold *adversely* to the title of the owner, whose estate thereby became a mere right; and in many cases it was very difficult to ascertain what would constitute such possession.

By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons having present rights of entry, and not being under any disabilities, if they did not claim within five years after the proclamations made; to all persons under disabilities if they did not claim within five years after their disabilities were removed: and to all persons not having present rights, if they did not claim within five years after their rights of entry accrued, unless under disabilities, and then within five years after the removal of their disabilities. By the abolition of fines, the practice of gaining a title by a fine, and non-claim will be prevented in future. (See 3 & 4 Will. 4, c. 74, s. 2, *post*.) In order that a fine should operate as a

Non-claim on  
fines.  
4 Hen. 7, c. 24.

3 & 4 Will. 4,  
c. 27, s. 2.

Adverse posses-  
sion necessary  
under above  
statutes.

Disseisin.

Question of ad-  
verse possession  
before 3 & 4 Will.  
4, c. 27.

Cases as to ad-  
verse possession  
before 3 & 4 Will.  
4, c. 27.

bar by non-claim, it was necessary that the person who levied it should have had a freehold, either by right or by wrong. If he turned out a lawful possessor of it, if he had committed a disseisin, he had what was called a wrongful freehold, and if the party entitled had not claimed within five years after the fine had been levied, that would be a bar to him. Or if a person had been in by right adversely to the rest of the world, and asserting the dominion to be his own, and levied a fine after the proclamations had been made and five years had expired, any demand or latent claim would be equally barred. (*Davies v. Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn v. Doe d. Cooper*, 5 B. & C. 701. See *Doe d. Burrell v. Perkins*, 3 Maule & S. 271; *Doe d. Parker v. Gregory*, 2 Ad. & Ell. 14.) For the case of married women, see *Doe d. Bright v. Pett*, 11 Ad. & El. 853; 4 P. & D. 278; *Doe d. Wright v. Plumtre*, 3 B. & Ald. 474.

It seems that the adverse possession necessary to make a fine with proclamations operate by way of bar, was the same as the adverse possession necessary for the purpose of barring a right of entry. (Note to *Nepean v. Doe*, 2 Smith's L. C. 615, 6th ed.) To constitute such adverse possession, it was formerly considered necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and deforcement. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrong-doer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrong-doer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in possession aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Deforcement was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner. (See 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173.)

When a party enters by colour of a void grant, he is a disseisor. (*Buckler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316.) But where a grant is according to the rules of law, but requires to be perfected by a subsequent ceremony, as if a feoffee enters before livery of seisin, he is not a disseisor. (2 Rep. 55.) Wherever there is a disseisin, the possession of the disseisor will be considered adverse, and the party must pursue his remedy within twenty years from the act constituting the disseisin. (Butl. Co. Litt. 330 b, n.) There may be an unlawful possession which does not amount to a disseisin. (*Doe v. Gregory*, 2 Ad. & Ell. 14; 4 Nev. & M. 308. See 2 Mee. & W. 904. As to disseisin, see *Taylor v. Horde*, 1 Burr. 108; *Doe v. Lynes*, 3 B. & C. 388; *Williams d. Hughes v. Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. on Abst. 284, *et seq.*)

Great practical difficulty had arisen under the former statutes in determining what is adverse possession, and when it shall be considered to have begun. This must generally be left as a question of fact for the jury; but there are some rules of law (*præsumptiones juris et de jure*) which absolutely prevented the possession from being considered adverse, and the expediency of which was very questionable, as they did not seem necessary for preserving rightful claims, and they greatly impaired the healing tendency of the statutes of limitations. (See 1 Real Prop. Rep. 47.) At the time of the enactment of 3 & 4 Will. 4, c. 27, it seems that the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant. (Note to *Nepean v. Doe*, 2 Smith's L. C. 614, 6th ed.)

Where one person held an estate on the joint account of himself and another, or by the permission of the real owner, and without claiming any inconsistent right, the possession is not adverse, and the original title is not affected. Thus, where one holds lands as lessee, his possession is in contemplation of law that of the lessor. (1 Wils. 176; 3 Wils. 521.) For length of possession during a particular estate, as under a lease for lives, as long as the lives are in being, gives no title; but if the tenant hold over for twenty years after the death of *cestui que vie*, such holding over will in



ejectment be a complete bar to the remainderman or reversioner, because it was adverse to his title. (Cowp. 218.) Where the relation of landlord and tenant could be implied, the statute 21 Jac. 1, c. 16, did not run (2 Bos. & Pull. 542), or where the party in possession was tenant at sufferance. (2 Dowl. & Ryl. 38.)

3 & 4 Will. 4,  
c. 27, s. 2.

Three females, being coparceners in tail, two of them suffered recoveries of their shares, but the third did not. They all married, and their husbands entered into an agreement for partition by deed of the lands held in coparcenary, but for nothing more. No such deed appeared to have been executed, but the lands had been held according to the agreement from its date. An action being brought by the heir in tail of the parcener who did not suffer a recovery, within twenty years after her death, and before the stat. 3 & 4 Will. 4, c. 27, to recover her share, which had been held by the husband of one of the other coparceners, it was held, that the possession was under the agreement, and not adverse. It was also held, that nothing could be presumed, beyond what was contemplated by the agreement, which provided for a deed and not for a recovery. (*Doe d. Millett v. Millett*, Law J., 1848, Q. B. 202; 11 Q. B. 1036.)

Possession is either in fact or in contemplation of law, and in either case, while it remained in the owner, the stat. 21 Jac. 1, c. 16, did not run. Therefore, where a stranger entered and divided the profits of an estate for more than twenty years with the real owner, it was held, that he might, notwithstanding, maintain an ejectment, as where two men are in possession, the law will adjudge it to be in him who has the right. (*Reading v. Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 423.)

Issues in tail had no distinct and successive rights under the stat. 21 Jac. 1, c. 16, any more than heirs of estates in fee simple (4 Taunt. 830), and therefore that statute began to run when the title descended to the first tenant in tail, unless he was under a disability, and each succeeding tenant in tail had no right to sue within twenty years after the death of his predecessor. (*Tolson v. Kaye*, 3 Brod. & Bing. 217. See 3 B. & A. 738; *Tolson v. Kaye*, in error, 6 Man. & G. 536; *Doe d. Daniel v. Woodroffe*, 10 M. & W. 633; 16 M. & W. 769.)

Where the possession of one party was consistent with that of the other, it was not considered adverse. Thus, where by a marriage settlement a copyhold estate was limited to the use of the survivor in fee, but no surrender was made to the use of the settlement, and after the death of the wife, the husband was admitted to the lands, pursuant to the equitable title acquired by the settlement: it was held, that if he had no other title than the admission, a possession by him for twenty years would have barred the heir of the wife; but as it appeared that there was a custom in the manor for the husband to hold the lands for his life in the nature of a tenant by the curtesy, and this without any admittance after the death of the wife, the possession of the copyhold by the husband was referred to this title, and not to the admission under the settlement; and such possession being consistent with the title of the heir at law, he was allowed to maintain ejectment against the devisee of the husband within twenty years after the husband's death, though more than twenty years after the death of the wife. (*Doe d. Milner v. Brightwen*, 10 East, 588.) So where A., being seised in fee of an undivided moiety of an estate, devised the same (by will made some years before her death) to her nephew and two nieces as tenants in common; one of the nieces died in the lifetime of A., leaving an infant daughter; A., by another will, which was never executed, intended to have devised the moiety to the nephew and surviving niece, and the infant daughter of the deceased niece. After A.'s death, the nephew and surviving niece covenanted to carry the unexecuted will into execution, and to convey one-third of the moiety to a trustee upon trust to convey the same to the infant if she attained twenty-one, or to her issue if she died under twenty-one and left issue, or otherwise to the nephew and niece in equal moieties. No conveyance was executed in pursuance of the deed. The rents of the third were received by the trustee for the use of the infant during her lifetime. An ejectment having been brought by the devisee of the nephew more than twenty years after his death, but within twenty years



3 & 4 Will. 4,  
c. 27, s. 2.

after the death of the infant: it was held, that there was no adverse possession until the death of the infant, and that the ejectment was well brought. (*Doe d. Colclough v. Hulse*, 3 B. & Cr. 757.) But where copyhold lands had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years: it was held, that C. was barred by the statute after B.'s death from maintaining ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land. (*Doe d. Foster v. Scott*, 4 B. & Cr. 706; 7 Dowl. & Ry. 190.) Where a daughter entered into occupation of premises on the death of a mother, to whom they had belonged till then, and held them without interruption for twenty years, but the mother had left a son who was living during the whole time of the daughter's occupation: it was held (on ejectment brought before the stat. 3 & 4 Will. 4, c. 27, came into operation), that it could not be presumed from this circumstance alone that the sister's occupation was virtually that of the brother's. (*Doe d. Draper v. Lanley*, 13 Q. B. 954.) A wrongful continuation of possession for twenty years after the expiration of a title, under which the tenant lawfully entered, constituted such an adverse possession as would, under the statute of 21 Jac. 1, c. 16, create a bar to an entry or to an action of ejectment, as where the husband of tenant for life held over twenty years after her decease. (*Doe d. Parker v. Gregory*, 4 Nev. & Mann. 308. See *Doe d. Allen v. Blakeway*, 5 Car. & P. 563.)

Where a party is let into possession of land with the consent of the owner, and does acts importing that he continued in possession only with the owner's permission, such acts will prevent the possession being adverse. (See Litt. s. 70.) On ejectment, G., under whom the defendant claimed, was let into possession twenty-two years before the action brought, by virtue of a contract with P. for the purchase of an allotment accruing to P. under an inclosure act, which provided that a purchaser let into possession of an allotment should have the same rights as the vendor. G. paid interest on a portion of the purchase-money for some years, but never completed the purchase: it was held, that even after the lapse of twenty-two years, his possession was not adverse to P.'s title, and that there was no ground to presume a conveyance. It was also held, that G., or any person claiming under him, was estopped from raising an objection to P.'s title, that the commissioners of inclosure had made no formal award. (*Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498.) Where a widow continued to reside in a freehold house, of which she was seised, for more than twenty years after her husband's death, it was held that her possession was not adverse, except perhaps against the heir, as her possession might be intended to be in respect of dower. (*Doe d. Hickman v. Haslewood*, 1 Nev. & P. 352; 6 Ad. & Ell. 167.) As to parol declarations negating a widow's title under a possession for twenty years, see *Doe d. Haman v. Pettet*, 5 B. & Ald. 223; *Doe d. Roffey v. Harbrow*, 1 Nev. & M. 422; 3 Ad. & Ell. 67, n.; and *Doe d. Welsh v. Langfield*, 16 M. & W. 497.)

The owner of a cottage divided into two parts, in 1808 put in two servants, H. and W. to occupy it, who occupied each part severally till his death in 1814, without paying rent. They continued to occupy undisturbed after his death till 1821, when H. died, having by his will devised his moiety to W. H. some time before his death took in L. to live with him as a servant, and after H.'s death L. continued in possession. It was held, on ejectment brought by W., that by proving L. to have come in under H. he had shown a *prima facie* title. The stat. 3 & 4 Will. 4, c. 27, s. 2, was held inapplicable, because the defendants were mere strangers; and the question was, whether the plaintiff had made out any title at all, and the court thought that he had, by showing H. to have been in possession of the premises, and that L. came in under H. (*Doe d. Willis v. Birchmore*, 1 Perry & Dav. 448; 9 Ad. & Ell. 662.) A woman, living apart from her husband, obtained a demise of property for a term; the husband's representative brought ejectment against a party who claimed to have had adverse possession for more than twenty years, and who had obtained and held possession without knowing of the husband's existence: it was held,

that it was no misdirection to direct the jury to find for the plaintiff, unless they thought that such possession was adverse to the wife; inasmuch as, if adverse to the wife, it was adverse to the husband, and not otherwise. (*Roe d. Wilkins v. Wilkins*, 4 Ad. & Ell. 86; 5 Nev. & M. 434.) The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, is no evidence of a possession not being adverse prior to 3 & 4 Will. 4, c. 27. (*Doe d. Linsey v. Edwards*, 5 Ad. & Ell. 95.)

3 & 4 Will. 4,  
c. 27, s. 2.

The stat. 21 Jac. 1, c. 16, ran against the lord of a manor as well as against any other person. Hence, if a house, &c., be built upon the waste, the lord shall take care to have some entry made of it in his books, and reserve some rent or service, otherwise he will lose his right. If a cottage is built upon waste in defiance of a lord of a manor, and quiet possession has been had of it for twenty years, it is within the statute 21 Jac. 1, c. 16; but if it were built at first by the lord's permission, or any acknowledgment have been since made, (though it were 100 years since,) that statute would not run against the lord. (Bull. N. P. 104, cited 3 B. & C. 414.) Payment of rent for a piece of waste land after an occupation of thirty years, without previously paying any rent, was held conclusive evidence that the former occupation by the party was a permissive occupation. (*Doe d. Jackson v. Wilkinson*, 3 B. & C. 413.) So where a cottage, standing in the corner of a meadow, (belonging to the lord of a manor,) but separated from the meadow and highway by a hedge, had been occupied for about twenty years without any payment of rent, and then upon possession being demanded by the lord was reluctantly given up, and was afterward restored to the party, he being at the time told that if allowed to resume possession, it would only be *during pleasure*, and he kept possession fifteen years more, and never paid any rent: it was held, that the jury were warranted in presuming that the possession had commenced by the permission of the lord. (*Doe d. Thompson v. Clarke*, 8 B. & C. 717. See *Reg. v. Cuddington*, 2 New Sess. C. 10; Law J. 1845, M. C. 182.) A mere licensee is in this respect on the same footing as a tenant. (*Doe v. Baytup*, 3 Ad. & E. 188.) A., in 1800, without any leave inclosed a small piece of waste land from a common, and held and cultivated it, and in 1826 built a hut upon it, wherein he lived for a year and a-half, and in 1827 sold and conveyed it to a purchaser. In the years 1806, 1811 and 1817, the parish officers and freeholders, who perambulated the parish for the purpose of marking the boundaries and asserting their right of common, pulled up a portion of the fence to the land inclosed, and dug up part of the bank and rode through the inclosure. In 1820 or 1822, a like perambulation was made by the direction of the lord of the manor, when similar acts were done. No acknowledgment was paid to the lord for the land, nor other act done for asserting the right to the land. In a question as to the settlement of A. it was held, that he had been in adverse possession of the land for twenty years. (*Rex v. Inhabitants of Woburn*, 10 B. & C. 846.) An inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time without objection, may be presumed by the jury to have been made by licence of the lord; and ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up. (*Doe d. Folley v. Wilson*, 11 East, 56.) As to licence for an encroachment on a common given by a commoner, see *Harvey v. Reynolds*, 12 Price, 724; 1 C. & P. 141. If a person, within twenty years, inclose a portion of the lord's waste by the licence of the lord, such person cannot be turned out of the possession of it by the lord, without some act being done, from which a legal revocation of the licence can be inferred. (*Doe d. Dunraven v. Williams*, 7 Car. & P. 332.) When premises have been inclosed from the waste with the knowledge of the lord, the licence presumed from his acquiescence may be revoked by the lord's breaking down the fences before the commencement of the action. A cottage had been built on land inclosed from the waste, and there was evidence of its having been done with the knowledge of the lord. It was proved, that the lord of the manor and his servants, a few days only before the action was brought, had entered on the inclosure and broken down the hedges in

Adverse possession before 3 & 4 Will. 4, c. 27, in the case of encroachments from waste.

3 & 4 Will. 4,  
c. 27, s. 2.

Encroachments by  
tenant adjoining  
landlord's estate.

Possessory title  
before the act.

Doctrine of non-  
adverse possession  
done away with  
by 3 & 4 Will. 4,  
c. 27, ss. 2 and 3.

several places: it was held, that the jury were warranted by such act in finding a revocation of the licence. Such revocation may be by act *in pais* or by parol; and no precise time is limited by law as necessary to intervene between it and the commencement of the action, which treats the party in possession as a trespasser. (*Doe d. Beck v. Heakin*, 6 Ad. & Ell. 495; 2 N. & P. 660.) A., forty-five years ago, inclosed a piece of ground from the waste, and built a cottage on it; he died twenty-nine years ago, and after that his widow and daughter lived on the premises till the death of the former, a month before the trial: it was held, in ejectment by A.'s eldest son, that his claim was barred unless the jury were satisfied that his mother held the premises by his permission and not adversely. (*Doe d. Pritchard v. Jauncey*, 8 Car. & P. 99.) If a person makes an encroachment from the waste and dies within twenty years, this encroachment (except as against the rightful owner) descends to his heir, and does not go to his executor. (*Ib.*)

If a tenant makes an encroachment adjoining to the farm he rents, this encroachment will be for the benefit of his landlord, unless it appear clearly, from some act done at the time, that the tenant intended to make the encroachment for his own benefit, and not to hold it as he held the farm. (*Doe d. Lewis v. Rees*, 6 Car. & P. 610; *Doe d. Challoner v. Davies*, 1 Esp. 461; *Bryan d. Child v. Winwood*, 1 Taunt. 208; *Doe d. Watt v. Morris*, 2 Bing. N. C. 189; 2 Scott, 276. See *ante*, pp. 48, 49.) As to when encroachments by the tenant on the waste do not belong to the landlord, see *Doe d. Colclough v. Mulliner*, 1 Esp. 460. *Primâ facie*, every enclosure made by a tenant adjoining the demised premises is presumed to be made by him for the benefit of the landlord; but this presumption may be rebutted by evidence. If a lessee inclose land which is near the demised premises, as being part of the premises comprised in his lease, this is not an adverse possession against his landlord, and a twenty years' possession by him will not enable him to retain possession of the inclosed land against his landlord. (*Doe d. Dunraven v. Williams*, 7 Car. & P. 332; *Doe d. Harrison v. Murrell*, 8 Car. & P. 134. *Ante*, p. 48.)

Possession for twenty years, though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, is a title as against strangers (*Doe d. Payne v. Webber*, 1 Ad. & Ell. 119; 8 Nev. & M. 746; *Doe v. Parke*, 4 Ad. & Ell. 816), and consequently confers on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries, notwithstanding it may be apparent to the court that the rightful title is in another. (See 3 Man. & R. 112, n.) A party who has a possession for twenty years has a good title against any one coming in after, unless the latter shows title. (*Doe d. Danson v. Parke*, 4 Ad. & Ell. 818; *per Lord Denman*. See *Doe d. Smith v. Webber*, 1 Ad. & Ell. 119.) Before the stat. 3 & 4 Will. 4, c. 27, if no other title appeared, a clear possession of twenty years was strong presumptive evidence of a fee. (*Doe d. Tarzwell v. Barnard*, Cowp. 595.) Possession of land for any term less than twenty years by a feoffee is not presumptive evidence of livery of seisin. (*Doe d. Wilkins v. Cleveland*, 9 B. & C. 864; 4 M. & R. 666; *Doe d. Lewis v. Davies*, 2 Mees. & W. 503.) Where a plaintiff in ejectment proved twenty years' possession immediately preceding that for ten years by the defendant, it was held that the former was entitled to recover, as his earlier possession must prevail. (*Doe d. Harding v. Cooke*, 7 Bing. 846; 5 Moore & P. 181. See also *Stocker v. Berny*, 1 Ld. Raym. 741; 2 Salk. 421; 1 Burr. 119.)

The effect of 3 & 4 Will. 4, c. 27, s. 2, is to put an end to all questions and discussions whether the possession of the lands, &c., be adverse or not, and if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section. (*Culley v. Doe d. Taylorson*, 3 P. & Dav. 548; 11 Ad. & Ell. 1008.) What is adverse possession has generally no operation except with regard to the 15th section. Sir E. Sugden, L. C., said, "Under the new act possession gives the right, and not only gives the right, but transfers the estate. All former statutes barred the remedy, but did not bar the estate; they did not create an estate, although they enable the party to hold

against all the world. But the new statute in point of fact gives the estate, to recover which the remedy is barred, for it bars the remedy and binds the estate; and if the five years have elapsed under the 15th section—if the possession was what was called adverse, because possession would give a good title under the act, unless the party could bring his case within some of the exceptions in the subsequent section—the estate is transferred, and the remedy is barred.” (*Incorporated Society v. Richards*, 1 Connor & L. 84, 85; 1 D. & War. 289, and see Sugd. R. P. Stat. 77, 2nd ed.) Lord Denman, C. J., said, “We are all clearly of opinion, that the 2nd and 3rd sections of the stat. 3 & 4 Will. 4, c. 27, have done away with the doctrine of non-adverse possession; and except in cases falling within the 15th section of the act (see *post*), the question is, whether twenty years have elapsed *since the right accrued*, whatever be the nature of the possession.” (*Nepean v. Doe d. Knight*, 2 Mees. & W. 911. See *Doe d. Higginbotham v. Barton*, 3 P. & Dav. 193; *Jack v. Walsh*, 4 Ir. L. R. 254.) It is perfectly settled, that adverse possession is no longer necessary in the sense in which it was formerly used, but that mere possession may be and is sufficient under many circumstances to give a title adversely; and although, perhaps, now, no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed. (*Dean of Ely v. Bliss*, 2 De G., M. & G. 476, 477.)

3 & 4 Will. 4,  
c. 27, s. 2.

Some of the principles, however, laid down in the old cases on adverse possession have been acted on in recent cases. Thus, in *Thomas v. Thomas* (2 K. & J. 83), *Wood, V.-C.*, applied and acted on the principle that possession is never considered adverse if it can be referred to a lawful title. (*Doe v. Brightmen*, 10 East, 583.) In *Pelly v. Bascombe* (4 Giff. 394), *Stuart, V.-C.*, said, “One effect of the statute 3 & 4 Will. 4, c. 27, is materially to alter the law as to what is called adverse possession. The present state of the law is as follows: The fact of a person receiving the rents of a property raises a presumption that he receives them in the character of owner; but this presumption may be rebutted in many ways. It may be rebutted by express evidence to the contrary; by evidence affecting the person who has entered into possession, or by evidence of the mode in which he has dealt with the rents.” In that case accordingly where a father seised of land made a will invalid as to real estate whereby he appointed his brother to whom he was indebted executor, and died leaving two infant daughters, and the uncle entered upon the real estate and kept down the interest on a mortgage, and laid out considerable sums on improvements, it was held that the possession of the uncle could not be treated as having been adverse to his nieces. This decision was affirmed on appeal. (13 W. R. 306.) Before the act 3 & 4 Will. 4, c. 27, the possession of a *cestui que trust* was not at law adverse to the title of the trustee (*Smith v. King*, 16 East, 283), and the same has been held since the act. (*Drummond v. Sant*, L. R., 6 Q. B. 763.) It was said that in the case of a mortgagee the doctrine of adverse possession had been revived by 7 Will. 4 & 1 Vict. c. 28. (*Doe v. Eyre*, 17 Q. B. 366.)

Adverse possession since 3 & 4 Will. 4, c. 27.

Where a landlord had set apart a portion of his property, and built a schoolhouse upon it, and appointed a schoolmaster, who was paid an annual stipend by the landlord, and was also paid by subscription and by the scholars, and the schoolmaster was permitted to occupy these premises for the purpose of the school: it was held, that such occupation for upwards of twenty years did not give the schoolmaster an adverse right against the landlord; for his occupation was the occupation of the landlord, he being in the situation of a servant. (*Lessee of Moore v. Doherty*, 5 Ir. L. R. 449; see *Lessee of Ellis v. Cramford*, 5 Ir. L. R. 404; *Lessee of Montmorency v. Walsh*, 4 Ir. L. R. 254.) Where a solicitor received the rents of a mortgaged property it was held that the possession was that of the client, and that time did not run against the client. (*Ward v. Carttar*, L. R., 1 Eq. 29.) A principal may acquire a possessory title to real estate by receiving the rents for twenty years through an agent, although that agent is the person really entitled to the estate. (*Williams v. Pott*, L. R., 12 Eq. 149.)

3 & 4 Will. 4,  
c. 27, s. 2.

If a person to whom a particular estate is given by will for his life, takes possession, and is allowed to keep as part of that estate something not strictly belonging to it, he cannot set up a title as gained by adverse possession against the remainderman. (*Anstee v. Nelms*, 1 H. & N. 225; 26 L. J., Ex. 5. See *Hawksbee v. Hawksbee*, 11 Hare, 231; *Yem v. Edwards*, 1 De G. & J. 598.) The landlord of A. and B., adjacent closes, mortgaged them, and afterwards demised A. The tenant of A. built upon B. without leave of the landlord, who, on permission being asked, refused it, saying he had granted rights over B. to the occupier of other adjoining lands. The tenant held both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B. It was held, that on this evidence, he might insist as against the landlord on a twenty years' occupation of B. within the 3 & 4 Will. 4, c. 27, ss. 2 and 3. (*Doe d. Baddeley v. Massey*, 17 Q. B. 373.) One who occupies as his own land belonging to another, and before the expiration of twenty years becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can whilst he remains tenant acquire as against his landlord, a prescriptive title to the land first occupied by him. (*Dixon v. Baty*, L. R., 1 Ex. 259.)

As to what acts amount to possession, see the note to sect. 3 (*post*); as to the effect of certain acts in creating or determining a tenancy at will, see the note to sect. 7 (*post*); and as to possessory titles under 3 & 4 Will. 4, c. 27, see the note to sect. 34 (*post*).

Rights of claimant  
to take possession.

It would seem that every claimant who has such a right of possession as would entitle him to maintain ejectment, is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace. (*Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 T. R. 431; *Rea v. Wilson*, 8 T. R. 357; *Rogers v. Pitcher*, 6 Taunt. 202; 1 Marshall, 541; *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574; Co. Litt. 245 b; 1 Mann. & Ry. 221, n. (c); 5 Nev. & M. 164; *Reg. v. Newlands*, 4 Jurist, 322; *Perry v. Fitzhorne*, 8 Q. B. 757.)

It was once held that the landlord could not acquire lawful possession by a forcible entry after the expiration of the term. (*Newton v. Harland*, 1 M. & Gr. 644; see *Hey v. Moorehouse*, 6 Bing. N. C. 52; *Butcher v. Butcher*, 7 B. & C. 402.) But the contrary has since been decided. (*Harvey v. Bridges*, 14 M. & W. 437; *Pollen v. Brewer*, 7 C. B., N. S. 371.) A proviso for re-entry may be so framed as expressly to justify the lessor on breach of any of the covenants in forcibly resuming possession of the premises and expelling the tenant. (*Kavanagh v. Gudge*, 7 M. & Gr. 316.)

### *When Right shall be deemed to have first accrued.*

When the right  
shall be deemed to  
have first accrued.

in case of an estate  
in possession,

on dispossession,

on abatement or  
death,

3. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were or was so received (*l*); and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been



the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time of such death (*m*); and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being, in respect of the same estate or interest, in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person, claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument (*n*); and when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession (*o*); and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred, or such condition was broken (*p*).

8 & 4 Will. 4,  
c. 27, s. 3.

on alienation:

In case of future  
estates:

In case of for-  
feiture or breach  
of condition.

(1) The first branch of sect. 8 deals with cases of discontinuance of possession of land and discontinuance of receipt of rent.

This statute does not apply to cases of want of actual possession, but to those cases only where the owner has been out of it and another party has been in possession for the prescribed time, for there must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. Therefore, where in 1725 the owner in fee of a close, with a stratum of coal and other minerals under it, conveyed the surface to A. (under whom the plaintiff claimed), excepting the minerals to himself, his heirs and assigns, and reserving liberty to enter and get them, and the right of entry had not been exercised for more than forty years by the owner, but no other person had worked or been in possession of the mines, such owner was not barred by this section. (*Smith v. Lloyd*, 9 Exch. 562; 23 L. J., Ex. 194; 2 W. R. 271.) Where by an indenture, dated 19th October, 1738, certain lands were granted, excepting the mines, and with liberty for the grantor, his heirs and assigns, to enter for working them: it was held, that the grantor's right was not barred or extinguished by his omitting to work the mines for twenty years, the original possession, whatever that was, having remained unaltered, and no act having been done, or claims made, at variance or inconsistent with the right of the grantor and his heirs: the court construed the words "discontinuance of possession," in the statute, to mean an abandonment of possession by one person, followed by the actual possession of another person; for if no one succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection the act could operate. To constitute discontinuance there must be both dereliction by the person who has the right, and actual possession, whether adverse or not, to be protected. (*M'Donnell v. M'Kinty*, 10 Ir. L. R. 514. See also *Rimington v. Cannon*, 12 C. B. 1, *post.*) To bring a case within the statute, possession must be by the person wishing

(1) Discontinu-  
ance of possession  
of land.

There must be  
actual possession  
by another.



3 & 4 Will. 4,  
c. 27, s. 3.

What is actual  
possession.

to assert the statute, and not by third persons, or by the custody of the law. (*Howlin v. Sheppard*, 19 W. R. 253.)

A road, the soil and freehold of which were in A., ran from a highway to a well. The land upon each side of the road belonged to B. B. built a wall along the high road across the mouth of the road to the well, leaving a stile for foot passengers, and levelled the fences on each side of the road. There was a dispute as to whether those acts of B. had been done twenty years before the action was brought. Upon the trial of an action of trespass brought by A. against B., the jury was unable to agree whether the acts of B. had been done within twenty years, but found that the public, down to the commencement of the action, had exercised a right of way to the well, since the erection of the stile on foot, and before with horses and carriages. The judge thereupon discharged them from a finding upon the time when B.'s acts were done, and directed a verdict for the plaintiff: it was held (*Pigot*, C. B., dissenting), that this was a misdirection, and that if B.'s acts were done more than twenty years before the action was brought, A.'s title was barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27. (*Tottenham v. Byrne*, 12 Ir. C. L. R. 376.)

As to what acts constitute possession of a ditch, see *Searby v. Tottenham Railway Company* (L. R., 5 Eq. 409); of a boundary wall, *Phillipson v. Gibbon* (L. R., 6 Ch. 428); of a gravel pit and road, *Smith v. Stocks* (17 W. R. 1135).

Possession of  
mines.

The inference of abandonment of right from non-user is not applicable to the case of mines. (*Seaman v. Vawdrey*, 16 Ves. 390.) Trespass for breaking and entering the plaintiff's closes and digging minerals therein. Pleas, first, not guilty; secondly, not possessed; and thirdly, a plea justifying the trespasses by the defendant as assignee of a lease of the minerals for ninety-nine years, granted by the owner in 1821. Replication, that the right to make an entry did not first accrue to the defendant within twenty years next before the making of the said entry. It appeared in evidence that from 1816, B. was in possession of the close under a lease, in which there was no reservation of the mines. In 1821, the owner granted a separate lease of the minerals to B. and P. for ninety-nine years, under whom the defendant claimed. In 1847, the mines were first worked: it was held, that B. was in possession of the mines before 1821, by reason of his being in possession of the surface as lessee under a lease, without reservation of the mines; and that such possession enured for the benefit of himself and P. on the granting of the lease of 1821, so as to make himself and P. possessed of the mines from 1821 under that lease, and not to leave the effect of that lease to be the granting of a mere *interesse termini*. (*Keyse v. Powell*, 2 Ell. & Bl. 132; 17 Jur. 1052; 22 L. J., Q. B. 305.) It was held further, on the third issue, that, although the plea confessed the possession to be in the plaintiff at the time of the alleged trespass in 1847, yet that the defendant was not confined to rely upon the right of entry which accrued to him in 1821, but might rely on a supposed dispossession within twenty years before 1847, and his right of immediate re-entry thereupon. (*Ibid.*)

Acts of trespass by working coal, of which the then owner of the coal-mine was ignorant, were held not to constitute adverse possession of the mine within this statute. (*Earl of Dartmouth v. Spittle*, 19 W. R. 444.)

In order to prove possession, in an ejectment for mines, it is not sufficient to show that the lessor of the plaintiff was lord of the manor; an actual possession of them within twenty years must be proved. (*Rich v. Johnson*, Str. 1142.) A verdict for the plaintiff in trover for lead dug out of a mine will not prove possession of the mine, for trover may be brought on property without possession. (Bull. N. P. 102; Adams on Ejectment, 263, 4th ed.)

Receipt of profits  
of land.

Lord *St. Leonards* is of opinion that the expression "in receipt of the profits of any land," is used in the act in conjunction with the words "in possession of the land," to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land. (R. P. Stat. 47.) By section 35, the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him

(but subject to the lease), the receipt of the profits of the land for the purposes of this act.

3 & 4 Will. 4,  
c. 27, s. 3.

Where a copyhold tenant had not paid his fine, and the lord had seized *quousque*, and thirty-seven years expired, and the heir of the tenant offered the fine, and then filed a bill to compel admittance; it was argued, that time ought to run from the date of the offer, but it was held that time ran from the date of the seizure, on the ground that it was the duty of the copyhold tenant to pay the fine. (*Walters v. Webb*, L. R., 5 Ch. 531.)

Seizure *quousque*.

As to the party upon whom the *onus* lies of proving the commencement of the wrongful possession, see *Poole v. Griffith*, 15 Ir. C. L. R. 239, 277.

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which the twenty years are to date at the day on which the last payment of rent was made, and the party claiming has not the option of calculating from the time when he discontinued the receipt of rents. In this case the defendant was entitled to an ancient quit rent, payable annually at Michaelmas out of certain land held of his manor. All the rent which accrued due to Michaelmas, 1824, was duly paid; the last payment having been made on the 15th January, 1825. No rent was paid after that date, and on the 15th May, 1845, the defendant distrained for six years' arrears of rent accrued due up to Michaelmas, 1844; and it was held, that at the time of the distress his title to this rent had been extinguished by lapse of time. (*Owen v. De Beauvoir*, 16 Mees. & W. 547, affirmed 5 Exch. 166; 19 L. J., Ex. 177. See *post*, s. 34, n.) A person dispossessed of land is allowed twenty years from the time of his being dispossessed, and during all that period he may bring his ejectment. But a person disseised of rent has, according to the above case, only twenty years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only nineteen years, instead of twenty, during which he can bring his action or distress; for during the first year of the twenty it is plain that he has no right of distress or action at all. (*Per Parke, B.*, *S. C.*, 16 Mees. & W. 565.)

Discontinuance of  
receipt of rent.

Where an old rent-charge had always been received from the occupier of one part of the premises charged, and then for the first time had been levied by distress on the occupier of another part, which for more than twenty years had been in a separate ownership, and the owner or occupier of which had never paid the rent before; it was held, that the right to distress for the rent on the latter portion of the premises was not barred by this statute. (*Woodcock v. Titterton*, 12 W. R. 865; cf. *Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. R. 251.) Where the rents of mines are reserved by means of payment of produce in specie, the produce will be considered as accruing to the lessor at the time of receiving such produce, and not at the time of the sale of it: and, therefore, time will run under the statute from the receipt, and not from the sale. (*Denys v. Shuckburgh*, 4 Y. & Coll. 42. See *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514.)

(m) The second branch of section 3, deals with cases where wrongful possession commenced on the death of a rightful owner. "Thus where A., seised in fee in possession dies either intestate, leaving B. his heir, or having devised to B. in fee or for a less estate (*sed qu.*, *James v. Salter*, 3 Bing. N. C. 544), and C., a stranger, first obtains possession after the death of A., the time runs against B. from A.'s death, and not from C.'s entry." (1 Hayes, Conv. 248.)

(2) Wrongful  
possession com-  
mencing on death.

Lord *St. Leonards* seems to be of opinion, that a rent newly created by will (as in *James v. Salter*, 3 Bing. N. C. 544), would fall within this second branch of section 3. (R. P. Stat. 22.) But this opinion is questioned. (*Darb. & Bos. Stat. Lim.* 228.)

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in March, 1846: A. died in December, 1846, the rent which became due in November, 1846, not having been paid. B. retained possession, and in ejectment brought

3 & 4 Will. 4,  
c. 27, s. 3.

(3) Wrongful  
possession com-  
mencing on aliena-  
tion by rightful  
owner.

*Cestui que trust* in  
possession.

by A.'s heir in October, 1866, it was held that time ran, under section 8, from the last payment of rent, and not from A.'s death under section 3; and that even if section 3 applied, A. was not shown to have continued in receipt of the rent till the time of her death, so as to bring the case within it. (*Baines v. Lumley*, 16 W. R. 674.)

(n) The third branch of sect. 3 deals with cases where wrongful possession commenced on alienation by a rightful owner. On the construction of the words "other than a will" in this branch, see *James v. Salter*, 3 Bing. N. C. 544.

On the trial of an ejectment for certain undivided shares of a messuage and lands in Kent, before Lord Denman, C. J., at the Maidstone Spring Assizes, 1846, it appeared that, in 1766, the owner in fee of the premises had mortgaged them to one Hubbard for a term of 500 years. In the following year Hubbard became the absolute purchaser in fee; and the residue of the term was at the same time assigned to one Holyhead (since deceased), in trust for Hubbard, and to attend the inheritance. A limited administration of this term, as part of the goods of Holyhead, had been taken out by the lessor of the plaintiff in 1843; and he brought this ejectment on behalf of the infants, who claimed title, through Hubbard, to the beneficial interest in four-ninths, undivided shares, of the property, their title being denied by the defendants, who also claimed through Hubbard. Holyhead had never been in possession, nor had Hubbard before he became owner in fee. The defendants objected that the right of entry was barred by the 2nd section of this act. The verdict was for the plaintiff, with leave for the defendants to move to enter a nonsuit. The court decided that the lessor of the plaintiff was barred by the 2nd and 3rd sections of the act. *Patteson, J.*, would not say that the words of the 3rd section, as to persons claiming on alienation, which have been referred to, are specially pointed to the case of trustee and *cestui que trust*; but they certainly seem to be very applicable. Now, if the termor could have brought ejectment twenty years before this action was brought, there is an end of the case; for this action was not brought within five years after the passing of stat. 3 & 4 Will. 4, c. 27, so as to be within the saving of the 15th section. The 3rd section seems clear; and there is nothing in any other part of the act to militate against our construction of it. (*Doe d. Jacobs v. Phillips*, 10 Q. B. 130.) The Court of Common Pleas did not consider the case last cited as binding on them, but expressed an opinion that the case of a *cestui que trust* holding possession of land under a trustee does not fall within this clause, which is meant to apply to cases where the person holding the land does not hold it under, or in privity with, the person in whom the right of entry is supposed to be. The *cestui que trust*, in such a case, holds possession under the trustee and under the protection of the instrument by which the estate is conveyed to the trustee. It cannot, therefore, be said that it is a case in which no person entitled under the instrument has been in possession, for the *cestui que trust* has been in possession under the instrument. It was held that the *cestui que trust* was tenant at will to his trustee, unaffected by sect. 7; and that whilst the estate at will remained, the statute did not operate. (*Garrard v. Tuck*, 8 C. B. 231.) See further as to the possession of the *cestui que trust*, *Drummond v. Sant*, L. R., 6 Q. B. 763, and the note to sect. 25, *post*.

(4) Future  
interests.

(o) The fourth branch of sect. 3, together with sects. 5 and 20, deal with future interests.

The words in this branch of sect. 3, "or other future estate or interest" were said to be large enough to comprehend, and would comprehend, all executory devises. (*James v. Salter*, 3 Bing. N. C. 554, *ante*, p. 145. See *Doe d. Johnson v. Liversedge*, 11 Mees. & W. 517, *post*, sect. 20, *n.*, as to what is a future estate within these words.)

A., being tenant for life of a copyhold estate, and B. his daughter tenant in tail in remainder, joined in a recovery in 1778, and A. surrendered to the use of himself for life, remainder to the right heirs of the survivor. A. and B. shortly afterwards surrendered to a *bond fide* purchaser in fee. B. having become the survivor died without having made any further surrender. On an ejectment by her heir-at-law within twenty years after her

death, it was held, that the Statute of Limitations did not apply, inasmuch as B.'s life estate passed to the purchaser; B. therefore could not enter, and, as the contingent remainder could not pass by the surrender (*Doe v. Tomkins*, 11 East, 185; *Doe v. Wilson*, 4 B. & Ald. 303), the heir-at-law had no right of entry until B.'s death. (*Doe d. Baverstock v. Rolfe*, 3 Nev. & P. 648; 8 Ad. & Ell. 650.)

3 & 4 Will. 4,  
o. 27, s. 3.

In 1788 estates were settled by marriage settlement to the use of the wife for life, with remainder to her issue in tail, with remainder to the settlor (whose heiress at law she was) in fee. In 1818, by deeds to which the husband and wife and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to J. F. his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828: it was held, that, inasmuch as the estate of J. F. was carved out of the estate by R. G., she had the same period for bringing an ejectment in respect of any estates comprised in the above deeds, as he would have had if he had continued alive, viz. twenty years from the year 1822, when his remainder came into possession. The effect of the deed of 1818, and of recovery was to bar all remainders over, and to create new estates out of his estate tail. (*Doe d. Curzon v. Edmonds*, 6 Mees. & W. 295.)

The effect of the statute in the cases (1), where the owner of an estate in possession grants out of it a particular estate with reversion or remainders following, after time has commenced to run against him; (2), where the owner of an estate in remainder, deals with it, while time is running against him; and (3), where a tenant for life and remainderman, deal with the estate which time is running against the tenant for life, is discussed. (Darb. & Bos. Stat. Lim. 236—242.)

Where a landlord merely omits to compel his lessee, during the continuance of a lease, to pay rent for twenty years, and there has been no payment to any other person, the landlord is not therefore barred, but may recover in ejectment, at any time within twenty years after the determination of the lease. (*Doe d. Davy v. Oxenham*, 7 Mees. & W. 131, 133, 134; see *Grant v. Ellis*, 9 M. & W. 118.) The former case was followed where the lessor of the plaintiff in ejectment had purchased the reversion, subject to a lease for years, at a rent of 4*l.* and to an annuity of 4*l.*, and the tenant in possession under the lease had paid the sum of 4*l.* yearly for upwards of twenty years to the annuitant, until his death in 1830, and subsequently to his widow: it was held, that it was for the jury to consider in what character the tenant made such annual payment, and if, as agent for his landlord, the possession was not adverse, and the right of the person entitled to the reversion is not barred by this statute. (*Doe d. Newman v. Godsill*, 5 Jur. 170; 4 Q. B. 603, n.)

For the case of leases containing a clause of re-entry for non-payment of rent, see note to sect. 4, *post*.

If husband and wife being seised in fee in right of the wife convey to a purchaser by a conveyance not operative to bind her, the wife, if she survives, and if not her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for forty years. It was held that the right of the wife came within the fourth branch of sect. 3, as being a future estate or interest. (*Jumpson v. Pitchers*, 13 Sim. 327). The case would be different if the husband and wife simply discontinued possession. (Sugden, R. P. Stat. 83. See also *Cannon v. Rimington*, 12 C. B. 1.)

See further as to future interests the notes to sect. 5 and sect. 20 (*post*).

(*p*) The fifth branch of sect. 3 and sect. 4 deal with rights arising on forfeitures and breaches of conditions, as to which see note to sect. 4.

(5) Rights arising  
on forfeiture or  
breach of con-  
dition.

### Forfeiture.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by

When advantage  
of forfeiture is not  
taken by re-

3 & 4 Will. 4,  
c. 27, s. 4.

mainderman, he shall have a new right when his estate comes into possession.

Law before the statute.

Entry for forfeiture of copyholds.

Clause of re-entry for non-payment of rent.

reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (*q*).

(*q*) Before this statute it was held that though a remainderman expectant on an estate for life or years, to whom a right to enter, or bring an ejectment, is given by the forfeiture of the tenant for life or years, may take immediate advantage of a forfeiture, yet he is not bound to do so; therefore, if he pursues his remedy within his time after the remainder attached, it will be sufficient, nor can the Statute of Limitations be insisted on against him, for not coming within twenty years after his title first accrued by the forfeiture. (1 Ves. sen. 278. See *Doe d. Allen v. Blake-way*, 5 Carr. & P. 563.) So where a testator, having made a lease for years of an estate, with a clause of re-entry on non-payment of rent, devised it, and after his death *his heir* received the rent during the lease (being a period of more than twenty years), without any steps having been taken by the *devisee* to recover the possession: it was held, that the devisee was not barred, for he could not have entered during the lease; and although a forfeiture had been committed, he was not obliged to take advantage of it. (*Doe d. Cooke v. Danvers*, 7 East, 299.) So also strangers to fines, having different and distinct rights by several titles accruing at different times, were allowed five years to avoid a fine after the accruing of each title. (Cruise, Dig. tit. XXXV. ss. 29, 34. See 1 Wms. Saund. 535, ed. 1871. See also *Fenn v. Smart*, 12 East, 444; *Doe d. Blight v. Pett*, 11 Ad. & El. 842; 4 P. & D. 278.)

The lord of a manor is barred by the Statute of Limitations from entering for a forfeiture after twenty years. (*Witton v. Peacock*, 3 M. & Keen, 325.) If a copyholder made a lease of his copyholds contrary to the custom of the manor, and the lord died before his entry or seizure for the forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time (*Lady Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe d. Tarrant v. Hellier*, 3 Term Rep. 162); unless the act of forfeiture destroys the estate. (3 Term Rep. 173.) As to the forfeiture of copyholds, see Shelford on Copyholds, pp. 148—172; *Chamberlain v. Drake* (2 Sid. 8); and for waste, *Eastcourt v. Weeks* (Salk. 186; Lutw. 799); *Bird v. Kirkby* (1 Mod. 199; Carter, 237; Gilb. Ten. 249). But the lord may seize copyhold land *quousque* in virtue of a right which accrued to the preceding lord on default of the heirs coming in to be admitted, although he be devisee, and not the heir of the preceding lord; but, to entitle him to make such seizure, there must be three proclamations made at three consecutive courts. (*Doe d. Boxer v. Trueman*, 1 B. & Ad. 736. See *Walters v. Webb*, L. R., 9 Eq. 83; 5 Ch. 531.) The admittance of a copyholder, after a forfeiture incurred by levying a fine, would be a waiver, and any act equally solemn will have the same effect. (3 Term Rep. 172.)

It was formerly held in Ireland that where a landlord, or those through whom he claims, have received no rent for upwards of twenty years under an *existing* lease, containing an express clause of re-entry for the non-payment, he is barred by the 2nd section of 3 & 4 Will. 4, c. 27, from recovering either the land or the rent, the case falling expressly within that section. (*Doe d. Mannion v. Bingham*, 3 Ir. L. R. 456.) But this decision has since been overruled. (*Cosbie v. Sugrue*, 9 Ir. L. R. 17; *Parke v. M'Loughlin*, 1 Ir. C. L. R. 186; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69.) The same question in England appears to depend upon different principles: it has been suggested that under such a clause in England a fresh right to re-enter accrues every time a fresh default in payment of rent is made.



(Darb. & Bos. Stat. Lim. 251. See *Doe v. Bliss*, 4 Taunt. 725; *Macher v. Foundling Hospital*, 1 Ves. & B. 191.)

3 & 4 Will. 4,  
o. 27, s. 4.

Old law as to con-  
ditions of re-  
entry;

in leases for lives;

in leases for years.

Present state of  
the law.

"In cases of conditions of re-entry there is a difference between leases for lives and leases for years; and with respect to the latter, there is also a difference between them, which arises entirely from the manner in which the condition of re-entry is expressed in the lease. As to leases for lives, it is held that, if the tenant neglect or refuse to pay his rent after a regular demand, or is guilty of any other breach of the condition of re-entry, the lease is only voidable, and therefore not determined until the lessor re-enters, that is, brings an ejectment for the forfeiture, though the clause of the condition should be, that for the non-payment of the rent, or the like, the lease shall cease and be void. For it is a rule that where an estate commences by livery it cannot be determined before entry. (*Browning v. Boston*, Plowd. 135, 136.) Therefore if the lessor, after notice of the forfeiture, which is a material and issuable fact (*Pennant's case*, 3 Rep. 64 b; *Roe v. Harrison*, 2 T. R. 430), accepts rents which accrued due after, or does any other act which amounts to a dispensation of the forfeiture, the lease, which was before voidable, is thereby affirmed. But if there be a lease for years, with a condition that, for non-payment of the rent, or the like, the lease shall be null and void, if the lessor makes a legal demand of the rent, and the lessee neglects or refuses to pay, or if the lessee is guilty of any other breach of the condition of re-entry, the lease is absolutely determined, and cannot be set up again by acceptance of rent due after the breach of the condition, or by any other act. (*Goodright v. Davids*, Cowp. 804.) But if in such a lease the clause be, that for non-payment of the rent it should be lawful for the lessor to re-enter, the lease is only voidable, and may be affirmed by acceptance of rent accrued due after, or other act, if the lessor had notice of the breach of the condition at the time. *Browning and Boston's case*, Plowd. 133; *Pennant's case*, 3 Rep. 64 a, b; 65 a, b; Co. Lit. 215, a; *Goodright v. Davids*, Cowp. 804." (1 Wms. Saund, 441, ed. 1871.)

Since the statutes 7 & 8 Vict. c. 76, and 8 & 9 Vict. c. 106, s. 2, estates for life may commence without livery; and the distinction taken above between leases for lives and leases for years (in those cases where the clause is, that the lease shall be void on breach of the condition) seems therefore to be now inapplicable. (1 Smith's L. C. 37, 6th ed.) But even in the case of a lease for years which contains a proviso that it shall be void for non-payment of rent or other breach of covenant, the modern authorities seem to establish that such a lease in case of a breach shall be regarded as voidable only, so that the landlord, by the acceptance of rent or the like, with notice of the breach, will waive the forfeiture. (*Roberts v. Davey*, 4 B. & Ad. 664; *Doe v. Banks*, 4 B. & A. 401; *Arnsby v. Woodward*, 6 B. & C. 519; *Read v. Farr*, 6 M. & S. 121; *Malins v. Freeman*, 4 Bing. N. C. 395; *Doe v. Birch*, 1 M. & W. 402; *Hyde v. Watts*, 12 M. & W. 254; *Hughes v. Palmer*, 19 C. B., N. S. 393; 13 W. R. 974.)

A distress made by a landlord on the assignee of his lessee is a waiver of a forfeiture incurred by a prior breach of covenant; but if there be a continuing breach the landlord is not precluded from taking advantage of it for a time subsequent to the distress. (*Doe d. Flomer v. Peok*, 1 Barn. & Ad. 428.) A lessor has a right to make the estate of his lessee conditional, and the assignee of such an estate takes it subject to the condition, and liable to be divested by the breach of it. It is immaterial in a case in which the lessor, and not the assignee of the reversion, is the real plaintiff, whether the condition is for the performance of some covenant which runs with the land, or one which is wholly collateral; upon the breach of either species of covenant, the estate ceases when the lessor chooses to take advantage of his right of re-entry. (*Ib.* 436, 437.)

It was held, that a condition of re-entry on breach of covenants in a lease could only operate during the continuance of the lease; when that was determined the proviso was gone, and the reversioner, having never been in possession by right of re-entry for the condition broken, could not take advantage of it, and that the lessee, who had sown the land, was entitled to emblements. (*Johns v. Whitley*, 3 Wils. 127.)



3 & 4 Will. 4,  
c. 27, s. 4.

Notice of con-  
dition.

Where a party is really ignorant of the existence of an instrument in which the condition is contained, and where he would have a good title if there were no such instrument, a neglect of the terms of the condition will not subject him to a loss of the estate; and the party entitled to avail himself of the condition must take care to make it known to the person who was to comply with it. (*France's case*, 8 Rep. 89 b; Shep. T. 148; *Mallon v. Fitzgerald*, 3 Mod. 28; Skinn. 125; *Doe d. Kenrick v. Lord W. Beauchamp*, 11 East, 657.) An heir at law to whom a devise is made upon condition, is not liable to lose his estate by a breach of the condition, unless he has notice of the devise which contains it; and the *onus* of proving that the notice has been given lies upon the party entitled to the benefit of the breach of the condition. (*Doe d. Taylor v. Crisp*, 1 P. & Dav. 37; 8 Ad. & Ell. 779; 2 Jur. 943.)

### Reversioner.

Reversioner to  
have a new right.

5. Provided also, that a right to make an entry or distress or to bring an action to recover any land or rent shall be deemed to have first accrued, in respect of an estate or interest in reversion, at the time at which the same shall have become an estate or interest in possession by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land, or some person through whom he claims, shall, at any time previously to the creation of the estate or estates which shall have determined, have been in possession or receipt of the profits of such land, or in receipt of such rent (*r*).

(*r*) This section appears to refer to the words in the fourth branch of sect. 3, "and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest." By this section the right of the reversioner is not affected by a possession by him, or any person through whom he claims, previously to the creation of the estate which shall have determined. (Darb. & Bos. Stat. Lim. 235.) But it will be seen by the 20th section (*post*), that several rights in the same person may, contrary to the rule which previously prevailed, be barred without any new allowance.

This section, which relates to estates in reversion expectant on the determination of a particular estate, applies only to cases where another person than the reversioner is entitled to the particular estate. (*Doe d. Hall v. Mouldsdales*, 16 M. & W. 689; see p. 698.)

In 1812, A., by deed, granted an annuity for two lives, payable out of certain lands of which he was the owner in fee in possession, and demised the lands for a term of 200 years to secure the annuity, with a proviso for cesser on death of survivor of *cestui que vie*s and payment of all arrears. In 1814, A. granted another annuity payable out of same lands, and demised them to a trustee for 500 years to secure that annuity. -In 1822, annuitant of 1812 filed bill to raise arrears of his annuity, to which bill annuitant of 1814 was not party. In 1828, a receiver was appointed in the suit, who continued in receipt of the rents until the lands were sold by the Landed Estates Court in 1868, on petition of the annuitant of 1812. The arrears of that annuity were paid off out of the purchase-money, and there remained in court a surplus which was claimed by annuitant of 1814 in payment of arrears of his annuity. No payment had been made in respect of the last-mentioned annuity, nor had any previous steps been taken to raise the arrears. The objection of the Statute of Limitations having been set up, it was held that, inasmuch as the term of 1812 had been attached in possession on the lands by appointment of receiver in 1828, the term of 1814 then became an estate in reversion within the saving of sect. 5, and con-

tinued as such until 1868, when by payment of arrears of annuity of 1812 the prior term ceased; and as the trusts of the term of 1814, being express, were saved by sect. 25, the claim of annuitant of 1814 was not barred by the statute. (*Re Bermingham's Estate*, I. R., 5 Eq. 147.)

3 & 4 Will. 4,  
c. 27, s. 5.

### Administrator.

6. For the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration (s).

An administrator to claim as if he had obtained the estate without interval after death of deceased.

(s) In the case of intestacy, it had been decided that, as to all rights occurring after the death of the intestate, the statutes of limitation only began to run from the grant of administration. Hence a right to a chattel interest in lands might have been kept alive, notwithstanding adverse possession, to the expiration of the term, however long, and instances had occurred of serious practical inconvenience from that state of the law. Thus, where a term was granted in remainder expectant on another existing term, and before the expiration of the first term the grantee died; at the expiration of the first term the lessor entered and levied a fine before administration granted; and after the five years' non-claim on the fine had run, letters of administration were obtained of the effects of the person entitled to the reversionary term, and it was held that the administrator should have five years from that time, as there was no right of entry before. (*Stanford's case*, Cro. Jac. 61; cited in *Cary v. Stephenson*, 2 Salk. 421; *S. C.*, Carth. 335; *Skinn.* 555; 4 Mod. 376.) In another case, where there was a gift of a term of years to A. for life, remainder to B. for life, remainder to C., who died in 1736; A. in 1757; B. in 1779. Administration of the effects of C. was first granted in 1816, *eighty years from his death*, and his administrator brought an ejectment; he was nonsuited at the trial, but the Court of Common Pleas granted a new trial. (*Fairclain v. Little*, cited in 5 Barn. & Ald. 214.) The object of this clause of the act is to make the period of limitation with respect to chattel interests in land begin to run from the time when the right of entry arose and might have been acquired by taking out letters of administration. The next of kin and creditors of the intestate will have no just cause of complaint, if for twenty years they neglect their rights, and great injustice might be done to the party in possession by allowing a stale demand to be brought forward after a longer lapse of time. (See 1st Real Prop. Rep. p. 48.)

Old rule that time ran from grant of administration.

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the ecclesiastical court, and has none until the letters of administration are granted, and the property of the deceased vests in him only from the time of the grant. (*Woolley v. Clark*, 5 B. & Ald. 744.) The title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate, so that he may recover against a wrongdoer who has seized or converted the goods of the intestate after his death in an action of trespass or trover. (*Tharpe v. Stallwood*, 5 M. & G. 760; *Foster v. Bates*, 12 Mees. & W. 233; *Welchman v. Sturgis*, 13 Q. B. 552.) But this doctrine of relation exists only in cases where the act done is for the benefit of the estate. (*Morgan v. Thomas*, 8 Exch. 302; 22 L. J., Ex. 152; 17 Jur. 283.) An executor, on the other hand, derives his title from the will itself, and the property vests in him from the moment of the testator's death. (*Hickman v. Walker*, Willes, 27.)

Distinction between administrator and executor.

Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him; although no right of action accrues to the administrator until he has obtained letters of administration. (*Pratt v. Swaine*, 8 Barn.

Nature of administrator's rights.

3 & 4 Will. 4,  
c. 27, s. 6.

& Cress. 287; 2 Man. & Ryl. 350.) An executor or administrator is not deemed to be in possession of things immoveable, as leases for years or houses, before entry (Went. Off. Ex. 228, 14th ed.); although a reversion of a term, which the testator granted *for part* of the term, is in the executor immediately on the testator's death. (*Trattle v. King*, T. Jones, 170.) But the relation of the grant of administration to the death of the intestate did not, it seems, divest any right legally vested in another between the death of the intestate and the grant, so as to enable an administrator, who had obtained letters of administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to the stat. 8 Anne, c. 17. (*Waring v. Demberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q).) It seems that the grant of administration will have the effect of vesting leasehold property in the administrator by relation, so as to enable him to bring actions in respect of that property for all matters affecting the same subsequent to the death of the intestate, and to render him liable to an account for the rents and profits of it from the death of the intestate. (*Rex v. Inhabitants of Horsley*, 8 East, 410.) And in ejectment by an administrator, the demise might be laid on a day after the intestate's death, but before the administration granted. (Selw. N. P. 716, 10th ed.; *Lessee of Patten v. Patten*, Alcock & Napier, 493, Ir. See *Holland v. King*, 6 C. B. 727.)

As to the running of time under 21 Jac. 1, c. 16, in the case of executors and administrators, see *post*.

### Tenancy at Will.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee (*t*).

This section does not apply where tenancy at will had been determined before the passing of act.

(*t*) Under the 2nd section (which limits the time for recovering lands by action to twenty years after the right accrues), s. 34 (which extinguishes the title at the determination of such period), and s. 7 (which enacts that, in the case of a tenancy at will, the right of action shall be deemed to have accrued at the determination, or at the end of one year from the commencement of such tenancy), no title accrues to a party who was tenant at will, and held without interruption for twenty years after the expiration of the first year, but who had quitted possession before the act passed. (*Doe d. Thompson v. Thompson*, 6 Ad. & Ell. 721; 2 Nev. & P. 656.) The court held, that this section only applies to cases of tenancies at will existing at the time it passed, or subsequently; and that it does not apply to cases where the tenancy at will has been determined before the passing of the act. (*Doe d. Evans v. Page*, 5 Q. B. 767, see p. 772.) A tenancy at will commencing in 1824, and determined in 1831, is no bar under the 2nd and 7th sections to an ejectment commenced in 1847. (*Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 127.)

Tenancy at will existing at time of passing of act.

In 1801, D., being seised of land in fee, permitted his daughter J. and her husband M. to occupy as tenants at will. D. died in 1837, after the passing (24th July, 1833) of this statute, but before the expiration of the five years allowed by sect. 15. He devised the land to J. for life, remainder to W. in fee. He also devised to J. an annuity charged on other land. J. and M. occupied from 1801 to J.'s death in 1843, no rent being paid. After J.'s death M. continued in the occupation. On ejectment

brought in 1844 by W., the remainderman, against M., it was held, that W. was not entitled to insist that J. and M. had held under the devise to J., but that M., although he had received the annuity on behalf of his wife, might rest his defence upon the occupation under the tenancy at will; that sect. 15 was inapplicable, no step having been taken within the five years; and that the action was barred, under sects. 2 and 7, by the lapse of twenty years from the end of one year after the commencement of the tenancy at will. (*Doe d. Dayman v. Moore*, 9 Q. B. 555.)

3 & 4 Will. 4,  
c. 27, s. 7.

Where A., in 1817, let B. into possession of lands as tenant at will, and in 1827 A. entered upon the land without B.'s consent, and cut and carried away stone therefrom, it was held, that this entry amounted to a determination of the estate at will; and that B., who continued in possession as before, thenceforth became tenant at sufferance, until by agreement, express or implied, a new tenancy was created between the parties; and therefore, that, unless the fact of such tenancy were found by the jury, an ejectment brought by A. in 1839 was too late, inasmuch as by the stat. 3 & 4 Will. 4, c. 27, s. 7, his right of action *first* accrued at the expiration of one year after the commencement of the original tenancy at will, that is, in the year 1818. But the court granted a new trial, in which the question for the jury would be, whether a new tenancy at will was created after the determination of the old one in 1827, as the effect of a determination of the tenancy at will was to make a tenancy by sufferance only, during which the landlord might have brought ejectment without any demand of possession or other act, and such tenancy at sufferance would continue until the parties created a new tenancy at will by fresh agreements between them, express or implied. (*Doe d. Bennett v. Turner*, 7 Mees. & W. 226.) Parke, B., said, "If the tenancy throughout the whole period had been one continuous tenancy at will, or if, when the original tenancy at will was determined in 1827, no new tenancy at will had been created, but the tenant had continued to occupy merely as tenant by sufferance, in either of these cases the right to bring an action, which, by the express provision of the 7th section, undoubtedly accrued to the lessor of the plaintiff in 1818, would have continued uninterrupted during the succeeding twenty years, and not having been exercised during that period would have been barred." (*Ib.* p. 224.)

On the new trial it appeared that the landlord entered upon the land without the tenant's consent, and cut and carried away stone; the Court of Exchequer Chamber held that such entry amounted to the determination of the estate at will. It also appeared that in the year 1829 the defendant, being one of the assessors for the land tax in the parish, signed an assessment, in which he was named as the occupier of the farm in question, and the landlord was named as the proprietor. This was held to be evidence whence the jury might infer that a new tenancy had been created between the parties. (*Turner v. Doe d. Bennett*, 9 Mees. & W. 643.)

A tenant at will in possession of a house and land was told by the landlord that he must give up possession. Upon his refusing to do so a writ of ejectment was served upon him, but he subsequently obtained verbal permission to retain the house and a portion of the land rent free for the life of himself and of his wife: it was held, that inasmuch as what had been done amounted to an actual entry, and as a new tenancy was created, the period of twenty-one years was to be reckoned from that time, and not from the original creation of the tenancy at will. (*Looke v. Matthews*, 13 C. B., N. S. 753; 11 W. R. 343. See *Thorp v. Facey*, 35 L. J., C. P. 349.)

Tenancy at will  
determined, and  
new tenancy at  
will created.

R. C., the purchaser of land, was let into possession before the execution of a conveyance. He let in his son as tenant at will. The son occupied, and built a cottage on, the land. Afterwards, R. C. took a conveyance from the vendor, and some time after he mortgaged the land. The son continued to occupy the premises in all respects as at first till his death, which happened within twenty-one years of his entry. The son's widow continued to occupy till the expiration of twenty-one years from her husband's entry: it was held, that an action of ejectment afterwards brought against her was barred by the 2nd and 7th sections of this act, for that the tenancy at will was not determined by the father's taking a conveyance; and that if it had in point of law been so determined by that event or by the mort-

Tenancy at will  
determined, and  
no new tenancy at  
will created.

8 & 4 Will. 4,  
c. 27, s. 7.

gage, a tenancy by sufferance must be deemed to have commenced from such determination, there being no evidence of a new tenancy at will, and the tenancy altogether had continued more than twenty years from the end of the first year. (*Doe d. Goody v. Carter*, 9 Q. B. 863.) In 1816, a landlord let a tenant into possession of lands under an agreement for purchase, which was never completed. The tenant continued in possession till his death in 1822, without having paid any rent. He devised all his real estate to his widow, who entered into possession of the premises. Rent was demanded of her in 1827, which she promised to pay, but did not. In ejectment for the premises brought in 1842 by parties claiming under the landlord, it was left to the jury to say, whether a tenancy at will had been created between the original landlord and the devisee, for if not the action was barred by this section. Such direction was held to be proper. (*Doe d. Stanway v. Rock*, 4 Man. & G. 30; 1 Car. & M. 549.) Where a tenant at will had been in possession of land for more than twenty-two years, it was held that time began to run under this section at the expiration of one year from the commencement of the tenancy; and that the question of a subsequent determination of the original tenancy was only relevant so far as it might have been preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation. (*Day v. Day*, L. R., 3 P. C. 751.)

Tenant at will  
dispossessed.

At Whitsuntide, 1818, the overseers of the parish put the plaintiff into possession of a cottage as a parish pauper. He continued in uninterrupted possession, without paying any rent, till a day in the month of April, 1839. The overseers then took proceedings against him, with a view to get possession of the cottage, before he could set up a claim to it under the Statute of Limitations. They accordingly entered upon it, turned out him and his family, and removed nearly the whole of his furniture and goods. Shortly after, on the same day, he resumed the possession of the cottage. There was evidence that he agreed to pay a weekly acknowledgment, but the jury found that he neither then nor afterwards became a weekly tenant nor tenant at will to the overseers. He continued in possession till the 24th July, 1852, when the overseers entered, and he having refused to deliver up the cottage, they destroyed it. In trespass against the overseers, it was held, that there was an actual determination of the tenancy in April, 1839, and that when the plaintiff resumed possession, a new right of entry accrued to the parish officers under this statute, which they must be supposed to have exercised in July, 1852, and therefore the action could not be maintained. (*Randall v. Stevens*, 2 El. & Bl. 641; 18 Jur. 182; 23 L. J., Q. B. 68.) A person used land as a garden for more than twenty years under permission from the owner to do so, in order to keep it from trespassers, the owner from time to time coming on the land and giving directions as to cutting the trees. Held, that the occupant had not got a title so as to enable him to sue a claimant under the owner for a forcible entry. (*Allen v. England*, 8 F. & F. 49;) see note to sect. 10.

Tenant at will  
paying rent.

In 1781, a lord of a manor, with the consent of the tenants of the manor, granted to certain persons a licence to inclose a piece of the waste land, and that they and their heirs should hold the same in trust for the purpose of building a workhouse, rendering to the lord of the manor the yearly rent of 5s. for the same for ever. The churchwardens and overseers entered into possession, and built a workhouse, and used it as such until 1836. The yearly rent of 5s. was paid from 1781 to 1791, and from 1825 to 1836. In 1835, the persons to whom the licence was granted in 1781 being dead, notice was given to the officers of the parish by the steward of the manor to nominate other persons for the purpose of admission to save a forfeiture. Seven persons were accordingly nominated and admitted, the parish paying a fine on their admission. In 1840, the parish officers, in conformity with a resolution of the inhabitants in vestry assembled, surrendered the premises into the hands of the lord of the manor, and the latter took possession and afterwards conveyed the premises to the defendants. In an action by the churchwardens and overseers to recover the premises, it was held, that the grant of the licence in 1781 did not manifest an intention to convey a freehold estate, and that the admission of fresh trustees in 1840, and



the payment of the 5s. (which the court inferred was paid during the interval between 1791 and 1825) were acknowledgments that the freehold was in the lord of the manor, and that the land was held by his permission, and therefore the possession was not adverse at the time of the passing of the act. (*Hodgson v. Hooper*, 6 Jur., N. S. 911; 29 L. J., Q. B. 222; 8 W. R. 637.) It was held, also, that the first tenancy being a tenancy at will, the admission in 1835 being inoperative to convey a copyhold estate, the possession under it amounted in point of law to no more than a tenancy at will, and therefore the right of entry of the lord would not be barred until twenty years after. (*Ib.* See Darb. & Bos. Stat. Lim. 258.)

3 & 4 Will. 4,  
c. 27, s. 7.

An estate at will, being the lowest estate which can arise by the agreement of the parties, is not bounded by definite limits with respect to time; but as it originated in mutual agreement, so it depends upon the concurrence of both parties. (See Litt. ss. 68, 82.) As it depends upon the will of *both*, although it is expressed to be at the will of *one* only (Co. Litt. 55 a), the dissent of either may determine it. An estate at will may arise by implication, as well as by express words. The definition of an estate at will is, "where lands and tenements are let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession." (Litt. s. 68; 2 Bl. Com. 145.) Thus, where a person makes a feoffment, and delivers the deed to the feoffee, without giving him livery of seisin, and the feoffee enters, he becomes tenant at will. (Litt. s. 70.) And a person who entered and enjoyed lands under a void lease, and paid rent, was held to be tenant at will. (*Denn v. Fearnside*, 1 Wils. 176.) A simple permission to occupy may create a tenancy at will unless an intention appears to create a yearly tenancy by an agreement to pay rent quarterly, or some other aliquot part of a year. Under an agreement to let premises so long as both parties like, and receiving a compensation accruing *de die in diem*, and not referable to a year or any aliquot part of a year, a tenancy at will, strictly so called, is created. (*Richardson v. Langridge*, 4 Taunt. 128.) This case lays down the law correctly on this subject, viz., that a simple permission to occupy creates a tenancy at will, unless there are circumstances to show an intention to create a tenancy from year to year, as, for instance, an agreement to pay rent by the quarter or some other aliquot part of a year. (*Per Parke, B., Doe d. Hull v. Wood*, 14 Mees. & W. 687.) Although the law is clearly settled that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will; yet it has been held, that if he subsequently pays rent under that agreement, he thereby becomes tenant from year to year. Payment of rent, indeed, must be understood to mean a payment with reference to a yearly holding; for in *Richardson v. Langridge* (4 Taunt. 128), a party who had paid rent under an agreement of this description, but had not paid it with reference to a year or any aliquot part of a year, was held nevertheless to be a tenant at will only. (See *Braythmayte v. Hitchcock*, 10 Mees. & W. 497; *Cox v. Bent*, 5 Bing. 185; 2 M. & P. 281.) A tenancy from year to year will not be presumed against the clearly expressed intention of the parties. By a proviso in a deed, A. agreed to become tenant to C. and D. of the premises, &c., at their will and pleasure, at and after the rate of 25l. 4s. per annum, payable quarterly. A. remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for four quarters' rent: it was held, that A. was tenant at will and not from year to year. (*Doe d. Baston v. Cox*, 11 Q. B. 122.)

Creation of  
tenancy at will.

An entry by a person under a contract for the purchase of an estate, or an agreement for a lease with the consent of the vendor, or of the person agreeing to grant the lease, will create a tenancy at will between the parties. (*Hegan v. Johnson*, 2 Taunt. 147; *Dunk v. Hunter*, 5 B. & Ald. 322; *Doe v. Lawder*, 1 Stark. 308; *Right v. Beard*, 13 East, 210; *Doe v. Jackson*, 1 Barn. & C. 448; *Doe v. Sayer*, 3 Camp. 8.) If there be an agreement to purchase, and the intended purchaser is *thereupon let into possession*, such possession is lawful, and amounts at law, strictly speaking, to a bare tenancy at will. (*Right d. Lewis v. Beard*, 13 East, 210.) It is not, however, the



3 & 4 Will. 4,  
c. 27, s. 7.

agreement, but the letting into possession, that creates such tenancy; for the person suffered so to occupy cannot, on the one hand, be considered as a trespasser when he enters, and, on the other hand, cannot have more than the interest of a tenant at will, the lowest estate known to the law. (1 Mees. & W. 700.) A party who has been let into the possession of land under a contract for sale which has not been completed, is a tenant at will to the vendor. (*Ball v. Cullimore*, 2 Cr. M. & R. 120; 1 Gale, 96.) Where a party was let into possession of land under an agreement of purchase, he paying interest after the rate of 5l. per cent. per annum on the purchase-money until the completion of the purchase, which was to be in three months; and the purchase not being completed, he continued in possession on the same terms: it was held, that this was only a tenancy at will, which might be determined without notice to quit. (*Doe d. Tomes v. Chamberlaine*, 5 Mees. & W. 14. See *Saunders v. Musgrove*, 8 B. & C. 524; 9 D. & R. 529.) But where the purchaser is already in possession as tenant from year to year, it must depend upon the intention of the parties, to be collected from the agreement, whether a new tenancy at will is created or not, and from what time. (*Doe d. Gray v. Stanion*, 1 Mees. & W. 695. See *Souter v. Drake*, 5 B. & Ad. 992.)

It may, under particular circumstances, be presumed that a party in possession as apparent owner was in reality only tenant at will. W. H., seised in fee of a house and land, died in 1798, leaving a widow, and his son J. H., a minor above fourteen years of age. The widow (with whom J. H. lived) continued to occupy the house and land. In 1798, J. H. being still a minor, the widow married the defendant, who continued thenceforward to occupy the house and land. In 1805, J. H. left the premises, but occasionally resided there afterwards for two or three weeks at a time, with the defendant and his wife. The wife died in 1841. In 1842, J. H. mortgaged the premises in fee to the lessor of the plaintiff for money which was paid to the defendant, the defendant himself being present at the execution of the deed and privy to its contents, and receiving the money from J. H. It was held, that, in ejectment by the mortgagee, the jury were warranted in presuming that the defendant occupied as tenant at will to J. H. (*Doe d. Groves v. Groves*, 10 Q. B. 486.) A party having a legal estate cannot convey it away to another by equivocal acts which amount to an admission of title in another. But where the party's title rests merely on the Statute of Limitations, his acts may amount to an admission that he held as tenant to another. (*Ib.*) See also *Ley v. Peter* (3 H. & N. 101; 6 W. R. 437), where a letter was held to be no evidence of a tenancy at will.

The lessee of premises for a term of ninety-nine years dependent on four lives, enclosed with the lessor's assent, given by word of mouth, some adjoining waste which belonged to the lessor as lord of the manor, on the understanding that the piece so enclosed should be treated as if comprised in the lease. Upon the determination of the lease, which was more than twenty-one years from the date of the enclosure, the reversioners brought ejectment to recover the land so enclosed from the tenant. Held, that the landlord's assent to the enclosure did not create such a tenancy as to bring the case within 3 & 4 Will. 4, c. 27, s. 7. (*Whitmore v. Humphries*, L. R., 7 C. P. 1.)

Determination of  
tenancy at will.

The most obvious mode of determining an estate at will is an express declaration, that the lessee shall hold no longer, either made on the land, or by notice given to the lessee. (Co. Litt. 55 b.) Any act of ownership exercised by the landlord, which is inconsistent with the nature of the estate, will operate as a determination of it. (*Ib.*; Co. Litt. 245 b.) Thus, any conveyance by the lessor of the property, held at will, is evidence of dissent, and operates as a determination of the will. (*Dinsdale v. Iles*, 2 Lev. 88.) It may be determined by demand or by entry. (*Doe d. Tomes v. Chamberlaine*, 5 Mees. & W. 16.) It is clearly laid down, "that if the lessor, without the consent of the lessee, enter into the land, and cut down a tree, this is a determination of the will, for that it should otherwise be a wrong in him, unless the trees were excepted, and then it is no determination of the will, for then the act is lawful, albeit the will doth continue." (Co. Litt. 55 b.) So a tenancy at will is determined by the landlord's entry

on the land without the consent of the tenant, and cutting and carrying away stone therefrom. (*Doe d. Bennett v. Turner*, 7 Mees. & W. 226.) So in *Ball v. Cullimore* (2 Cr. M. & R. 120), it was held, that a feoffment by the lessor, with livery of seisin on the land, operates as a determination of the will, although the tenant at will be off the land at the time when the livery is made, and have no notice of the determination of the will, the general rule of law being, that any act done upon the land by the lessor in assertion of his title to the possession determines the will. A tenancy at will is determined by an agreement to purchase. (*Daniels v. Davison*, 16 Ves. 252.) A letter from the owner to the tenant at will, stating that unless the latter paid what was due to the former, immediate measures would be taken to recover possession of the property, was held sufficient to determine the estate at will. (*Doe v. Price*, 9 Bing. 356; 2 M. & Scott, 464.) Neither party can determine an estate at will at a time which would be prejudicial to the other. (Co. Litt. 55 b, n. 16; *Leighton v. Theed*, 1 Ld. Raym. 707; *Peacock v. Peacock*, 16 Ves. 57.) A tenant at will cannot put an end to his tenancy, even by an assignment, without giving notice to his landlord. (*Pinkhorn v. Souster*, 8 Exch. 763; 22 L. J., Ex. 266; see *Melling v. Leak*, 16 C. B. 669.) When a party creates a tenancy at will, and afterwards becomes insolvent, the vesting order of the Insolvent Debtors Court, with knowledge thereof by the tenant, is a determination of the tenancy; and if the tenant, after such information, continues in possession, he may be treated as a trespasser. (*Doe d. Davies v. Thomas*, 6 Exch. 854.) The granting of a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2. (*Hogan v. Hand*, 14 Moore, P. C. C. 310; 9 W. R. 673.)

3 & 4 Will. 4,  
c. 27, s. 7.

See further, as to the creation and determination of tenancies at will, the notes to *Richardson v. Langridge* (Tudor, L. C. Conv. 11, 2nd ed.); and *Clayton v. Blakey* (2 Smith, L. C. 108, 6th ed.).

The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years, in those cases in which a mortgagor or *cestui que trust* in possession was held to be tenant at will to the mortgagee or trustee.

Proviso as to  
mortgagors and  
*cestui que trusts*.

The relation between mortgagor and mortgagee is perfectly anomalous and *sui generis*. (2 Jac. & Walk. 183.) The mortgagor is only like a tenant at will to the mortgagee, his legal interest being inferior to that of a strict tenant at will. (Doug. 22, 282, 283.) A mortgagor in possession may be described in pleading as the tenant of the mortgagee in an action by a third party. (*Partridge v. Bere*, 5 B. & Ald. 604; *S. C.*, 1 Dowl. & Ryl. 273.) The legal interest of the mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser, at the election of a mortgagee (*Doe v. Maisey*, 8 B. & Cr. 767; see *Wheeler v. Montefiore*, 1 Gale & D. 493), and the mortgagor, or his tenant coming in after the mortgage, may be ejected without any demand of possession having been made (*Ib.*) either by the original mortgagee or by his assignee (*Thunder v. Belcher*, 3 East, 449); whereas a tenant at will cannot be ejected on a demise laid previous to the determination of the will (4 T. R. 680), and the mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will. (1 T. R. 388. See Coote on Mortgages, 325—330; *Walmsley v. Milne*, 7 C. B., N. S. 133; 5 B. & Ald. 605, n.) "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor is inferior to that of a tenant at will." (*Per Buller, J.*, in *Bird v. Wright*, 1 T. R. 378. See 4 Bligh, 97.) A mortgagee may consider the mortgagor, as against a stranger, as his tenant at will; but he is not bound to do so, and therefore it is that he may bring ejectment against him as a trespasser, without a previous demand of possession. (*Partridge v. Bere*, 5 B. & Ald. 604; *Hitchman v. Walton*, 4 Mees. & W. 415; *Doe d. Garrod v. Olley*, 12 Ad. & Ell. 481.) By the mortgage deed, the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the

Relation between  
mortgagee and  
mortgagor in pos-  
session.

3 & 4 Will. 4,  
c. 27, s. 7.

purpose of securing the principal and interest, and in contemplation and part discharge thereof. A power of entry was also reserved to the mortgagee on default of payment: it was held, that he or his assignee might bring ejectment against the mortgagor without giving him notice to quit. (*Doe d. Snell v. Tom*, 4 Q. B. 615.) In *Doe d. Higginbotham v. Barton* (11 Ad. & Ell. 314), *Denman*, C. J., said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge v. Bere* (5 B. & Ald. 604), and *Hitchman v. Walton* (4 Mees. & W. 409), that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner, so that as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right. (We purposely avoid the expression 'is not adverse,' by reason of the statutes 3 & 4 Will. 4, c. 27, and 7 Will. 4 & 1 Vict. c. 28.)"

An express tenancy at will may exist notwithstanding the reservation of a yearly rent. An indenture of mortgage, after the usual power of sale by public auction or private contract, in the event of the nonpayment of the mortgage money, contained a proviso and covenant by the mortgagee that no sale, or public notice or advertisement for any sale, should be made or given, nor any means be taken for obtaining possession until the expiration of twelve calendar months after notice in writing of such intention should have been given to the mortgagor. There was likewise a covenant by the mortgagee for quiet enjoyment by the mortgagor *as tenant at will* to the mortgagee on payment of a certain yearly rent by two equal half-yearly payments, but no livery of seisin was made to the mortgagor: it was held, that the mortgagor was tenant at will only to the mortgagee, and that those clauses in the deed did not create in him a tenancy from year to year. (*Doe d. Dixie v. Davies*, 7 Exch. 89; 16 Jur. 44; 21 L. J., Ex. 60; *Doe d. Basto v. Cox*, 11 Q. B. 122; 17 L. J., Q. B. 3; *Walker v. Giles*, 6 C. B. 662. See the *Metropolitan Counties Assurance Co. v. Brown*, 4 H. & N. 428.) Where a mortgagee recognizes a tenant as being in lawful possession of the premises at a given time by the receipt of rent, it is not competent to him to say afterwards that at that time he was a trespasser. (*Doe d. Whitaker v. Hales*, 7 Bing. 322.) But in ejectment by a mortgagee, the mere fact of his having received interest on the mortgage down to a time later than the day of the demise in the declaration does not amount to a recognition by him that the mortgagor or his tenant was in lawful possession of the premises till the time when such interest was paid, and consequently is no defence to the ejectment. (*Doe d. Rogers v. Cadwallader*, 2 Barn. & Ad. 473.)

See further, as to the relation subsisting between a mortgagee and a mortgagor in possession, the note to *Keech v. Hall* (1 Smith, L. C. 523, 6th ed.), and *Watkins on Conveyancing*, 13, 9th ed.

By 7 Will. 4 & 1 Vict. c. 28, mortgagees may bring actions to recover the land mortgaged within twenty years after the last payment of principal or interest.

Relation between  
trustee and *cestui*  
*que trust* in pos-  
session.

The general rule is, that a *cestui que trust* being in possession of the estate, with the consent, or even the mere acquiescence, of the trustee, is considered as his tenant at will. (4 Bac. Abr. 198; *Smith v. Pierce*, 3 Mod. 195; *Focus v. Salisbury*, Hardr. 400; *Fresman v. Barnes*, 1 Ventr. 55, 80; 1 Lev. 270; *Pomfret v. Windsor*, 2 Ves. sen. 472, 481; 1 Ventr. 329; *Gree v. Rolle*, 1 Ld. Raym. 716.) The doctrine that the legal estate cannot be set up at law by a trustee against his *cestui que trust* has been long repudiated. (*Doe d. Shemen v. Wroot*, 5 East, 138. See *Lessee of Massey v. Touchstone*, 1 Sch. & Lef. 67, n.) It is a rule, that however plain the trust may be, yet in a court of law the *legal interest* must prevail; (*Doe d. Da Costa v. Wharton*, 8 T. R. 2;) therefore trustees of a meeting-house or of lands, of which they are seised in trust for the support of the minister, may maintain an action of ejectment against him upon a simple demand of possession without any notice to quit. (*Doe d. Jones v. Jones*, 10 B. & C. 718; 5 M. & R. 616; *Doe d. Nicholl v. M'Keag*, 10 B. & C. 724; 5 M. & R. 620.) But the trustee and visitors of a free grammar school

cannot recover the schoolhouse in ejectment without having previously determined his interest by summons. (*Doe d. Thanet v. Gartham*, 8 Moore, 368; 1 Bing. 357. See *Rea v. Gaskin*, 8 T. R. 209; *Reg. v. Governors of Darlington School*, 6 Q. B. 682.) The relation between trustee and *cestui que trust* is not analogous to that between mortgagor and mortgagee, as equity never takes away the possession of the *cestui que trust* by delivering it to the trustees, unless there be gross mismanagement, or some other reason for it. (9 Mod. by Leech, p. 227. See Watkins on Conveyancing, 16, 9th ed.)

3 & 4 Will. 4,  
c. 27, s. 7.

The proviso at the end of sect. 7 prevents a *cestui que trust* from being considered tenant at will to the trustee for the purposes of this section only, but does not alter his position with reference to the other sections of the statute. The object of this statute was to settle the rights of persons adversely litigating with each other, not to deal with cases of trustee and *cestui que trust* where there is but one single interest, viz., that of the person beneficially entitled. A *cestui que trust* who enters into possession of land becomes at law tenant at will to the trustee. Where, therefore, the equitable owner of an estate, a term in which had been assigned to attend the inheritance, is in possession, the right of entry under the 2nd section of this act accrues only upon the determination of the tenancy at will resulting from such possession. The 3rd section of this act does not apply to the case of a *cestui que trust* holding possession of land under the trustee. (*Garrard*, dem., *Tuck*, ten., 8 C. B. 231.) The provision, that no *cestui que trust* shall be deemed to be a tenant at will within this clause, is said by the Court of Common Pleas to be equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of the tenancy; and the exception seems to be introduced, in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time. (*Ib.*)

Meaning of the  
proviso as to  
*cestui que trusts*.

The doctrine, that a *cestui que trust*, who is in the possession of an estate by the consent or acquiescence of the trustee, must be regarded as tenant at will, only applies where the *cestui que trust* is the actual occupant. If he is only allowed to receive the rents, or otherwise deal with the estate in the hands of the occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees, who choose to allow him to act for them in the management of the estate, and the consequence appears inevitable, that if the actual occupier is under such circumstances permitted to occupy for more than the twenty years prescribed by this statute without paying rent, the result must be that the trustees lose their title, exactly as in the ordinary case of landlord and tenant. (*Melling v. Leak*, 16 C. B. 652; 1 Jur., N. S. 759; 24 Law J., C. P. 187.)

The proviso as to *cestuis que trust* contained in this section applies only to cases of declared and expressed trusts, and not to the case of a person holding under an agreement to purchase. (*Doe d. Stanway v. Rook*, 4 M. & Gr. 30.) But where articles of agreement for a lease (which was never actually executed) were entered into and the premises occupied pursuant to the articles from 1771 to 1867: it was held, that an actual direct trust had been constituted between the owners of the fee and those who held under the articles; and that the *cestui que trusts* being in possession the estate of the trustees was not destroyed by lapse of time. (*Drummond v. Sant*, L. R., 6 Q. B. 763.)

### Tenancy from Year to Year.

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to

No person after a  
tenancy from year  
to year to have  
any right but  
from the end of  
the first year or  
last payment of  
rent.

3 & 4 Will. 4,  
c. 27, s. 8.

bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen) (u).

Section applies to tenancies from year to year created before and existing at passing of act.

(u) The 8th section applies to tenancies from year to year, created before and existing at the passing of the act, 24th July, 1833. In the year 1814 the defendant's father was let into possession as tenant from year to year, without any lease or other writing of the premises in question. He continued in possession and paid rent to Kempson until the 25th of March, 1824, since which time no demand or payment of rent appeared to have been made. The defendant's father died a few years ago, leaving the defendant in possession of the premises. Rent was demanded of him, and payment being refused, ejectment was brought in June, 1844. It was objected for the defendant, that the right of action was barred by this section of the act: and the Lord Chief Baron, being of that opinion, nonsuited the plaintiff. Upon motion by the plaintiff to enter a verdict, *Parke*, B., thought no rule ought to be granted, the case being clearly within the words of the 8th section, which are not the same as those of the 7th section, upon which *Doe v. Page* (*ante*, p. 164) was decided. Here the defendant's father was in possession of the land as tenant from year to year after the passing of the act, therefore the period of limitation is twenty years from the last receipt of rent from him, in April, 1824; it expired, therefore, in April, 1844, and this ejectment was consequently brought too late. (*Doe d. Jukes v. Sumner*, 14 Mees. & W. 39.)

Lease in writing within this section.

This section requires an instrument in writing which may operate as a lease, and a party holding property for twenty years without such a lease or payment of any rent acquires a title. In 1824, B. was let into possession of a cottage under an agreement purporting to be a demise by the churchwardens and overseers of the poor of the parish of P., at the rent of 1s. 6d. per week; B. to quit on one month's notice being given, &c. This agreement was signed only by one of the overseers. The churchwardens did not sign, nor was there any evidence to show that they had assented to the agreement. B. never paid any rent or made any acknowledgment. B. afterwards sold the premises to the defendant: it was held, in an action of ejectment brought after twenty years by the churchwardens and overseers for the time being against the defendant, that, as the agreement did not pass an interest, it did not amount to a lease in writing, within the meaning of this section, and that consequently the claim of the lessor of the plaintiff was barred by twenty years' adverse possession. (*Doe d. Lansdell v. Gomer*, 16 Jur. 100; 21 Law J., Q. B. 57; 17 Q. B. 589.)

Evidence of payment of rent.

The lessor of the plaintiff in ejectment proved a conveyance of the land to himself fifty years before the action was brought: he had not occupied; but a person who had occupied proved payment of rent by himself to the lessor of the plaintiff within thirty-three years of the action brought, at which time H. came into occupation. No lease to H. was shown. It was proved that, within twenty years before the action was brought, H., being in possession, declared that he was then paying rent to the lessor of the plaintiff; and that afterwards, and before action brought, the defendant had said that he was tenant to H. H. died before the trial. It was held, that the plaintiff was not barred by the second section of this act, payment of rent being duly proved by H.'s admission, so as to satisfy sect. 8, and the defendant being bound by the evidence which was good as against H.; and that sect. 14, which requires acknowledgments of title to be in writing, was inapplicable to this case. (*Doe d. Earl Spencer v. Beckett*, 4 Q. B. 601.) Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section. (*Attorney-General v. Stephens*, 6 De G., M. & G. 146.)

A. let land to B. by parol from year to year, reserving rent payable in



March and November. The last payment of rent was in March, 1846. A. died in December of the same year, and B. retained possession. In ejectment by A.'s heir it was held that time ran from the last payment of rent, and not from the death of A., as the case fell within sect. 8 and not sect. 3. (*Baines v. Lumley*, 16 W. R. 674.)

3 & 4 Will. 4,  
c. 27, s. 8.

An estate from year to year may be created either by the parol or written agreement of the parties. The qualities that distinguish it from proper terms of years, and from estates at will, are, that it is now raised by construction of law alone instead of an estate at will, in every instance where a possession is taken with the consent of the legal owner, and where an annual rent has been paid, but without there having been any conveyance or agreement conferring a legal interest, and that whether it arises from express agreement, or by implication of law, it may, unless surrendered or determined by a regular notice to quit, subsist for an indefinite period, if the estate of the lessor will allow of it, or for the whole term of his estate, where it is of a limited duration, unaffected by the death either of the lessor or lessee, or by a conveyance of their estate by either of them. (*Birch v. Wright*, 1 T. R. 380.) Although *prima facie* all leases for uncertain terms create a tenancy at will, the courts of law have for some time past inclined to construe such leases to constitute a tenancy from year to year, especially where an annual rent is reserved; (3 Burr. R. 1609; *Roe v. Lees*, 2 Bl. R. 1171; *Doe v. Weller*, 7 T. R. 478. See *Pope v. Garland*, 4 Y. & Coll. 399; *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365;) which is certain, or which, from the terms of the agreement, is capable of being ascertained with certainty. (*Daniel v. Gracie*, 6 Q. B. 145.)

Creation of  
tenancy from  
year to year.

The defendant, being tenant from year to year at a given rent, the rent was raised, at the termination of one of the years, by consent of the landlord and tenant. It was held, that, if this created a new contract, it must be a contract to hold on the old terms; and that a contract for a tenancy for two years certain from the time of raising the rent could not be inferred (in default of additional evidence), even on the assumption that an original contract for a tenancy from year to year creates a tenancy for two years certain. (*Doe d. Monok v. Geekie*, 5 Q. B. 841.) A tenancy from year to year, so long as both parties please, is determinable at the end of the first as well as of any subsequent year, unless, in creating such tenancy, the parties use words showing that they contemplate a tenancy for two years at least. Therefore, where a tenant, at the expiration of a term of years, held over, and the landlord received rent from him, it was held, that the landlord might, by a half-year's notice, require him to quit at the end of the first year after the term of years had expired. (*Doe d. Clarke v. Smaridge*, 7 Q. B. 957.)

Payment of rent is *prima facie* evidence of a tenancy from year to year; (*Doe d. Pritchard v. Dodd*, 2 Nev. & P. 838; 5 B. & Ad. 689;) if made with reference to a year or some aliquot part of a year. (*Braythwaite v. Hitchcock*, 10 Mees. & W. 497; *Doe d. Hull v. Wood*, 14 Mees. & W. 687.) Although a tenancy from year to year is ordinarily implied from the mere receipt of rent (*Bishop v. Howard*, 2 B. & C. 100), it is competent to either the payer or receiver to prove the circumstances under which the payments as for rent were so made, and by such circumstances to repel the legal implication which would result from the payment of rent unexplained. (*Doe d. Lord v. Orago*, 6 C. B. 90.) A demise "not for one year only but from year to year" operates as a demise for two years, and consequently the tenant cannot be ejected after a notice to quit at the expiration of the first year. (*Denn v. Cartwright*, 4 East, 31.) A lease for one year and so on from year to year, until the tenancy hereby created shall be determined as hereafter mentioned, with a provision that it should be lawful for either of the parties to determine the tenancy by three months' notice, creates a tenancy for two years certain, and cannot be terminated by a three months' notice to quit at the end of the first year. (*Doe d. Chadborn v. Green*, 1 Perry & Dav. 454; 9 Ad. & Ell. 658. See *Bucknorth v. Simpson*, 1 Cr. M. & R. 834; 5 Tyr. 344.)

A tenancy from year to year will not arise by implication where it will work a forfeiture. (*Fenny v. Child*, 2 Maule & S. 255.)



8 & 4 Will. 4,  
c. 27, s. 8.

A tenant who holds on after a term has elapsed goes on as tenant from year to year, because in the silence of the parties no other terms can be implied. (*Doe d. Rogers v. Pullen*, 2 Bing. N. C. 753.) A tenant for life under a settlement made a lease for lives not warranted by his leasing power, and after his death and that of the last *cestui que vie*, the remainderman continued to receive of the lessee rent of the same amount as that reserved by the lease, which was far below the real value of the lands. There was evidence from which it might be inferred that the lease in question had been since the death of the last *cestui que trust* treated by both parties under a mistake, as a renewal in pursuance of a supposed covenant for perpetual renewal in a former lease. It was held, in an ejectment on the title brought by the remainderman, that the lessee was a tenant from year to year since the death of the last *cestui que vie*, and was entitled to a notice to quit. (*Bell v. Nangle*, 2 Jebb & Symes, 259. See *Doe d. Martin v. Watts*, 7 T. R. 83; *Howard v. Sherwood*, 1 Alcock & Nap. 217.) An undertenant who is in possession at the determination of the original lease, and is permitted by the reversioner to hold over, is a quasi tenant at sufferance, and the mere fact of occupation, coupled with payment of rent for such time of occupation, does not raise the presumption of a demise for years, unless there is some evidence to show an agreement for a demise for a term. (*Simpkin v. Ashurst*, 4 Tyrw. 781; *S. C.*, 1 Cr., Mees. & Rosc. 261.) So long as the occupation is merely continued with the bare acquiescence, or without the disagreement of the person entitled to the possession, a tenancy at sufferance exists. (*Sykes d. Murgatroyd v. Birkett*, cited 1 T. R. 161; Co. Litt. 270 b; Cro. Jac. 169.)

Where a party enters into possession of a farm, and pays rent under an agreement for a lease containing divers covenants applicable to a tenancy from year to year: it was held, that where the agreement stipulated for the lease to contain a condition of re-entry, if the tenant should grow two successive crops of white corn without fallowing, that he might be ejected without notice if he committed a breach of the covenant. (*Doe d. Thompson v. Amey*, 4 P. & Dav. 177. See *Lord Bolton v. Tomlin*, 1 Nev. & P. 247; 5 Ad. & Ell. 856.)

A tenancy from year to year was considered as recommencing every year in the case of *Tomkins v. Lawrence*, 8 Carr. & P. 729, but in *Doe d. Hull v. Wood*, 14 M. & W. 682, Parke, B., said, "Though some doubts may once have existed as to whether, in the case of a tenancy from year to year, there was a fresh tenancy at the end of each year, it is now clear beyond all doubt that the same tenancy continues till the one or the other of the parties determines it at his pleasure." And the same principle must apply to any shorter tenancy, as from week to week. (*Per Crompton, J., Reg. v. Thornton (Township)*, 6 Jur., N. S. 799; 29 L. J., M. C. 162, 164.) The nonpayment of rent for sixteen years, and no proof of any demand being made, is of itself sufficient evidence to presume the determination of a tenancy from year to year. (*Stagg v. Wyatt*, 2 Jur. 892.)

Though a *parol* agreement for a longer term than three years is void by the Statute of Frauds, 29 Car. 2, c. 3, s. 1, as to the duration of the term, yet it creates a tenancy from year to year, regulated in every other respect by the agreement. (*Doe v. Bell*, 5 T. R. 471; *Clayton v. Blakely*, 8 T. R. 3. See *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680.)

By stat. 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing of any tenements or hereditaments "shall be void at law unless made by deed." An agreement to let for three years and a week is void as a lease by that section, but the tenant, notwithstanding, holds from year to year, subject to the terms of the agreement, and is bound to quit at the expiration of the three years, without a previous notice to quit. (*Tress v. Savage*, 4 Ell. & Bl. 36; 18 Jur. 680; 23 L. J., Q. B. 339. See 8 & 9 Vict. c. 106, s. 3, *post*.)

The interest of a tenant from year to year does not determine by his death, but devolves to his personal representatives. (*Doe v. Porter*, 3 T. R. 13; 15 Ves. 241.)

Notice to quit.

A tenancy from year to year may be determined by a notice to quit from either party, which, when there is no agreement, or where the agreement is silent on that point, must be at least half a year's (and not merely six

months') notice, requiring from the tenant, or offering on his part, to give up possession at the expiration of the year, computing from the time when the tenancy commenced. (*Right v. Darby*, 1 T. R. 159.) A notice to quit a house held by the plaintiff as tenant from year to year was given to him on the 17th June, 1840, which required him to quit the premises "on the 11th October now next ensuing, or such other day and time as his said tenancy might expire on." The tenancy had commenced on the 11th October in a former year. It was held, that this was not a good notice for the year ending on the 11th October, 1841. (*Mills v. Goff*, 14 Mees. & W. 72.)

3 & 4 Will. 4,  
c. 27, s. 8.

Land was let for one year, and so on from year to year, until the tenancy should be determined as after mentioned, with a subsequent proviso that three months should be sufficient notice to be given from either party, and another subsequent proviso that it should be lawful for either party to determine the tenancy by giving three months' notice. It was held, that the tenancy was not determinable by three months' notice expiring before the end of the second year. (*Doe d. Chadborn v. Green*, 9 Ad. & Ell. 658; 1 P. & Dav. 454; see *Biroh v. Wright*, 1 T. R. 378; *Denn d. Jenkin v. Cartwright*, 2 Campb. 572; *Thompson v. Maberley*, 4 East, 29.) On a demise for one year and six months certain from August 13th, at a rent payable on the usual quarter days, three calendar months' notice to be given on either side before determination of the said tenancy. The tenant continued to occupy beyond the year and six months. It was held, that a three months' notice to quit, expiring on 13th August, was proper; and not a notice expiring at the end of a year from the termination of the year and six months. (*Doe d. Robinson v. Dobell*, 1 Q. B. 806.) A tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that period, which the landlord accepted; the tenant having afterwards discovered that his tenancy expired at Christmas gave his landlord another notice accordingly, and on possession being demanded at Midsummer refused to quit the premises. It was held, that the tenancy was not determined by notice, inasmuch as it was not good as a notice to quit, and could not operate as a surrender by note in writing, within the Statute of Frauds, being to take effect *in futuro*. (*Doe d. Murrell v. Milward*, 3 Mees. & W. 328; see *Johnstone v. Hudleston*, 4 B. & C. 922; *Weddall v. Capes*, 1 Mees. & W. 50.) A tenant from year to year gave his landlord notice to quit, ending at a time within half a year. The landlord at first acquiesced, but ultimately refused to accept the notice. The tenant quitted according to his notice, and the landlord entered, and did some repairs. It was held, that the tenancy was not determined. (*Bessell v. Landsberg*, 7 Q. B. 688.) A notice to quit must be such that the tenant may safely act on it at the time of receiving it; therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal after the proper time for giving it. Notice to quit at the end of the current year of tenancy, "on failure whereof I shall require you to pay me double former rent or value for so long as you detain possession," is an unqualified notice, and does not give the tenant an option. (*Doe d. Lyster v. Goldwin*, 2 Q. B. 143.) Land and buildings were held by a yearly tenant, the land from 2nd February to 2nd February, the buildings from 1st May to 1st May. The landlord, on the 22nd October, 1838, served him with a notice to quit the lands and buildings, "at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year's holding of or in the said premises, or any part or parts thereof respectively, shall expire after the expiration of half a year from the delivery of this notice." It was held, that as to the lands the notice was to be considered a notice to quit on 2nd February, 1835; and that the landlord might recover both land and buildings after that day in ejectment. (*Doe d. Williams v. Smith*, 5 Ad. & Ell. 350.) As to requisites of notice to quit, see 1 Selw. N. P. 630, 635, 13th ed. A notice to quit given by a person authorized by one of several joint-tenants, purporting to be given on behalf of them all, is good for all, because the tenant holds the premises only so long as he and they shall all agree. (*Doe d. Aslin v. Summersett*, 1 B. & Ad. 135; *Doe d. Kindersley v. Hughes*, 7 Mees. & W. 139; see *Doe d. Mann v. Walters*, 10 B. & C. 626.)

8 & 4 Will. 4,  
c. 27, s. 8.

A notice to quit cannot be required by a person holding adversely, but only where there is a subsisting tenancy on both sides, nor is it necessary where the tenant does an act which amounts to a disavowal of the title of the landlord. (*Doe d. Calvert v. Fromd*, 1 Moore & P. 486.) A notice to quit is unnecessary, where on demand of possession the party refuses to give up possession, claiming the property as his own. (*Doe d. Lansdell v. Gower*, 17 Q. B. 589.) In *Doe d. Williams v. Pasquali*, Peake's N. P. C. 196, a refusal to pay rent to a devisee under a will, which was contested, was not such a disavowal of his title as to entitle such devisee to maintain ejectment without a previous notice to quit. (See *post*, pp. 178, 179.)

### Lease reserving Rent.

Where rent amounting to 20s. reserved by a lease in writing shall have been wrongfully received, no right to accrue on the determination of the lease.

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled (*x*).

(*x*) According to the judgment of Lord Denman, C. J., in *Doe d. Angell v. Angell*, 9 Q. B. 356, this section is to be read as if the word "charge" in italics had been interposed.

Law before the statute.

The rule of law before this statute was, that in case of a lease, adverse possession, so as to bar the reversioner, did not commence till the expiration of the term. Before the new act, length of possession during a particular estate, as a term of 1,000 years, or under a lease for lives as long as the lives were in being, gave no title; but if tenant *pur auter vie* held over for twenty years after the death of *cestui que vie*, such holding over would in ejectment be a complete bar to the remainderman or reversioner, because the possession was adverse. (Cowp. 218.) Before this act it was decided that the holding over for twenty years by a lessee for years determinable on lives at a *nominal* rent, who, at the commencement of such holding over, falsely asserted that one of the *cestuæ que vies* was alive, but omitted to pay the reserved rent, was not an adverse possession barring the entry or ejectment of the reversioner. So although the reversioner had notice of the cesser of the term, and granted a fresh lease to another person, who neglected to enter for more than twenty years. (*Rex v. Inhabitants of Axbridge*, 4 Nev. & M. 477.)

Receipt of rent by stranger no evidence of adverse possession.

The mere receipt of rent by a stranger, without colour of title, was not evidence of adverse possession against one who had the legal title, for it was no disseisin, but at the option of the latter, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry. (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith v. Parkhurst*, Andr. 324; *Jayne v. Price*, 5 Taunt. 326; 1 Marsh. 68.) If there be a tenant at sufferance, and a stranger, not having any right to the land, make a lease to him by indenture, rendering rent, without putting the tenant by

sufferance out of possession, and the tenant pay the rent to the stranger, that is not any disseisin to him who has the right. (1 Roll. Abr. 659, (C.) pl. 11.) So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election. (*Blunden v. Baugh*, Cro. Car. 302.) For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election. (See 2 Sch. & Lef. 622; 1 Tannt. 599.)

3 & 4 Will. 4,  
c. 27, s. 9.

Before the stat. 3 & 4 Will. 4, c. 27, when there was a valid lease subsisting, the right of entry was preserved until the determination of the lease, although no rent had been received; (*Orrell v. Maddox*, Runn. Eject. App. No. 1;) and even the adverse receipt of rent for more than twenty years did not deprive the party of his right of entry on the determination of the lease (*Doe v. Danvers*, 7 East, 299. See *Bushby v. Dixon*, 3 Barn. & C. 298, 304, 305), although a void lease, or a term which had become attendant upon the inheritance for the benefit of the owner of it, did not prevent the running of the Statute of Limitations. (*Taylor v. Horde*, 1 Burr. 60.)

But where an estate had been in lease, and A. entered and received the rent during the continuance of the lease, and remained in possession more than twenty years from the time of his entry, and another person claiming the estate within twenty years after the expiration of the lease brought an ejectment and filed a bill for a discovery, it was held that the possession was adverse, as a bill might have been filed by the parties claiming during the whole time the leases were in existence, and a demurrer to the discovery was allowed, and assistance in equity refused. (*Cholmondeley v. Clinton*, Turn. & Russ. 107.)

The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil: the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where *no rent* or only a *nominal rent* is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and, in such cases, till the expiration of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20s. a year may for this purpose be considered nominal." (1 Real Prop. Rep. 47.)

Remarks of real  
property commis-  
sioners.

J., seised in fee, leased for sixty-one years, for a term expiring in 1887, within five years after the passing of stat. 3 & 4 Will. 4, c. 27 (24th July, 1833). From J.'s death, which happened more than twenty years before the passing of the act, B. received the rent reserved on the lease down to its expiration, and he then entered into possession; and afterwards W., within five years after the passing of the act, brought ejectment against B., claiming to be entitled, as J.'s devisee, immediately on J.'s death. It was held, that, under sect. 9, the action would have been barred by B.'s receipt of the rent; but that it was preserved by sect. 15 for five years after the passing of the act. (*Doe d. Angell v. Angell*, 9 Q. B. 328.)

Cases under  
sect. 9.

Lord Denman, C. J., in giving judgment, observed, that "considerable difficulty arises in the construction of this act of parliament, by reason of the word 'rent' being used in two different senses throughout, viz., in the sense of a rent charged upon land, and of a rent reserved under a lease. In the very first section of the act, the interpretation clause, it is used in both senses; for it is made to extend 'to all heriots, and to all services and suits for which a distress may be made, and to all annuities and periodical sums of money charged upon or payable out of any land.' In the 2nd section, it is used in the sense of rent-charge only, as was stated by Tindal, C. J., in the judgment in *Paget v. Fbley*, 2 Bing. N. C. 679, 688; and as expressly held by the Court of Exchequer in the case of *Grant v. Ellis*, 9 Mees. & W. 113. The word is used in the same sense in the 3rd, 4th and 5th sections. In the 7th section it is used in the same sense; the words

Meaning of  
"rent" in 3 & 4  
Will. 4, c. 27.

3 & 4 Will. 4,  
c. 27, s. 9.

are 'when any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will.' Now a tenant at will of land, out of which a rent is reserved, cannot by any possible construction of language be said to be in the receipt of that rent which he pays; he cannot be tenant at will of the land and of the rent also. Indeed, no one can be said to be tenant of, or to have any estate in, the rent reserved by a lease, as was shown in the case of *Prescott v. Boucher*, 3 B. & Ad. 849—859; and was agreed to in the judgment in *Grant v. Ellis*, 9 Mees. & W. 124. The word 'rent,' therefore, in the 7th section must mean rent-charge; and there is no absolute absurdity in supposing that a person, seised in fee or for life of a rent-charge, might, for a gross sum of money, demise it for years or at will at a smaller rent. In the 8th section the same sense must, for the same reasons, be given to the word 'rent' in the earlier part of the section: but at the close of it the word is manifestly used in the other sense, viz., that of rent reserved, the words being 'or at the last time when any rent payable in respect of such tenancy shall have been received.'" We come now to the 9th section, on which the case of *Doe d. Angell v. Angell* turned; the word "rent" is there used seven times. The first time it means rent-charge; the second and third rent reserved; the fourth, rent-charge; the fifth, rent reserved; the sixth, rent-charge; the seventh, rent reserved. If the word "rent-charge" be substituted for "rent" where the meaning is such, in this section, the section will run with the word rent-charge substituted as above for the word rent. (*Doe d. Angell v. Angell*, 9 Q. B. 355, 356. See *Baines v. Lumley*, 16 W. R. 675.)

When time begins  
to run.

The right to recover land subject to a lease is to be considered as having accrued not from the time which any person dealing with the leases, or dealing with those entitled to the leases, gets possession, and claims to be entitled to the fee, but from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease; for then the adverse title of the person, who receives the rent under such circumstances, is first really brought into operation against the party who claims on the expiration of the lease. (*Per Lord Langdale, Chadwick v. Broadwood*, 3 Beav. 316; see *Archbold v. Scully*, 9 H. L. C. 360; *Twiss v. Noblett*, 1 R., 4 Eq. 60.)

Wrongful receipt  
of rent within this  
section.

A person claiming without any real title to be entitled to land is a person "wrongfully" claiming within the meaning of this section: and this section applies although the claim may be put forward under a mistake, and without any improper intention to deprive others of their property. (*Williams v. Pott*, L. R., 12 Eq. 149.) For the bearing of this section on the case where there is a lease and a sublease, and the parties claiming under the sublease pay their rent directly to the head landlord, see *Drew v. Lord Norbury*, 3 J. & Lat. 306. See further, as to wrongful receipt of rent within this section, *Sloane v. Flood*, 5 Ir. C. L. 75; *Shaw v. Keighron*, 1 R., 3 Eq. 574.

Disclaimer of  
landlord's title.

A disclaimer imports a renunciation by the party of his character of tenant, either by setting up a title in another, or by claiming title in himself. (1 Mann. & G. 139.) And if a tenant disavowed his landlord's title by attorning to another, and the landlord was apprised of it and acquiesced, the possession of his tenant became adverse, and the Statute of Limitations would have run against the landlord. (*Hovenden v. Lord Annesley*, 2 Sch. & Lef. 624.) Lord Redesdale observed, "The attornment of a tenant will not affect the title of the lessor so long as he has a right to consider the person holding the possession as his tenant. But as he has a right to punish the act of the tenant *disavowing the tenure* by proceeding to eject him, notwithstanding his lease, if he will not proceed for the forfeiture, he has no right to affect the rights of third persons, on the ground that the possession was betrayed; and there must be a limitation to that as to every other demand. But where there is no disavowal of the tenure, the mere nonpayment of rent by the tenant for a number of years will not bar the remedies of the landlord at the expiration of the term, as the possession of a tenant entering under a lease is lawful as against his lessor who was entitled to all his remedies for the rent." (2 Sch. & Lef. 625, 626.) The



act of a tenant in setting up a title adverse to that of his landlord, in order to obtain the freehold, operates as a forfeiture of his term, and it is the same whether he does it himself, or assists another to do it. Whether he tries to get the freehold himself, or by collusion or connivance assists that result in favour of another, it operates equally as a forfeiture. Therefore where a termor, after deserting the demised premises, delivered up the possession of them with the lease, to a party who claimed by a title adverse to that of the landlord, with the intent to assist him in setting up that title, and not that he should hold *bonâ fide* under the lease, it was held that the term was forfeited by such act of betraying possession. (*Doe d. Ellerbrock v. Flynn*, 1 Cr. M. & R. 137; 4 Tyrw. 619.) But a tenant for a definite term of years does not forfeit his term by orally refusing, upon demand of the rent made by his landlord, to pay the rent, and claiming the fee as his own. (*Doe d. Graves v. Wells*, 10 Ad. & Ell. 427.) In order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant; or to a distinct claim to hold possession of the estate, upon a ground wholly inconsistent with the existence of that relation, which by necessary implication is a repudiation of it. An omission to acknowledge the landlord as such by requesting further information will not be enough, nor will a mere refusal to pay rent. (*Doe d. Williams v. Pasquali*, Peake, N. P. C. 196.) When a landlord brings an action to recover the possession from a defendant who has been his tenant from year to year, evidence of the disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy from its particular nature was limited. (10 Ad. & Ell. 435.) But though a lessee set up an adverse claim to the property in the premises he holds under the lease, yet that does not incapacitate him from maintaining possession under the lease, where the relation of landlord and tenant has not been actually abandoned. (*Rees d. Powell v. King*, Forrest, 19.) A tenant from year to year, who had agreed to buy his landlord's estate, having remained in possession for several years without paying either rent or interest on the purchase-money, the agent of the lessor applied to him to give up possession, to which he answered that he had bought the property and would keep it, and had a friend who was ready to give him the money for it. This was held to be no disclaimer, because it was not a claim to hold the estate on a ground necessarily inconsistent with the continuance of the tenancy from year to year. (*Doe d. Gray v. Stanion*, 1 Mees. & W. 695; 1 Tyr. & G. 1065. See *Doe d. Williams v. Cooper*, 1 Mann. & G. 135.) It was held, that payment of rent to another party without the consent or knowledge of the landlord, after an adverse possession of twenty-three years, did not amount to an attornment; and that the fraudulent act of a tenant in betraying the possession of his landlord by disclaiming tenure under him, and admitting a title in a third person, would not affect the landlord's title, so long as he had a right to consider the person as holding possession as tenant. (*Meredith v. Gilpin*, 6 Price, 146.) Payment of rent by a lessee to a lessor, after the lessor's title has expired, and after the lessee has notice of an adverse claim, does not amount to an acknowledgment of title in the lessor, or to a virtual attornment, unless at the time of payment the lessee knew the precise nature of the adverse claim, or the manner in which the lessor's title had expired, and such knowledge is a fact to be decided by the jury. (*Fenner v. Duplock*, 2 Bing. 10; 9 Moore, 38.) A tenant, though not permitted to deny the right of demising, may rely upon his landlord's title having expired. (*Downs v. Cooper*, 2 Q. B. 256.) On disclaimer, see Woodfall's L. & T. 325 *et seq.*, 9th ed.

3 & 4 Will. 4,  
c. 27, s. 9.

### Entry.

10. No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon (y).

A mere entry not  
to be deemed pos-  
session.



3 & 4 Will. 4,  
c. 27, s. 10.

Acts sufficient to  
interrupt adverse  
possession.

(y) By stat. 21 Jac. 1, c. 16, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. An entry to avoid a fine with proclamations, though not authorized by the party in whose behalf it was made, is sufficiently ratified by an action of ejectment founded on it. (*Doe d. Blight v. Pett*, 11 Ad. & Ell. 842; 4 P. & Dav. 278.) By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Statute of Limitations (21 Jac. 1, c. 16), or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect. (See 1 Wms. Saund. 319, n. (1); 10 B. & C. 848.) This clause in the act will have the effect of shortening the period within which an ejectment can be brought; for, under the Statute of Anne, a party might enter just before the expiration of the twenty years, and commence his action within one year afterwards.

The defendant being in adverse possession of a hut and piece of land, the lord of the manor entered in the absence of the defendant, but in the presence of his family said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. It was held, that these acts were not sufficient to disturb the defendant's possession under this section. (*Doe d. Baker v. Combes*, 19 L. J., C. P. 306.) If there be adverse possession of land, that adverse possession will be interrupted (so as to cause the Statute of Limitations to run as against the true owner) by the true owner entering on the land, asserting his rights, and entirely removing that which constituted the possession of the tortious possessor. And, as a matter of law, it is unnecessary for the true owner to go on and show that he continued in possession. (*Worssam v. Vandenberghe*, 17 W. R. 53.)

### Continual Claim.

No right to be pre-  
served by con-  
tinual claim.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action (z).

(z) Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day (which was called *continual claim*), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations. (Litt. ss. 414, 415; Rann. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford v. Grey*, 1 Salk. 285.) Actual entry was sufficient to keep alive the right of a person disseised, but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations. (*Hodde v. Healey*, 1 Ves. & B. 540.)

### Coparceners, &c.

Possession of one  
coparcener, &c.  
not to be the pos-  
session of the  
others.

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them (a).

(a) Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other. (Co. Litt. 243 b, n. (1), 373 b; *Ford v. Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868; Burton's Compendium, 895 *et seq.*) The possession of one coparcener was that of the other, so as to create a seisin in the other, and carry her share by descent to her heirs, although the other had never actually entered; (*Doe v. Keen*, 7 T. R. 386;) and entry by one coparcener, when not *adverse* to her companions, enured to the benefit of all. (Co. Litt. 243 b; *Doe v. Pearson*, 6 East, 173; Smith, 295.) But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other. (*Davenport v. Tyrrel*, 1 Bl. R. 675.) Where a tenant in common had been in the exclusive possession of the rents of S. for more than twenty years, and an ejectment had been brought by another co-tenant in common to which A. had taken defence, and on which no further proceedings were had, taking such defence is not conclusive evidence of adverse possession against A.'s co-tenant in common. (*O'Sullivan v. M'Swiny*, 1 Longfield & T. 111.)

3 & 4 Will. 4,  
c. 27, s. 12.

How coparceners,  
&c. were affected  
by old statutes of  
limitation.

Since the passing of the act 3 & 4 Will. 4, c. 27, the possession of land by one coparcener cannot be considered as the possession of his coparcener; nor, consequently, can the entry of one have the effect of vesting the possession in the other. (*Woodroffe v. Doe d. Daniell*, 15 Mees. & W. 792.)

Effect of sect. 12.

This section has relation back as far as relates to the period of the act, and makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession. Therefore, where one tenant in common has been out of possession for twenty years prior to the passing of the statute, he is barred by sections 2 and 12 from bringing his action, but might have maintained it under section 15 within five years of the passing of the act, if the other tenant in common had not been in possession adversely to him at the time of the passing of the act. (*Culley v. Doe d. Taylerson*, 11 Ad. & Ell. 1008; 3 P. & Dav. 538.) This statute is, to a certain degree, retrospective, as to the possession of tenants in common; and though before the act the separate possession of one coparcener, joint tenant, or tenant in common, of the entirety, or more than his individual share of such land, was not adverse as against the owners of the other shares, yet, by the operation of the act, the possession, which was not adverse prior to that act, became by that act adverse as against tenants in common who were not in possession. (*O'Sullivan v. M'Swiny*, 1 Longfield & T. 118, 119; *Doe d. Holt v. Horrocks*, 1 Car. & K. 566.)

This section applies, not only to the case where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also to the case where such tenant has been in possession of the entirety of any portion of such lands. (*Murphy v. Murphy*, 11 Ir. C. L. R. 205, where *Tidball v. James*, 29 L. J., Ex. 91, is explained.)

Lands were conveyed to a trustee and his heirs, in trust for five persons, as tenants in common in fee. For more than twenty years prior to the filing of the bill, four of the tenants in common had been, by their agent, in the uninterrupted and exclusive receipt and enjoyment of the rents and profits of all the lands. The trustee never, in any manner, interfered in the trust. It was held, that the title of the fifth tenant in common was barred by this statute, which has altered the rule that the possession of one tenant in common is the possession of the other. The case was not within the saving of the 25th section, for the defendants had not received the rents under, but in opposition to, the trustees. (*Burroughs v. M'Creight*, 1 J. & Lat. 290.)

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued in possession for twenty-one years, it was decided that they held on as joint tenants;

3 & 4 Will. 4,  
c. 27, s. 12.

and inasmuch as they had done nothing to sever their tenancy, the interest of the one who died first determined on his death. (*Ward v. Ward*, L. R., 6 Ch. 789. See *Williams v. Williams*, L. R., 2 Ch. 294.)

Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants. (*M'Mahon v. Burchell*, 2 Phill. C. C. 127; 1 Coop. 457.) One tenant in common of real property cannot maintain an action for money had and received against his co-tenant, his remedy being an action of account under the stat. 4 Ann. c. 16, s. 27. (*Thomas v. Thomas*, 19 L. J., Exch. 175; 14 Jur. 180.) As the only remedy given by the stat. 4 Ann. c. 16, s. 27, is an action, there is no right to relief in equity, unless the case be one in which such action would lie. An executor who had been co-tenant in common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right. (*Henderson v. Eason*, 2 Phill. C. C. 308; 15 Sim. 303. See *Murray v. Hall*, 7 C. B. 441.)

### Possession of Younger Brother, &c.

Possession of a  
younger brother  
not to be the pos-  
session of the heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir (b).

(b) The effect of this section is illustrated in the judgment of the court in *Jones v. Jones*, 16 Mees. & W. 712, ante, p. 145.

Prior state of the  
law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son, as the law intended that he entered claiming as heir to his father, being the same title as that by which the elder son claimed. (Litt. s. 396; *Sharington v. Shrotton*, Plowd. 306.) On proof that the sister of the plaintiff occupied the estate for twenty years, and that the defendant entered as her heir, her possession would be construed to be by curtesy and licence, to preserve the possession of the brother, and therefore not within the intent of the stat. 21 Jac. 1, c. 16. The presumption ceased if it appeared that the brother had been in the actual possession, and that he had been ousted by the sister. (*Page v. Selby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306. See also *Lessee of Dordall v. Bryne*, Batty's Ir. R. 373.)

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir. on her death in 1838. (*Doe d. Bennet v. Long*, 9 Carr. & P. 773. See *Doe d. Draper v. Lawley*, 13 Q. B. 954.)

### Written Acknowledgment of Title.

Acknowledgment  
in writing given  
to the person en-  
titled, or his agent,  
to be equivalent  
to possession or  
receipt of rent.

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the

profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given (c).

3 & 4 Will. 4,  
c. 27, s. 14.

(c) The requiring an acknowledgment in writing to take a case out of the statute 3 & 4 Will. 4, c. 27, is adopted by analogy to the statute 9 Geo. 4. c. 14, in this section, and in the 28th, 40th, and 42nd sections of this act, and in the 5th section of the 3 & 4 Will. 4, c. 42. It may be proper to remark, that a difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party in possession, or *his agent*, signed by the person in possession. By the 28th section, twenty years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him. By the 40th section, money charged upon land and legacies are to be deemed satisfied at the end of twenty years, unless some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. In the four cases above mentioned, therefore, the acknowledgment is binding if given to the party entitled, or *his agent*; but an acknowledgment of title under the 14th section, or of a right to redeem under the 28th section, cannot be given by an *agent*, whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the 40th and 42nd sections of this act, and under 9 Geo. 4, c. 14, are collected in the subsequent notes. By the 5th section of 3 & 4 Will. 4, c. 42 (limiting the time within which actions on specialties are to be brought), any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that act.

Different sections  
as to acknowledg-  
ments in the  
Statutes of Limi-  
tation.

Sect. 14 of 3 & 4 Will. 4, c. 27, provides that the acknowledgment must be signed by the person in possession: therefore, an acknowledgment signed by an agent will be insufficient. Defendant's grandfather had been owner of two undivided thirds of a meadow, and held the other third under a lease which expired in 1818. Defendant's father and defendant succeeded in their turn; and at time of action defendant was owner of two-thirds and occupant of whole, no rent having been paid since 1818. Plaintiff's only evidence was a letter of the land agent who managed defendant's property, written within twenty years of action, in which he said that defendant "would no doubt accept a lease of Ley's one-third at a fair rack-rent." Held, in ejectment for the one-third, that this was not a sufficient acknowledgment within sect. 14, as not being signed by person in possession, but only by an agent; and also that the letter was no evidence of a tenancy at will on the part of the defendant. (*Ley v. Peter*, 3 H. & N. 101; 6 W. R. 437.) It was held, that the unaccepted proposal

By whom  
acknowledgment  
must be made  
under sect. 14.

3 & 4 Will. 4,  
c. 27, s. 14.

To whom.

What is an  
acknowledgment.

for a lease made, by E. F., whose personal representative the defendant was, to the parties from whom the lessors of the plaintiff derived title, such proposal having been signed by a third party for and in the presence of E. F., who was unable from illness to write, was evidence of an acknowledgment of title within the 14th section. (*Corporation of Dublin v. Judge*, 11 Ir. L. R. 9. See Story on Agency, 55, 56.)

The acknowledgment must be given to the person entitled or his agent. (See *Fursden v. Clegg*, 10 M. & W. 572; *Goode v. Job*, 28 L. J., Q. B. 1, *post.*)

Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide. (*Doe d. Curzon v. Edmonds*, 6 Mees. & W. 295; *Morrell v. Frith*, 3 M. & W. 402.) Where letters were relied on as an acknowledgment of title, Sir E. Sugden, L. C., said it was a question of fact for a jury, whether the letters in question amounted to an acknowledgment of title within the statute. (*Incorporated Society v. Richards*, 1 Dru. & War. 290; see, however, Sugd. R. P. Stat. 67.) A party in possession adversely of land, being applied to by the party claiming title to it to pay rent, and offered a lease of it, wrote as follows:—"Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent on an agreement for a term of twenty-one years:" the bargain subsequently went off, and no rent was paid or lease executed. It was held, that this letter was not an acknowledgment of title within this section, because there was no final bargain. (*Doe d. Curzon v. Edmonds*, 6 Mees. & W. 295. See *Morrell v. Frith*, 3 Mees. & W. 402.)

By an indenture dated 27th October, 1827, between the defendant of the one part, and the plaintiff of the other part, after reciting that certain copyhold premises were surrendered to the plaintiff for securing the repayment of 300*l.* by him that day lent to the defendant, the plaintiff covenanted on repayment of that sum and interest on the 27th April, 1828, to surrender the premises to the defendant, and the defendant covenanted to pay the 300*l.* and interest at the time appointed for payment. There was also a stipulation that in default of repayment, the plaintiff might take possession of the premises. The deed was in fact executed on the 23rd of August, 1834. No principal, interest or rent had ever been paid by the defendant. In February, 1854, the plaintiff brought ejectment. It was held, that the deed was a sufficient acknowledgment of the plaintiff's title within this section, as the deed was to be read as speaking from the time of its execution, and consequently there was a sufficient acknowledgment to prevent the right of entry from being barred. (*Jayne v. Hughes*, 10 Exch. 430; 24 L. J., Ex. 113.)

A correspondence by a party in possession of property with the solicitor of a society, by which he merely professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, and offered to refer to arbitration all questions touching such account, as the only matter in dispute, was held to amount to a written acknowledgment of the plaintiff's title, and save it from being barred. (*Incorporated Society v. Richards*, 1 Connor & Lawson, 86; 1 Dru. & War. 258.) Where two parties are dealing with each other, the one claiming a right to the property, and the other an incumbrance on it, the incumbrancer cannot be heard to say that an acknowledgment, contained in a correspondence between them, is not binding on him, because there might be an infirmity in the title acknowledged, in case some third party were to make a claim. (*Ib.*) The acknowledgment must be in writing, and it may be doubted whether parol evidence of the acknowledgment will be excluded. (*Haydon v. Williams*, 7 Bing. 168; 4 M. & P. 811.)

If a person through whom the defendant in an action of ejectment claims has, in an answer sworn by him to a bill filed by the plaintiff in reference to the same property, acknowledged the title of the plaintiff within twenty years of the time of the action being brought, such acknowledgment will be evidence against the defendant, and will operate as a bar to the Statute of



Limitations under this section. (*Goode v. Job*, 28 L. J., Q. B. 1; Ell. & Ell. 6.)

3 & 4 Will. 4,  
c. 27, s. 14.

In an action for the use and occupation of premises alleged to have been held by the defendant as tenant to the plaintiff's testator, who died in 1837, the defendant pleaded the Statute of Limitations. A letter, dated August 30, 1837, after the testator's death, in answer to an application by the attorney for payment of the arrears of rent, was held a sufficient acknowledgment of the testator's title to take the case out of the statute. The property which the defendant had occupied for several years had for a long time been the subject of a chancery suit. The letter stated that the defendant was involved in law from 1805 to 1816 concerning the land, which had given him great trouble and expense, and that with respect to the expenses it was reasonable that the lords of the fee should make him some recompence accordingly; and after detailing certain particulars as to the several claims which had been made to the property, that the plaintiff's testator had been applied to to defend his title as to one-fourth, but had objected so to do, and that, "it appeared reasonable that the plaintiff should vindicate his right to the land," rather than that the expenses should fall upon the tenants; the letter concluded by stating that the writer "begged compassion, mercy and pity, and recompence in a satisfactory manner." (*Furden v. Clegg*, 10 Mees. & W. 572.)

The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made. (*Burroughs v. M'Creight*, 1 Jones & L. 304; *Scott v. Nixon*, 3 Dru. & War. 404.) See, however, *Darb. & Bos. Stat. Lim.* 290.

When time runs  
after an acknow-  
ledgment.

### *Time of Limitation enlarged.*

#### *Possession not adverse at passing of Act.*

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or *interest* (*d*), at any time within five years next after the passing of this act (*e*).

Where possession  
is not adverse at  
the time of passing  
the act, the right  
shall not be barred  
until the end of  
five years after-  
wards.

(*d*) The word "interest," which is in the parliament roll, appears to be a mistake for "rent," *per* Lord Denman, C. J. (*Doe d. Angell v. Angell*, 9 Q. B. 360.)

(*e*) The policy of this act was to make a possession of twenty years confirm a title, subject to certain exceptions. One of those exceptions is, where there has been an acknowledgment in writing according to the 14th section; the other, where the possession, at the time of the passing of the act, was not adverse: and, in such cases, it was accordingly considered, that the parties should have five years for the recovery of the land or interest claimed. (2 Brady, Adair & Moore, 95.) This section does not give five additional years to the party claiming, if the possession was *adverse* to his right at the time of the passing of the act (24th July, 1833). (*Holmes v. Newland*, 11 Ad. & Ell. 44; 3 P. & Dav. 128. See *Culley v. Doe d. Taylerson*, 3 P. & Dav. 551; 11 Ad. & Ell. 1008; *O'Sullivan v. M'Sweeney*, 2 Ir. L. R. 95, 96.) Adverse possession, within the meaning of this section, is not an adverse possession for twenty years: it was held, therefore, that a possession for twenty years, without payment of rent or an acknowledgment of title, was sufficient to bar an ejectment brought for the recovery of lands where the possession was adverse *at the time of*



3 & 4 Will. 4,  
c. 27, s. 15.

*the passing of the act*, although such possession had not been adverse for a period of twenty years. (*Lessee of O'Sullivan v. M'Sweeny*, 2 Ir. L. R. 89.)

The question as to the fact of an adverse possession, such as would bring a party within this section, must be determined as it would have been if the act had never passed. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 296.)

There is no saving of minority in the 15th section, and, therefore, the period of five years given by that section cannot be extended by reason of the minority of the claimant. (*Scott v. Nixon*, 3 Dru. & War. 388. See also on this section, *Incorporated Society v. Richards*, 1 Dru. & War. 289.)

Decisions under this section will be found in the cases of *Doe d. Burgess v. Thompson*, 5 Ad. & Ell. 532; 1 Nev. & P. 215; and *Ex parte Hassell*, *In re Manchester Gas Act*, 3 Jur. 1101; 3 Y. & Coll. 617.

### 3. Savings in Case of Disabilities.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid (*f*), such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy (*g*), coverture, idiotcy, lunacy (*h*), unsoundness of mind, or absence beyond seas (*i*), then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened) (*j*).

(*f*) See sections 2 to 14, *ante*, pp. 144—182.

Disability of infancy.

Possession by father of son's estate.

(*g*) An estate being settled on the wife for life, with remainder to her children, the husband entered on the wife's death in 1832, and remained in possession till his death, the eldest son attained his age in 1836, and in 1855 filed a bill against the devisee of his father: it was held, that the son was not barred by this section. It was contended, that the plaintiff's right was barred, as he had been of age more than *ten years*, his right having accrued on the death of his mother in 1832. It was held, the reasonable inference was that the father entered on behalf of his children as their guardian, which was totally different from the case of a more stranger entering upon property under similar circumstances. (*Thomas v. Thomas*, 2 Kay & J. 79.) A testator who died in 1833 gave all his property to his two daughters, and appointed his brother and another executors of his will and trustees for his wife and children. The will having been attested by only two witnesses, the real estate descended upon his two daughters, one of whom died an infant. In 1833, J., one of the executors named in the will, entered into the receipt of the rents, and paid interest on a mortgage affecting the estate. Thirty years afterwards, on a question as to whether the claim of the infant's heir was barred as against the claim of J.'s heir, it was held, that, in the absence of express evidence to the contrary, J. must be presumed to have entered on behalf of the infants, and therefore time did not run against them. (*Pelly v. Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306.)

Possession by executor.

(*h*) See *Fulton v. Creagh*, 3 J. & Lat. 329; 3 Y. & Coll. 620.

Absence beyond seas.

(*i*) The words "absence beyond seas," were interpreted literally, and meant out of the realm. (*Ruckmaboye v. Mottichund*, 8 Moore, P. C. C. 4.) See section 19, *post*, p. 193, as to what places are not to be deemed

beyond seas. Absence beyond seas has not ceased to be a disability under this section by 19 & 20 Vict. c. 97, s. 10. (See *post*.)

3 & 4 Will. 4,  
c. 27, s. 16.

It will be observed that imprisonment is not a disability within this act. The disability of imprisonment was omitted in this section on the ground that imprisonment, whether under civil or criminal process, is of short and defined duration; and during its continuance the party has ample means of communication with friends and professional advisers. (1 Real Prop. Rep. 44.) Imprisonment is no longer a disability under stat. 21 Jac. 1, c. 16; 19 & 20 Vict. c. 17, s. 10.

Imprisonment.

Successive disabilities in *the same person* had been held under the old Limitation Act for Ireland to prevent the operation of the Statute of Limitations, and to give to the heir ten years after the death of his ancestor to enforce his claim by ejectment. Therefore, when A., a minor, having herself been dispossessed of certain lands in 1787, married in 1794, and being a *feme covert*, attained her full age in 1796, and died in 1827, it was held that an ejectment was well brought by her heir. (*Lessee of Supple v. Raymond*, 1 Hayes, Ir. Rep. 6. See 2 Prest. Abstr. 340; Blansh. Lim. 21, 22.) It has been held under 3 & 4 Will. 4, c. 27, s. 16, that when the person to whom the right to bring an action for the recovery of land accrues is under a disability, and before the removal of that disability the same person falls under another disability, his right to bring an action is preserved until ten years after the removal of the latter disability. (*Borrows v. Ellison*, L. R., 6 Ex. 128.)

Successive disabilities in the same person.

(j) *Parke, B.*, observed, "This clause, it will be observed, is made to operate only where the party intended to be protected is under disability at the time when the right to make the distress or bring the action *first* accrued; and if this be held to be the time when the last payment was made, the protection will, in many cases, be wholly illusory. Put the case, for instance, of a party regularly receiving his rent up to a given day, and becoming lunatic before the next day of payment arrives: if he should, by reason of his lunacy, omit to enforce payment of his rent for twenty years, it would seem, on all principle, that he must have been intended to be protected; but, certainly, as he was not under disability at the last time of payment, he would not come within the protection of the 16th section. Many other similar cases may be pointed out. This is, no doubt, a very serious defect, and would afford strong grounds for adopting any reasonable construction of the 3rd section, by which it might be remedied. But no construction would have that result; for, even if by a forced and difficult construction of the sixth [*qu. first*] branch of the section we were to hold that the point of time there designated was not the last actual payment, but the time when the rent first fell into arrear; yet the very same difficulty would exist in all the other cases pointed out by the statute, namely, the case of a person dying seised, and leaving an heir not under disabilities, but who should become disabled before any rent has accrued due, and the case of a person claiming under a settlement, who may be a *feme sole* when her title accrues, but may be under coverture before she has any title to distrain or sue for rent; and so as to the other cases provided for by the 3rd section. The same thing may be said of the 8th section. For these reasons, though we are fully sensible of the incongruities of the case, yet we feel bound to act on the plain and natural construction of the language of the 3rd section, and to hold that the right of the defendant in this case to distrain must be taken to have first accrued on the 15th day of January, 1825, when the last payment of rent was made, and so that the distress made in May, 1845, was unlawful, all right to the rent having been extinguished before that time." (*Owen v. De Beauvoir*, 16 Mees. & W. 567, 568; see observations of *Patteson, J.*, in *De Beauvoir v. Owen*, 5 Exch. 166, Law J., 1850, Exch. Ch. 182.)

Bearing of this section upon the construction of the first branch of sect. 3.

The stat. 21 Jac. 1, c. 16, s. 2 (10 Car. 1, sess. 2, c. 6, s. 13, Ir.) contained a proviso, that "if any person having right of entry should be, at the time his right or title *first* descended, accrued, come or fallen, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned or beyond seas, then such person and his heir might, notwithstanding the said twenty years had expired, bring his action or make his entry, as he might have

Saving clause in the old Limitation Act, 21 Jac. 1, c. 16, s. 2.

3 & 4 Will. 4,  
c. 27, s. 16.

Construction of  
this clause.

done before that act; so as such person or his heir shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same; and at no time after the said ten years." In the construction of that clause, it was held that it only extended to the persons on whom the right *first* descended, and that when the statute had once begun to run, no subsequent disability, either voluntary or involuntary, would prevent its operation. (*Doe d. Duroure v. Jones*, 4 T. R. 310; and see *Sturt v. Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134.) Thus, where a tenant in tail died, with issue in tail, a *feme covert*, who died under coverture, leaving issue two sons, both infants, the eldest attained twenty-one, and died without issue, leaving his brother under age, who did not prosecute his claim within ten years after he attained twenty-one, nor until more than twenty years had elapsed since the right first descended: he was held to be barred by the statute, on the ground that the time began to run against the eldest son when he attained twenty-one, and no subsequent disability could stop it; therefore, he and his heirs had only ten years from the time he attained twenty-one. (*Cotterell v. Dutton*, 4 Taunt. 826.) When the ancestor, to whom the right first accrued, died under a disability, which suspended the operation of the statute, it was held, that his heir must enter within ten years next after his ancestor's death, provided more than twenty years had elapsed from the time of the commencement of the ancestor's title to the expiration of the ten years. (*Doe d. George v. Jesson*, 6 East, 80.) Where an estate descended to parceners, one of whom was under a disability, which continued more than twenty years, and the other did not enter within that period, the disability of the one was held not to preserve the title of the other after the twenty years had elapsed. (*Doe d. Langdon v. Rowleston*, 2 Taunt. 441.)

Presumption of  
death where  
person has not  
been heard of for  
seven years.

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the statute of bigamy (1 Jac. 1, c. 11, s. 2), and the statute concerning leases determinable on lives. (19 Car. 2, c. 6.) Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years. (*Hopewell v. De Pinna*, 2 Campb. 113.) Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death. (*Doe v. Deakin*, 4 B. & Ald. 433: see 2 *Id.* 386.) It was held, that where no account could be given of a person within the exception of the statute 21 Jac. 1, c. 16, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him. (*Doe d. George v. Jesson*, 6 East, 84.) Proof that a person sailed in a ship bound to the West Indies some years ago, which has not since been heard of, is evidence upon which a jury may presume that the individual is dead; but the time of the death, if it become material, must depend upon the particular circumstances of the case. (*Watson v. King*, 1 Stark. N. P. C. 121; *Pater-son v. Black*, Park's Ins. 483; 1 Bl. R. 404.) The burthen of proof is on those asserting the death. (*Wilson v. Hodges*, 2 East, 312.)

No presumption as  
to time of death.

Though where a party has not been heard of for seven years, after going abroad, he will, at the expiration of that time, be presumed to be dead, there is no presumption raised by law as to the *time* when the death actually took place; but this is a matter concerning which the jury must form their own opinion upon the particular facts of the case. And therefore an ejectment brought by a remainderman more than twenty but less than twenty-seven years since the tenant for life was last heard of, cannot be supported without other evidence, from which the jury may infer that the tenant for life was alive within twenty years. (*Doe d. Knight v. Nepean*, 2 Nev. & M. 219; 5 B. & Ad. 86.) In that case it was necessary to show that the ejectment was brought within twenty years of the death of a party, and for that purpose it was insisted, that although after a lapse of seven years after a party was last heard of, the law presumes him to be dead, yet that the presumption is that he lives during the whole of that period; but the Court of Exchequer Chamber, on appeal from the Court of

King's Bench, affirmed the doctrine there laid down, "that where a person goes abroad, and is not heard of for seven years, the law presumes the fact that such person is dead, but not that he died at the beginning or end of any particular period during those seven years; that if it be important to any person to establish the precise time of such person's death, he must do so by evidence of some sort, to be laid before the jury for that purpose, beyond the mere lapse of seven years since such person was heard of. The presumption of law relates only to the fact of death; the time of death, whenever it is material, must be a subject of distinct proof." (*Nepean v. Doe d. Knight*, 2 Mees. & W. 894. See *Doe d. Knight v. Nepean*, 5 B. & Ad. 86; 2 Nev. & M. 219; *Rex v. Inhabitants of Harbourn*, 2 Ad. & Ell. 540; 4 Nev. & M. 841; *Rex v. Tryning*, 2 B. & Ald. 386.)

3 & 4 Will. 4,  
c. 27, s. 16.

It was held in a series of cases that when a person had not been heard of for seven years, he must be taken to have lived to the end of the seven years; and that those who alleged his death within that period were bound to prove the fact. (*Lambe v. Orton*, 8 W. R. 111; *Dunn v. Snowden*, 2 Dr. & Sm. 201; *Thomas v. Thomas*, *ib.* 298; *Re Benham's Trusts*, L. R., 4 Eq. 416.) But these cases have been overruled, and it is now settled, that if a person has not been heard of for seven years, there is a presumption of law that he is dead; but at what time within that period he died is not a matter of presumption but of evidence. And the onus of proving that the person survived any particular period within the seven years lies upon those who claim a right, to the establishment of which that fact is essential. (*Re Phene's Trusts*, L. R., 5 Ch. 139, where the cases are collected.)

Where, accordingly, a legatee has not been heard of for seven years, his death will be presumed, and the onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee, or the next of kin of the testator. (*Re Lewis' Trusts*, L. R., 6 Ch. 356; *Re Walker*, L. R., 7 Ch. 120.)

Presumption as to  
death of legatee.

Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death endeavours were made, by inquiries and advertisements, to ascertain whether such child were living or dead, but without success: it was held, that he must be presumed to have died before the date of the will. (*Rust v. Baker*, 8 Sim. 443.) The death of a legatee has been presumed from twenty-five years' absence abroad without being heard of. (*Dixon v. Dixon*, 3 Br. C. C. 510.) On a reference to the master to inquire whether a legatee was living or dead, the certificate of the master, stating that the legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree. (*Lee v. Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315. See also 13 Ves. 362.)

A. went abroad in September, 1830. His father died in September, 1833. About twenty months previous to that time A. was heard of for the last time. The court ordered the share of the father's residue bequeathed to A. to be transferred to his brother, as the sole next of kin of the father living at the father's death, on the brother giving security to refund it, in case A. should be living, or should have died after his father. (*Dowling v. Winfield*, 14 Sim. 277.) A sum of money was set apart, in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837, the master having certified, upon presumption that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842, the master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment to the same party of the accumulation since that time. And, in 1847, it ordered payment of the rest of the fund to the same party, though resident abroad, upon his giving his personal security to refund, in case the annuitant, or her personal repre-

Security to refund.

3 & 4 Will. 4, c. 27, s. 16. tentative, should ever establish a claim. (*Cuthbert v. Purrier*, 2 Ph. C. C. 199.)

In establishing a title upon a pedigree, where it may be necessary to throw a branch of the family out of the case, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists. What is done on such a trial is no injury to the man or his issue, if he should afterwards appear and claim the estate. (*Rowe v. Hasland*, 1 W. Bl. 404. See Fitz. N. B. 196, A. L.) Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment. (*Doe d. Banning v. Griffin*, 15 East, 293.) As to pleading, see *Dayrell v. Hoare*, 4 Per. & Dav. 114; *Fryer v. Coombs*, 4 Per. & Dav. 120; 11 Ad. & Ell. 40. Where the husband of a party had, seven years before her death, left this country for America, and had not been heard of since three days after his arrival there, although he had been advertised for in that country, the husband's death was presumed, and probate was granted of his wife's will as if she had died a widow. (*Re bonis How*, 1 Sw. & T. 53; 4 Jur., N. S. 366.) As to presuming the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *In bonis Norris*, 1 Sw. & T. 6; 27 L. J., Prob. 4; *In bonis Main*, 1 Sw. & T. 11; 27 L. J., Prob. 5; *In bonis Smyth*, 28 L. J., Prob. 1.

Effect of other circumstances.

A person ought not to be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive. The old law relating to presumption of death is daily becoming more untenable, in consequence of the increased facility of travelling. (*Watson v. England*, 14 Sim. 28.) A reference was made to the master, to inquire whether A. B. was living or dead. He reported certain facts and findings on stated evidence, showing that, after diligent inquiry, nothing had been heard of A. B. for more than seven years; and he found that he was not able to state to the court whether A. B. was living or dead. On a petition to confirm the report, the court read and considered the evidence, and came to a conclusion presuming the death. (*Grissall v. Stelfax*, 9 Jur. 890. See *Wilcox v. Purchase*, *Ib.*) The presumption of death, after seven years' absence, does not arise where the probability of intelligence is rebutted by circumstances. (*Bowden v. Henderson*, 2 Sm. & Giff. 360; and see *M' Mahon v. M' Elroy*, I. R., 5 Eq. 1.) In *Webster v. Birchmore* (13 Ves. 862), the presumption of death from length of time was held to have relation to the commencement of the period of uncertainty as to the existence of the party when he was proved to have been in a desperate state of health, and was to have returned to his relation in six months. In *Sillick v. Booth* (1 Y. & Coll. N. C. 117), a party was presumed to have died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months. See also, as to the effect of circumstances in supporting a presumption of death at a particular period within seven years, *Re Beasley's Trusts*, L. R., 7 Eq. 498.

Presumption of survivorship.

A young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, was presumed to have survived his grandmother, who died in March, 1841. (*Re Tindall*, 30 Beav. 151.) A son, first tenant in tail in remainder, left this country on the 11th April, 1858, and was never afterwards heard of. His father, tenant for life, died on the 30th May, 1858. Held, in 1872, that it should be presumed that the son survived the father. (*Pennefather v. Pennefather*, I. R., 6 Eq. 171. See *Lakin v. Lakin*, 34 Beav. 443.)

Where two persons die by same calamity.

Where husband and wife are drowned by the same accident, the presumption is that they died at the same time, and in order to entitle the next of kin of the husband to the wife's property, it must be shown that he survived his wife. (*Satterthwaite v. Powell*, 1 Curt. 705.) In *Sillick v.*



*Booth* (1 Y. & Coll. C. C. 117), it was held that evidence of health, strength, age or other circumstances might be given in cases of the above nature, tending to the judicial presumption that one of two brothers who perished by shipwreck survived the other. But this case has been doubted. (1 Taylor on Evidence, 203.)

3 & 4 Will. 4,  
c. 27, s. 16.

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again; a question was raised between the next of kin of the testator and a legatee under the will, which was dependent on the event of the testator's surviving his wife: it was held, first, that the onus of proof, that the husband was the survivor, was upon the legatee; secondly, that it was requisite to produce positive evidence in order to enable the court to pronounce in favour of the survivorship; and thirdly, that no such evidence having been produced, the next of kin was entitled. (*Underwood v. Wing*, 4 De G., M. & G. 631; 1 Jur., N. S. 169; 24 Law J., Ch. 293.) By the law of England the question of survivorship, in cases of the above description, is matter of evidence, and not of positive regulation and enactment (varying according to the ages and sex of the persons dying in the same shipwreck), as it is in the French Code, and in the absence of evidence there is no conclusion of law on the subject. (*Ib.*) There is no presumption of law arising from age and sex as to survivorship among persons whose death is occasioned by one and the same cause. Nor is there any presumption of law that all died at the same time. The question is one of fact, depending wholly upon evidence: and if the evidence does not establish the survivorship of any one, the law will treat it as a matter incapable of being determined. (*Wing v. Angrave*, 8 H. L. C. 183. See further, *Gen. Stannix's case*, Fearn's Post. Works, 38; *Rex v. Dr. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright v. Netherwood*, 2 Salk. 593, n.; *Hitchcock v. Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw v. Toulmin*, 2 Dick. 633; *Mason v. Mason*, 1 Mer. 308; *Taylor v. Diplock*, 2 Phill. Ecc. C. 261; *In bonis Selwyn*, 3 Hagg. Ecc. R. 741; *Colvin v. The King's Proctor*, 1 Hagg. Ecc. 92.)

### Extreme Period of Limitation fixed.

#### Forty Years.

17. Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired (*k*).

But no action, &c., shall be brought beyond forty years after the right of action accrued.

(*k*) The period for which a good title is required to be shown is still sixty years, notwithstanding the stat. 3 & 4 Will. 4, c. 27. Lord *Lyndhurst*, C., said, "It was supposed that, by the operation of that act, it was not necessary that the title should be carried back, as formerly, to a period of sixty years, but that some shorter period would be proper. It appears that conveyancers have entertained different opinions on the subject; but, after considering it, I am of opinion, that the statute does not introduce any new rule in this respect; and that to introduce any new rule shortening the period would affect the security of titles. One ground of the rule was

A purchaser entitled to evidence of sixty years' title.



3 & 4 Will. 4,  
c. 27, s. 17.

Where husband  
and wife abandon  
possession of  
wife's property.

Where husband  
purports to convey  
wife's property by  
a conveyance  
which does not  
bind her.

the duration of human life, and that is not affected by the statute. It was true that, in other respects, the security of a sixty years' title is better now than it was before; but I think that it is not a sufficient reason for shortening the period—for adopting forty years, or, as it has been suggested by a high authority, fifty years, instead of the sixty. I think the rule ought to remain as it is, and that it would be dangerous to make any alteration." (*Cooper v. Emery*, 1 Phill. C. C. 388. See the remarks of Lord Campbell in *Moulton v. Edmonds*, 1 De G., F. & J. 250.)

A *feme sole* seised in fee married, and she and her husband ceased to be in the possession or enjoyment of the land, and went to reside at a distance from it. They both died at times which were not shown to be within forty years from their ceasing to occupy. The wife's heir-at-law brought ejectment against the person in possession within twenty years of the husband's death, and within five years of the passing of this statute, but more than forty years after the husband and wife ceased to occupy: it was held, that the heir-at-law was barred by the 17th section of the statute, though it did not appear when or how the defendant came into possession, and though proof was offered that the wife had levied no fine. (*Doe d. Corbyn v. Bramston*, 3 Ad. & Ell. 63; *S. C. nom. Doe d. Corbyn v. Branson*, 4 Nev. & M. 664.) There is a material distinction between the case of a husband and wife making the possession derelict as was the case in *Doe v. Bramston*, and the case where the husband and wife are seised in fee in right of the wife, and the husband, by a conveyance which does not bind the wife, purports to convey the fee. Because the effect at law is, that such conveyance merely passes to the grantee of the husband that estate which he had and might have held during the continuance of the coverture. In such case the right of the wife comes within the fourth description of interest in the 3rd section of the stat. 3 & 4 Will. 4, c. 27. If husband and wife, being seised in fee in right of the wife, convey to a purchaser by deed without fine, the wife, if she survives, and if not her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for more than forty years. (*Jumpsen v. Pitchers*, 13 Sim. 327.)

In 1787, a lease was made by a lunatic to his brother for lives renewable for ever. The lessee, who was the last life in that lease, died in 1836. Various proceedings were had in the lunacy matter respecting the lease and the rent reserved thereby, the result of which was that, without recognizing the lease as a valid demise, the lessee was permitted to hold part of the lands demised, paying the entire reserved rent. From 1836 to 1842 the profits were received by the heir of the lessee. In 1842 the lessor died, and the fee descended upon the heir of the lessee, who was also heir of the lessor. It was held, on a bill filed by a judgment creditor of the lessee, that the latter had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal, by reason of the Statute of Limitations (3 & 4 Will. 4, c. 27), length of time, or the proceedings in the lunacy matter; and that the profits received by the heir of the lessee, from 1836 to 1842, were not assets of the lessee. (*Fulton v. Creagh*, 3 Jones & L. 329.)

### Successive Disabilities.

No further time  
to be allowed for  
a succession of  
disabilities.

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the

said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person (l). 3 & 4 Will. 4,  
c. 27, s. 18.

(l) This section is so far retrospective as to extend to a case where the first person under disability died before the passing of the act. A claimant to land in the colony of New South Wales, whose ancestor died under disability in 1835, and who himself continued under disability till he brought an action of ejectment in 1856, was barred by a colonial ordinance of 1837, which applied the 3 & 4 Will. 4, c. 27, to the colony of New South Wales. (*Devine v. Holloway*, 9 W. R. 642; 14 Moore, P. C. C. 290.) It is easy to imagine infancy, coverture, lunacy and absence beyond the seas, so to follow one another with respect to a particular line of heirs, that by successive disabilities the period of limitation might be indefinitely protracted; the object of this section of the act is, where ten years or more have expired from the time when the right accrued to a party dying under disability, to allow his heir only ten years whether under disability or not. As to successive disabilities in the same person, see note to sect. 16, *ante*.

### *Beyond the Seas.*

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act (m). Scotland, Ireland  
and the adjacent  
islands not to be  
deemed beyond  
seas.

(m) See sect. 16, *ante*, and 19 & 20 Vict. c. 97, s. 12, *post*. It was held that Dublin, or any place in Ireland, was beyond the sea within the meaning of the statute 21 Jac. 1, c. 16, s. 7. (*Nightingale v. Adams*, Show. 91.) Of course, Scotland was not considered beyond sea. (*King v. Walker*, 1 Bl. Rep. 286.) The 19th section of the stat. 3 & 4 Will. 4, c. 27, which removes disabilities by reason of residence in Ireland, &c., is applicable to cases of residence in Ireland before the passing of the statute, if the controversy has not arisen till after the passing of it. (*Ex parte Hassell*, *In re Manchester Act*, 3 Jur. 1101; 3 Y. & Coll. 617. See *Battersby v. Kirk*, 2 Bing. N. C. 603; *Lane v. Bennett*, 1 Mees. & W. 70; Tyrw. & G. 441; *Ruckmaboye v. Mottichund*, 8 Moore, P. C. C. 4.)

### 4. *Concurrent Rights.*

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession (n).

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

3 & 4 Will. 4,  
c. 27, s. 20.

Cases on the construction of this section.

(n) This section of the act is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in una personâ equum est ac si essent in diversis.*" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368.) Under the statute 21 Jac. 1, c. 16, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment. Thus when a tenant in tail of lands in ancient demesne demised them by fine in the court of ancient demesne for three lives, and afterwards levied a fine of the reversion in the same court to the use of himself and his heirs, it being agreed that the fines in that court did not bar the estate tail, it was held that the first fine created a discontinuance, and the second did not; and that although the issue in tail did not bring their formedon within twenty years after the death of their ancestor, they were not barred of their right of entry within twenty years from the determination of the lease for lives. (*Hunt v. Bourne*, 1 Salk. 839; 2 *Id.* 421; 4 Br. P. C. 66. See *ante*, s. 5, p. 162.)

Copyhold land was surrendered, in 1798, to the husband and wife for their joint lives, with remainder to the heirs of the husband. In 1805, the husband absconded and went abroad, and was never afterwards heard of. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death in 1841: it was held, that an ejectment by the assignee brought within twenty years after her death was in time, for that the husband's reversion in fee was a future estate within the meaning of the stat. 3 & 4 Will. 4, c. 27, s. 3. The court thought it clear that the husband, if he had not been bankrupt, would have been entitled to the possession during the joint lives of himself and wife, and that upon his death the wife was entitled to possession for her life, and the heirs of the husband on the expiration of their joint lives. There would, however, be only one interest, and the assignee being barred as to the estate in possession during the continuance of the husband's life, it was urged that he was barred altogether by the 20th section. The court thought, supposing the 20th section to apply, the proviso at the end of it applied also, because the wife had been in possession during the whole period of her life, until the time of her death; and though she had not recovered that possession by virtue of legal proceedings, it was a sufficient *recovery* for the purpose of that section, if she had been in the actual possession during the whole of her life. Until her death, there was no right in the assignee to take possession, and the action was brought in time. (*Doe d. Johnson v. Liversedge*, 11 Mees. & W. 517.)

A., in 1793, conveyed an estate to which she was entitled under a lease for three lives to her son R., and the heirs of his body, with a proviso that if he should have no child living at his death, the limitation thereby made should cease, and the estate should revert to A., her heirs and assigns. In 1811, R. purchased the reversion in fee in the premises, expectant on the lease for lives. R. died in 1812, without issue, leaving his nephew L., his heir-at-law, and the heir-at-law of A. The lease for lives determined in 1835. For upwards of twenty years from the death of R. the premises were held adversely to L. It was held, that his right of entry was barred thereby, and that he had not a new right of entry on the determination of the lease for lives in 1835. (*Doe d. Hall v. Mouldsdale*, 16 Mees. & W. 689.)

A testator devised lands to A., with a gift over to B. in case either of two events should happen. Both events happened, and a few months after the second event, but more than twenty years after the first, B. brought ejectment against the devisee of A. Held, that sect. 20 deprived the plaintiff of the benefit of the new right of action which accrued on the happening of the second event; and that as more than twenty years had elapsed since the happening of the first event, B. could not maintain the ejectment. (*Clarke v. Clarke*, 1 R., 2 C. L. 395.)

5. Operation of the Statute in Cases of Estates Tail.

Where Time has run against Tenant in Tail.

3 & 4 Will. 4,  
c. 27, s. 21.

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred (o).

Where tenant in tail is barred, remainderman whom he might have barred shall not recover.

(o) In ejectment the plaintiff proved that A. being seised in fee of the land in question devised it to the father of the plaintiff in tail general, and died in 1799. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed possession. It was held, that under this section, since the tenant in tail was barred, the issue in tail was also barred. (*Austin v. Llewellyn*, 9 Exch. 276; 23 Law J., Exch. 11.) An estate tail was limited to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability. It was held, that under the 21st and 22nd sections of this act time commenced running against C. from the death of A., and that having commenced to run C. was not saved from its operation under 16th section by being under disability when her right accrued in possession. Vice-Chancellor *Kindersley* said, the intention and operation of the 21st and 22nd sections are to put remaindermen, whose estate might be barred by the tenant in tail, in the same position as if they claimed under tenants in tail; that is, the act of the tenant in tail, in allowing any portion of the twenty years to run without making an entry or bring an action to the extent of the period allowed to elapse, binds the remainderman. (*Goodall v. Skerratt*, 3 Drew. 216; 1 Jur., N. S. 57; 24 Law J., Chan. 323.)

Cases under this section.

The 21st section applies to the case where the right of entry of tenant in tail is barred by his neglect to make such entry in proper time, not to the case where he has conveyed away his own right to another and put it out of his power to enter. In the latter case the right of entry is not barred by reason of the same not being made within the period limited, but by reason of his not being able to enter against his own conveyance.

An estate tail having been discontinued by a feoffment made by the tenant in tail more than twenty years before his death, it was held that the issue in tail might bring his writ of formedon at any time within twenty years next after such death, the period of limitation prescribed by this statute not running against him during the life of tenant in tail. (*Cannon, dem., Rimington, ten.*, 12 C. B. 1, 18.)

In this last case the estate of a tenant in tail in possession is considered as coming within this section. (12 C. B. 34.) But it has been said by *Bramwell, B.*, that the sects. 21 and 22 refer only to estates in remainder and reversion, the estate of the tenant in tail which descends to his issue being provided for by sect. 2. (*Earl of Abergavenny v. Brace*, L. R., 7 Ex. 149, 173.) See further, pp. 147, 149, ante.

Where Time has commenced running against Tenant in Tail.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred

Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.

3 & 4 Will. 4,  
c. 27, s. 22.

shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action (*p*).

(*p*) The twenty years for making an entry did not commence under the stat. 21 Jac. 1, c. 16, until the right accrued. An estate might have been enjoyed for centuries under an adverse possession against a tenant in tail, and afterwards have been recovered by a remainderman, as, for example, where an estate was limited to one in tail, with remainder to another in fee, and the *tenant in tail* and his issue were barred of their remedy by the Statute of Limitations; yet, as the remainderman's right of *entry* did not accrue until the failure of the issue of the tenant in tail, which might not have happened for an immense number of years, the remainderman might, at any time within twenty years after the failure of the issue in tail, have entered and recovered the estate by ejectment. (*Taylor v. Horde*, 1 Burr. 60; *S. C.*, Cowp. 689; 1 Ken. 143; 5 Br. P. C. 247.)

### *Possession under Defective Conveyance by Tenant in Tail.*

Where there shall have been possession, under an assurance, by a tenant in tail, which shall not bar the remainders, they shall be barred at the end of twenty years after the time when the assurance, if then executed, would have barred them.

23. When a tenant in tail of any land or rent shall have made an assurance thereof, which shall not operate to bar an estate or estates to take effect after or in defeasance of his estate tail, and any person shall by virtue of such assurance, at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person, or any other person whatsoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail), shall continue or be in such possession or receipt for the period of twenty years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then at the expiration of such period of twenty years such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest or right to take effect after or in defeasance of such estate tail (*q*).

Law before the statute.

(*q*) Before the passing of this act, when an heir in tail brought an ejectment against a defendant who had been in receipt of the rents of an estate thirty years during the life of the ancestor in tail, and seven years after his death, the ancestor having had seisin, it was held, that such possession of the defendant was no bar to the action, and that the lessor of the plaintiff was not bound to rebut the presumption arising from such possession, by showing that the ancestor had not conveyed by fine and recovery. For though he might have conveyed by fine and recovery, and so have barred the lessor of the plaintiff, he might also have conveyed by lease and release, which would have made a good title against himself only, and would not have barred his son, the next tenant in tail. The court were of opinion that the long possession by the defendants might be referable to such a state of things, and if so, there would have been no adverse possession to the title of the issue in tail, and the son was not barred. (*Doe d. Smith v. Pike*, 3 B. & Ad. 742; 1 Nev. & Mann. 385.)

An estate being limited by marriage settlement to the use of A. and his wife, and the heirs of their bodies, and A. having died leaving his widow



and three children, viz., G., an only son, and L. and H. daughters, the widow in 1735, by deed-poll, in consideration of an annuity granted to her by her son G., and of natural affection, granted, surrendered and yielded up the estate to G. in fee; and he afterwards, during her life, suffered a recovery. The widow died in 1767; G. died without issue in 1779, having devised the estate to trustees to secure the payment of an annuity to W., the only son of his sister L. (who was then dead), and subject thereto to B., the eldest son of W., for life, with remainder to his second son. In 1790, B. entered, on his father's death, into possession of the entirety of the estate, claiming under the will of G., and subsequently did various acts in the character of devisee for life. In 1814, he suffered a recovery of one moiety, and in 1816 conveyed the entirety of the estate to mortgagees in fee. In 1818, M., the descendant of the other coparcener, H., at B.'s request, suffered a recovery of a moiety, which it was declared should enure (subject to a term to secure a sum of money to M.) to the use of B.'s mortgagees. It was held, on error, by the Court of Exchequer Chamber (affirming the judgment of the Court of Exchequer):—1. That the deed-poll of 1735 operated as a covenant to stand seised, and created a base fee, determinable by the entry of the issue in tail. 2. That this base fee did not, on the death of the widow, become merged in the reversion in fee in G., as the estate tail subsisted as an intermediate estate; and that although G., being estopped by the recovery suffered by him, was not remitted to the estate tail, no right of entry accrued till his death, and therefore the period of twenty years, for the operation of the Statute of Limitations (21 Jac. 1, c. 16) against the issue in tail, was to be calculated from G.'s death in 1779, and not from the death of his mother in 1767; and that B.'s entry in 1790 was not barred by lapse of time. 3. That although B. entered under the will, and manifested an intention to take the estate under it, for his life only, that intention was immaterial, and he was remitted, *nolens volens* as to his moiety, to the original estate tail, which was barred by the recovery in 1814. It was held also (reversing the judgment of the Court of Exchequer), that the entry and remitter of B. did not operate to remit M., his coparcener, to the other moiety of the estate. (*Woodroffe v. Doe d. Daniell*, 15 Mees. & W. 769 (affirmed by House of Lords, 2 H. L. Cases, 811); *Doe d. Daniell v. Woodroffe*, 10 Mees. & W. 608.)

3 & 4 Will. 4,  
c. 27, s. 23.

The proposition of the real property commissioners on the subject of this section was, "That on any alienation by tenant in tail, by any assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests, limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests." (1 Real Prop. Rep. 79, pl. 15; and see *Ib.* p. 46.)

Remarks of real  
property com-  
missioners.

The object of this section was to give effect to acts of a tenant in tail against remaindermen and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which show what the operation is as to the issue, and those clauses [*qu.* this clause] seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail. (*Per Cranworth*, L. C., *Penny v. Allen*, 7 De G., M. & G. 426.)

Cases under  
sect. 23.

The section applies to cases where a tenant in tail executes a deed enrolled under 3 & 4 Will. 4, c. 74, which, for want of the consent of the protector, operates only to create a base fee, and possession is obtained under the deed. (Sugd. V. & P. 483, 14th ed.) As to whether the section extends to fines and recoveries previous to 3 & 4 Will. 4, c. 74, see 1 Hayes' Conv. 264, 5th ed.; Sugd. R. P. Stat. 89, and the argument in *Anderson v. Anderson*, 30 Beav. 207.

In 1791, land was settled to the use of R. for life, with remainder to T. in tail; and in 1820, T., during R.'s life, purported to convey the reversion in fee to X., but did no act to bar the estate tail. T. died in 1824, leaving D. his only son; R. died in 1842, and thereupon X. entered into possession.



3 & 4 Will. 4,  
c. 27, s. 23.

In 1847, D. joined in a conveyance of the land from X. to a purchaser, and thereby purported to grant, release and confirm the estate to the purchaser in fee. The deed was not enrolled, and no disentailing assurance was executed. The purchaser entered into immediate possession. In 1860, D. died leaving an only son, who attained twenty-one in 1867, and filed a bill to recover the land in 1868. Held, that his claim was not barred by this statute. (*Morgan v. Morgan*, L. R., 10 Eq. 99.)

## 6. Limitation of Time as to Suits in Equity.

### *Time of Limitation fixed with reference to the Legal Limitation.*

No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

24. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity (r).

How far courts of equity bound by Statutes of Limitation.

(r) By this section twenty years' possession is a bar to suits in respect of equitable rights, but in the case of disability ten years is allowed by the 16th section (*ante*, p. 186) next after the disability has ceased; but by the 17th section (*ante*, p. 191) no suit can be brought after the lapse of forty years from the accrual of the right, whatever disabilities may have existed.

Courts of equity have constantly guided themselves by this principle, that wherever the legislature has limited a period for proceedings at law, equity will, in analogous cases, consider the equitable rights as bound by the same limitation. (1 P. Wms. 742; 3 *Ib.* 143; Prec. Ch. 518.) Thus, in the case of equitable titles to land, equity required relief to be sought within the same period in which an ejectment would lie at law; and in cases of personal claims it also requires relief to be sought within the period prescribed for personal suits at law of a like nature. If, therefore, the ordinary limitation of such suits at law be six years, courts of equity will follow the same period of limitation. (*Edsell v. Buchanan*, 1 Ves. sen. 83; Com. Dig. Chancery, 1; *Smith v. Clay*, 3 Br. C. C. 639, n.; *Cholmondeley v. Clinton*, 2 Jac. & W. 156; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629.) Lord *Redesdale* held that courts of equity acted not merely by *analogy*, but in *obedience* to the Statute of Limitations upon all legal titles and demands, and could not act contrary to their provisions, and that the Statute of Limitations virtually included courts of equity; for when the legislature limited the proceedings at law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated *that equity followed the law*, and therefore to have virtually enacted in the same cases a limitation in equity. (2 Sch. & Lef. 630, 631; 1 *Ib.* 428; *Foley v. Hill*, 1 Phill. C. C. 405.) This statute was intended to put an end altogether to the discretion of courts of equity in those cases where they had before acted by analogy to the time limited at law. That was an analogy founded both in law and good sense, but it no longer remains in the discretion of the court, but is incorporated in the statute. (*Berrington v. Erans*, 1 Y. & Coll. 439, 440.) Those courts also, by their own rules, independently of any statutes of limitation, give great effect to length of time, and refer frequently to those statutes for no other purpose than as furnishing a convenient measure for the length of time that ought to operate as a bar in equity of any particular demand. (17 Ves. 97.) This section of the statute only bars equitable rights so far as they would have been barred if they had been legal rights. (*Archbold v. Scully*, 9 H. L. C. 360.) Time is a bar in equity to stale demands independent of this statute.

A bill filed by tenant for life in remainder against the representatives of a prior tenant for life for an account of timber improperly cut, was dismissed with costs on account of the delay, the bill not having been filed until nearly twenty years after the death of the first tenant for life. (*Harcourt v. White*, 28 Beav. 303.)

3 & 4 Will. 4,  
c. 27, s. 24.

Delay.

The statutory rule, 3 & 4 Will. 4, c. 27, ss. 2, 3, 4, 5, which gives to a remainderman twenty years from the time when his title accrues in possession, for bringing an action or suit for the property, applies to a claim for compensation for equitable waste as well as to a claim to the land itself; and, therefore, an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff as remainderman in tail having accrued within twenty years before the filing of the bill. (*Duke of Leeds v. Earl Amherst*, 2 Phill. 117. See *Morris v. Morris*, 4 Jur., N. S. 964; 6 W. R. 427.)

Equitable waste.

Where a tenant for life impeachable for waste commits legal waste by wrongfully cutting timber, time runs against the remainderman from the time of the cutting, and it appears that the period of limitation is six years. (*Seagram v. Knight*, L. R., 2 Ch. 628; *Higginbotham v. Hawkins*, L. R., 7 Ch. 676. See *Birch Wolfe v. Birch*, L. R., 9 Eq. 633.)

Legal waste.

According to Lord *St. Leonards*, a bill of foreclosure is not a suit in equity for the recovery of the money charged upon the land, although it may lead to that; but it is, in effect, a suit to obtain the equity of redemption, which is, in the view of equity, an actual estate. The right to file a bill of foreclosure, whether the mortgage be legal or equitable, falls within the 24th section of the 3 & 4 Will. 4, c. 27, and the 7 Will. 4 & 1 Vict. c. 28 (see *post*, sect. 28), and the time is governed by the legal right of the party to bring an action, or if he have not the legal estate, by the right which he would have had, if his estate had been a legal instead of an equitable one. (*Wrixon v. Vize*, 3 Dru. & War. 104; Sugd. R. P. Stat. 94, 121, 2nd ed. See, however, *Dearman v. Wyche*, 9 Sim. 570, and the note to sect. 40, *post*.) Where an equitable incumbrancer files a bill to assert his claim, he may be assisted by the fact that there is a fund in court, the rights in which have not been ascertained. (*Lancaster v. Evors*, 10 Beav. 154.)

Foreclosure suits.

The lord of a manor granted a lease of the manor for three lives, and deposited the court rolls with the lessee; upon the expiration of the lease by the death of the surviving life, the lord requested the representatives of the lessee to deliver back the court rolls, of which no notice nor any proceeding was taken until twenty-two years after, in 1844, when a bill was filed by the lord to recover the title deeds and court rolls. It was held, upon a plea of the statute, that the suit was brought too late, that which was tantamount to a conversion and adverse possession having taken place in 1822. The bill was retained for a year, to enable the plaintiffs to try an action at law. (*Dean and Chapter of Wells v. Doddington*, 2 Coll. C. C. 73.)

Charities are within the operation of this section. (*Att.-Gen. v. Magdalen College, Oxford*, 6 H. L. C. 189. See the note to sect. 25, *post*.)

Charities.

In order to prevent the operation of the statute in a court of equity in a matter of simple contract, it was sufficient if the bill was filed within six years after the accrual of the right to sue, although the subpoena was not sued out till after the expiration of that period. (*Coppin v. Gray*, 1 Y. & Coll. C. C. 205; *Purcell v. Blennerhassett*, 3 Jones & L. 24.) With reference to the Statute of Limitations, an amended bill will date from the day of the filing of the original bill, and not from the day of the amendment. (*Blair v. Ormond*, 1 De G. & S. 428; *Byron v. Cooper*, 11 Cl. & Fin. 556; *Plowden v. Thorpe*, 7 Cl. & Fin. 164; *Att.-Gen. v. Hall*, 11 Price, 760.) Although the mere filing of a bill will operate by itself to save the bar of the statute, yet the court will know how to deal with any improper delay, by not giving the benefit of the statute to the plaintiff, if there was anything in his conduct to disentitle him to its assistance. (*Forster v. Thompson*, 4 Dru. & War. 318; *Coppin v. Gray*, 1 Y. & Coll. C. C. 205; *Boyd v. Higginson*, Flan. & K. 603.) When a defendant is out of the jurisdiction, and the bill prays process against him

Effect of proceedings in equity in preventing the operation of the statute.

3 & 4 Will. 4,  
c. 27, s. 24.

when he shall come within it, the operation of the Statute of Limitations is suspended, though he has neither been served nor appeared in the suit. (*Hele v. Lord Bexley*, 20 Beav. 127.) A plaintiff was required to account for the delay of nineteen years in filing his bill, where the circumstances of the parties had changed by deaths; and the foundation of the suit being a legal demand, the court, after such delay, declined to act, unless the demand was established in an action. (*Blair v. Ormond*, 1 De G. & S. 428.)

A testator died in 1821, having devised and bequeathed his real and personal estate to trustees upon certain trusts. In 1826, a bill was filed for the execution of the trusts as to the personal estate. In 1847, a supplemental bill was filed raising questions on the will as to the real estate in which the heir who was then unknown was interested; and in 1849, another supplemental bill was filed to bring the heir who was then ascertained before the court: it was held, that the heir was barred by lapse of time from claiming the real estate adversely to the trustees, for the institution of a suit to carry the trusts of a will into execution could not preserve the rights of the heir who claimed adversely to such will, but that the heir-at-law was not barred from claiming part of the real estate as being in the events that had happened undisposed of and held by the trustees in trust for him. (*Simmons v. Rudall*, 1 Sim., N. S. 115; 15 Jur. 102.)

Pendency of suits.

The existence of a creditors' suit for the administration of the estate of a deceased debtor does not prevent the operation of the statute against a debt, in respect of which no claim is made under the decree. (*Tatam v. Williams*, 3 Hare, 347.) The right of a vendor to enforce his lien for unpaid purchase-money is not preserved by the existence of a suit by the creditors of the devisor of the estate under whose will the sale took place, nor by suits by the residuary devisees and legatees of the purchaser for the administration of his estate. (*Toft v. Stephenson*, 7 Hare, 1.) See also *Alsop v. Bell*, 24 Beav. 451, and the note under sect. 40 (*post*) as to when time ceases to run in the case of claims brought in under decree in administration suits.

An ejectment bill, filed in 1842, stated that the plaintiff's alleged right to the land accrued in 1812; that a bill had been filed in 1824 to recover the property; and that an ejectment had been brought in 1832, which was stayed until the plaintiff had paid the costs of a former ejectment; but it did not state the result of the suit or action: it was held, that it must be inferred that they had failed, and that they did not prevent the operation of the Statute of Limitations. (*Bampton v. Birchall*, 5 Beav. 67.)

A plaintiff brought an action of ejectment against a person in possession, and afterwards filed a bill of discovery in aid of the action, and to restrain the defendant from setting up outstanding terms. By the death of the defendant the suit abated, and the benefit of the action at law became lost. After twenty years' adverse possession, the plaintiff having filed a bill of revivor, a demurrer thereto was allowed, on the ground that no effectual proceeding could now be had at law, and that the discovery and relief sought would therefore be useless. (*Bampton v. Birchall*, 11 Beav. 38; 1 Phill. C. C. 568.)

Lunacy.

Where a creditor is prevented from recovering by lunacy time will not run. (*Stedman v. Hart*, Kay, 607.) But proceedings in lunacy were held not to exclude the operation of the statute on a promissory note. (*Rock v. Cooke*, 1 De G. & Sm. 675; 17 L. J., Ch. 93; 12 Jur. 5.) A petition in lunacy, after the death of the lunatic, by his committee, and a reference to the master thereon, followed by a report finding that a sum of money had been expended by the committee in the maintenance of the lunatic, is not a proceeding which will take the claim of the committee out of the Statute of Limitations, as against the heir-at-law of the lunatic, who was not a party to the application. (*Wilkinson v. Wilkinson*, 9 Hare, 204.) Where a fund in the hands of a lunatic as executrix was carried over to an account in the names of herself and other persons interested, and the income was paid to her, it was held that the order of court for the carrying over of the fund preserved the right of the parties interested, but that arrears of income could only be recovered for six years. (*Re Walker*,

L. R., 7 Ch. 120.) Where time has commenced to run against the right of a legatee to recover his legacy, and the executor is subsequently found a lunatic, time will continue to run during the lunacy. (*Boldero v. Halpin*, 19 W. R. 320.)

3 & 4 Will. 4,  
c. 27, s. 24.

Although the appointment of a receiver by the Court of Chancery does not prevent the bar under the statute *against* a stranger, yet it will prevent time running in *favour* of a stranger to the suit. (*Wrixon v. Vize*, 3 Dru. & War. 104, see p. 123; *Parkinson v. Lucas*, 28 Beav. 627.) The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession. (*Gresley v. Adderley*, 1 Swans. 579; *Boehm v. Wood*, Turn. & R. 345; *Wrixon v. Vize*, 3 Dru. & War. 104. See *Groome v. Blake*, 8 Ir. C. L. R. 428; *Re Butler's Estate*, 13 Ir. Ch. R. 453.)

Effect of appointment of a receiver.

The appointment of receiver in the matter of an infant will not prevent the operation of the Statute of Limitations on a claim affecting the minor's estate, notwithstanding the fact, that the master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance. (*Harrison v. Duignan*, 2 Dru. & War. 295. See *Greenway v. Bromfield*, 9 Hare, 203.)

Where, by the interposition of a court of equity to prevent an act rightfully or wrongfully intended, the defendant has lost a remedy at law, a court of equity will give him a remedy equivalent to that from which the interposition of such court has debarred him. Thus, where the Statute of Limitations has run pending an injunction, the court will restrain a debtor from taking advantage of the statute. (*Anon.*, 2 Cas. Ch. 217; *Brown v. Newall*, 2 M. & Cr. 572.) And a court of equity will supply a defect in any title which has been prejudiced by an order of the court. If, for instance, an injunction has been continued so long as to deprive a party of his legal remedy, who has a clear right to recover at law, a court of equity would restrain the party who obtained the injunction from pleading the Statute of Limitations. (*Fyson v. Pole*, 3 Y. & Coll. 273.) So equity will give interest on the arrears of an annuity (*Morgan v. Morgan*, 2 Dick. 643; see *Grant v. Grant*, 3 Sim. 340, see p. 364; 3 Russ. 598, and see p. 607), where the annuitant, with a term of years and a power of entry and distress, had by means of the injunction been prevented from proceeding with an action of ejectment, which had been commenced for recovery of such arrears. So a party who has been restrained in equity from proceeding at law, while the debt was under the penalty of the bond, will be entitled to the principal and interest beyond the penalty. (*Duval v. Terry*, Show. P. C. 15, cited in *Grant v. Grant*, 3 Russ. 607; see *O'Donel v. Browne*, 1 Ball & B. 262.) Where a party applies to a court of equity, and carries on an unfounded litigation, protracted under circumstances, and for a length of time, which deprives his adversary of his legal rights, a court of equity will supply and administer, within its own jurisdiction, a substitute for that legal right, of which the party so prosecuting an unfounded claim has deprived his adversary. (*Pultney v. Warren*, 6 Ves. 73; *The East India Co. v. Campion*, 11 Bligh, 158, 186, 187; see *Furnival v. Boyle*, 4 Russ. 142; *Morgan v. Morgan*, 2 Dick. 643; *Grant v. Grant*, 3 Sim. 863; *Sirdefield v. Price*, 2 Y. & C. 73; *Brown v. Newall*, 2 M. & Cr. 572, 573.)

When equity will prevent Statute of Limitations being used as a bar.

### Express Trust.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

3 & 4 Will. 4,  
c. 27, s. 25.

act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him (s).

This section applies to express trusts only.

(s) This section is confined to express trusts; that is, trusts expressly declared by a deed or a will, or some other written instrument; it does not mean a trust that is to be made out by circumstances; the trustee must be expressly appointed by some written instrument, and the effect is, that a person who is under some instrument an express trustee, or who derives title under such a trustee, is precluded, how long soever he may have been in the enjoyment of the property, from setting up the statute; but if a person has been in possession, not being a trustee under some instrument, but still being in under such circumstances that the court, on the principles of equity, would hold him a trustee, then this section does not apply, and if the possession of such a constructive trustee has continued for more than twenty years, he may set up the statute against the party who but for the loss of time would be the right owner. (*Per Kindersley, V.-C., Petre v. Petre*, 1 Drew. 398.) The rule that trusts are not within the Statute of Limitations was held not to apply, where a claim was made after a great length of time against a trustee by implication of law arising upon a doubtful equity. (*Townshend v. Townshend*, 1 Cox, 28; 1 Bro. C. C. 550.) Though no time bars a direct trust as between *cestui que trust* and trustee, a court of equity will not allow a man to make out a case of constructive trust at any distance of time; for where the length of time would render it extremely difficult to ascertain the true state of the fact, or where the true state of the fact is easily ascertained, and where relief would originally have been given upon the ground of constructive trust, it is refused to a party, who after long acquiescence comes into a court of equity to seek that relief. (*Beckford v. Wade*, 17 Ves. 97; *Ex parte Hassell*, 3 Y. & Coll. 622; *Bell v. Bell*, 1 Lloyd & G. temp. Plunket, 65. See *Bonny v. Ridgard*, cited 4 Br. C. C. 138.) In *Salter v. Cavanagh* (1 Drury & Walsh, 668), it was held, that where a party had been expressly named in a will, his representatives were trustees within this section; and that though a constructive trust would be barred by that statute, and might have been barred previously to it by length of time, yet that that only applied to cases where the trust did not arise on the face of the instrument, but was to be made out by evidence. (See as to constructive trusts, Lewin on Trusts, 147 *et seq.*, 5th ed.)

Who are express trustees.

Where a person acted as trustee of a will containing express trusts of realty, though the trust estate was not vested in her, she was held to have placed herself in the position of an express trustee. (*Life Association of Scotland v. Siddall*, 3 De G., F. & J. 58.) A *cestui que trust* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831, he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee, in trust for the creditors under the bankruptcy: held, that the legal estate thereby became vested in the assignee upon an express trust within this section, viz., the trust declared by the will, the benefit of which belonged to the creditors under the insolvency. (*Sturgis v. Morse*, 3 De G. & J. 1.) See also *Drummond v. Sant*, L. R., 6 Q. B. 768.

A trust for sale of land by way of security for money lent is not an express trust within this section. (*Locking v. Parker*, W. N. 1872, p. 201.) Where lands in Ireland held under church leases were settled upon A. for life, with remainder to several as tenants in common, and one of the remaindermen entered into possession of the lands and procured a fee-farm grant to himself: it was held, that he did not take the fee-farm grant as a trustee within this section for himself and his co-tenants. (*Re Dane's Estate*, 1 R., 5 Eq. 498.) Where an executor assigned certain leaseholds belonging to his testator to a purchaser at an undervalue, the purchaser having notice of the trusts of the will, and twenty-three years afterwards



a bill was filed to set aside the assignment, it was held that the purchaser was not an express trustee within this section. (*Pyrah v. Woodcock*, 24 L. T., N. S. 407.) And see the cases quoted, 205, *post*. 3 & 4 Will. 4, c. 27, s. 25.

Where a trust is created by the act of parties no time is a bar to relief; but where there is no trust, except such as is created by the decree of the court on setting aside the transaction, time runs from the discovery of circumstances which constitute the right to relief. (*Marquis of Clanricarde v. Henning*, 30 Beav. 175, which was the case of a purchase by a solicitor from his client.) The rules of equity as to such a purchase, and the operation of lapse of time upon the right to relief in such a case are considered in *Gresley v. Mousley*, 4 De G. & J. 78. In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments. (*Att.-Gen. v. Lord Dudley*, Coop. C. C. 146.) But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years. (*Gregory v. Gregory*, Coop. C. C. 201. See *Champion v. Rigby*, 1 Russ. & M. 539.) As to the time within which a sale to trustees may be set aside, see Lewin on Trusts, 369, 5th ed.

Purchase by solicitors and trustees.

Where land is vested in trustees, upon express trusts to secure payment of charges, debts or legacies, this section qualifies the provisions of sect. 40 (*post*), though it was formerly held otherwise in Ireland. (*Knox v. Kelly*, 6 Ir. Eq. R. 279; *Young v. Wilton*, 10 Ir. Eq. R. 10.) Thus, under a marriage settlement a term of years was vested in trustees for raising 10,000*l.* for the younger children of the marriage, and subject thereto the estates were limited to the first and other sons in tail male. Much more than twenty years after the 10,000*l.* ought to have been raised and paid, the younger children filed a bill to have that sum raised. It was held, that the relation of trustee and *cestui que trust* existed between the parties, and that the plaintiffs' claim was not barred by the 40th section of this act. (*Young v. Lord Waterpark*, 13 Sim. 204; affirmed by Lord *Lyndhurst*, C., 10 Jur. 1; 15 L. J., Ch. 63.) By settlement of 1786, lands were conveyed to trustees upon trust to raise 500*l.* for the issue of the marriage, and subject thereto for the husband and his heirs. In 1792, the husband and the trustees joined in demising the lands to B., in consideration of a sum of money paid to the husband, and a bond for 500*l.* given by B. to the trustees; and it was declared that B. should not be liable to be sued for the 500*l.* until the trust vested in the trustees relative to the 500*l.* should be executed or spent, pursuant to the settlement of 1786, without affecting or in any way charging or incumbering the lands in the hands of B., his heirs or assigns, or until the husband or his heirs should otherwise discharge and exonerate the lands from the said sum of 500*l.* There was issue of the marriage one child only, a daughter, who married J. S., and died; and J. S. became entitled to the 500*l.* The trustees entered judgment on the bond against B., and in 1812 assigned it to J. S. No part of the principal or interest of the 500*l.* had been paid, or acknowledgment given, since 1812, the bill being filed in 1844. It was held, that the demand of J. S. to the 500*l.* was not barred by the Statute of Limitations. The assignment of the judgment in 1812 to J. S., being a transaction to which the trustee and himself alone were parties, merely substituted him in the place of the trustee, and did not discharge the estate from the original trust, or vary the rights of the parties to the 500*l.* The trust created by the settlement of 1786 for raising the 500*l.* was an express trust, and within this section. (*Blair v. Nugent*, 8 Jones & L. 660, 661; see *Lawton v. Ford*, L. R., 2 Eq. 97.)

Sect. 25 qualifies sect. 40 where land is vested in trustees upon express trust, to secure payment of charges,

Where a testator in the introductory part of his will directed all his just debts to be paid, and then devised his lands, subject to the payment thereof, to trustees upon trust for other persons in succession, it was held that a trust was created for the payment of the testator's debts, and that the right of a judgment creditor was not affected by the 40th section of this statute, but it was taken out of it by the saving of this section. This case appears to have been decided expressly on the ground that the estate was vested in trustees, and that on the whole construction of the will the pay-

to secure debts,



3 & 4 Will. 4,  
c. 27, s. 25.

ment of the debts was part of the trusts to be performed. (*Hunt v. Bateman*, 10 Ir. Eq. R. 360. See *Dillon v. Cruise*, 3 Ir. Eq. R. 70.) However, *Brady*, L. C., could not find any satisfactory authority for the position that a devise to a party intended to take beneficially, subject to the debts of the deviser, without more, constitutes that description of trust which would warrant him in holding that, as between the creditors and the devisee, the relation of *cestui que trust* and trustee is so established as to except the charge from the operation of the 40th section of the 3 & 4 Will. 4, c. 27. Therefore he held that a devise of lands to A. for life, subject to all the testator's just debts, &c., with a bequest of personalty, the better to enable the devisee to pay the testator's debts, &c., did not prevent a judgment debt of the testator from being barred by the 40th section, nor create a trust within the 25th section. (*Dundas v. Blake*, 11 Ir. Eq. R. 138.)

to secure legacies,

An express trust of realty for the payment of legacies was held not to be barred by sect. 40. (*Watson v. Saul*, 1 Giff. 188. See note to sect. 40, *post*.)

to secure annuities.

A testator, who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates, until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than twenty years before the bill was filed in 1837 for executing the trusts of the will, and for raising the arrears of the annuities by sale of the testator's real estates. The trustees had entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about eleven years prior to the filing of the bill. The defendant relied on the 42nd and 40th sections of this act, and *Sheppard v. Duke*, 9 Sim. 567. But the court held, that the plaintiff's right to the annuities was not barred by this statute, for the trustees were trustees to pay the annuities, and their possession of the estates, out of which the annuities were directed to be paid, continued down to the year 1826; therefore it was plain that the objection to the bill founded on the Statute of Limitations could not be supported. (*Ward v. Arch*, 12 Sim. 472.)

Sect 25 qualifies  
sect. 42 when land  
is vested in  
trustees upon ex-  
press trust,

This section also qualifies the provisions of sect. 42 (*post*), in the recovery of arrears of annuities, of arrears of interest on legacies, and of arrears of interest on a mortgage, when secured respectively by an express trust of realty.

to secure annuities,

A testator devised his real estate to trustees upon trust to pay certain annuities, which were to be increased in certain events, and a term of ninety-nine years was vested in other trustees for better securing the annuities, and, subject thereto, the estates were limited to the testator's sons for life, with divers remainders over. The first tenant for life entered into possession, and soon afterwards the events happened by which the annuities were to be increased. The original annuities were regularly paid, but no payment was made in respect of the increased annuities. After the death of the tenant for life, and much more than six years after the period when such increased payments ought to have been made, a bill was filed by one of the annuitants to have the whole arrears raised out of the estate of the tenant for life, and by sale or mortgage of the term. It was held, that the term being a subsisting term on which the trustees might obtain possession, the case was within the saving of this section, and that the annuitant was not barred by the operation of the 42nd section of this act from recovering the entire arrears. (*Cox v. Dolman*, 2 D., M. & G. 592; 17 Jur. 97; 22 Law J., Chanc. 427.)

In 1824, A., and B. as his surety, covenanted to pay an annuity for ninety years, and A. granted lands to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life to a trustee for 500 years, upon trust, in case the annuity should be in arrear for a month, and either before or after the decease of the surviving tenant for life, to sell for the purpose of raising the arrears of the annuity and securing future payments. B. became a bankrupt in 1827, A. in 1829. The last payment in respect of the annuity was made in 1831. Upon a bill filed by the annuitant, in 1854, one of the life estates still subsisting: it was held, that the

plaintiff was entitled to have the lands sold for the residue of the term according to the trusts, and to payment of all arrears. (*Snow v. Booth*, 2 K. & J. 132; 8 D., M. & G. 69.)

3 & 4 Will. 4,  
c. 27, s. 25.

A conveyance of real estate to trustees upon trust, in the first place, to secure payment of an annuity, is within this section. An owner of a reversionary interest in real estates, for the purpose of better securing an annuity, granted the estates to trustees upon trust, to permit him to hold and enjoy the same until default should be made in payment of the annuity; and in case of default, upon trust to sell the estates, and after payment of the costs attending the sale, to pay the arrears of the annuity, and invest the residue to meet the growing payments of the annuity, and subject thereto in trust for the grantor, his executors, administrators, and assigns absolutely: it was held, that an express trust was created for the benefit of the annuitant within this section, and that he was entitled to recover the whole of the arrears of the annuity as against the grantor and the subsequent incumbrancers, and was not limited to six years by the 42nd section of this act. (*Lewis v. Duncombe*, 29 Beav. 175. See *Round v. Bell*, 30 Beav. 121.)

A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estate: it was held, that the legatee was not barred by the 42nd section of this statute from claiming interest on the legacy from the end of the first year after the testator's death. (*Gough v. Bult*, 16 Sim. 323.)

to secure legacies,

Where a mortgage is secured by a term in a trustee, the mortgagee in foreclosing can have a general account of arrears of interest. (*Shaw v. Johnson*, 1 Dr. & Sm. 412.)

to secure mortgage debts.

"The words 'express trust' in this statute are used by way of opposition to trusts arising by implication, trusts resulting, or trusts by operation of law. Two things must combine here; there must be a trustee with an express trust, and an estate or interest in lands vested in the trustee, and which therefore the trust must effect." (*Per Westbury, C., Dickenson v. Teasdale*, 1 De G., J. & S. 59.)

What is an express trust of land to secure payment of money.

Where an annuity is given by will, and the real estate of the testator is charged with the payment of it, and then the estate is simply devised charged with the payment of the annuity, *Wigram, V.-C.*, was of opinion, that it is not the case of an express trust within the 25th section of the statute. (*Francis v. Grover*, 5 Hare, 39.) A devise of realty subject and charged with legacies does not create an express trust in favour of the legatees within this section. (*Proud v. Proud*, 32 Beav. 234.) A vendor's lien is not an express trust within this section. (*Toft v. Stephenson*, 7 Hare, 1; and see *Dundas v. Blake*, 11 Ir. Eq. R. 138; *Henderson v. Atkins*, 7 W. R. 387; 28 L. J., Ch. 913.) Where a testator charged his real estates with his debts, and he devised his C. plantation in trust to pay his debts, it was held, that as to the C. plantation a trust had been created in favour of the creditors, but that as to the other real estates they had a mere charge. (*Jacquet v. Jacquet*, 27 Beav. 332;) see further, *Lewin on Trusts*, 634, 5th ed.; and *Locking v. Parker*, 20 W. R. 737.

In the case of a direct or express trust, as where an estate is conveyed to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *cestui que trust*, can operate as a bar to the equitable right of the latter; (*Barnard, C. R.* 449; *Townshend v. Townshend*, 1 Br. C. C. 551;) for between him and his trustee there is no adverse possession. Where there is a trust created by the act of the parties, no time will be a bar, for the possession of the trustees is the possession of the *cestui que trust*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title. (*Hovenden v. Lord Annesley*, 2 Sch. & L. 633.) In the case of a strict trustee, it is his duty to take care of the interest of his *cestui que trust*, and he is not permitted to do anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them. (*Per Lord Eldon*, 2 Jac. & W. 190.) A trustee, whose duty it was to sell certain estates, and pay off a mortgage

Time no bar between trustee and *cestui que trust*.

Where trustee in possession.

3 & 4 Will. 4,  
c. 27, s. 25.

ment of the debts was part of the trusts to be performed. (*Hunt v. Bateman*, 10 Ir. Eq. R. 360. See *Dillon v. Cruise*, 3 Ir. Eq. R. 70.) However, *Brady*, L. C., could not find any satisfactory authority for the position that a devise to a party intended to take beneficially, subject to the debts of the devisor, without more, constitutes that description of trust which would warrant him in holding that, as between the creditors and the devisee, the relation of *cestui que trust* and trustee is so established as to except the charge from the operation of the 40th section of the 3 & 4 Will. 4, c. 27. Therefore he held that a devise of lands to A. for life, subject to all the testator's just debts, &c., with a bequest of personalty, the better to enable the devisee to pay the testator's debts, &c., did not prevent a judgment debt of the testator from being barred by the 40th section, nor create a trust within the 25th section. (*Dundas v. Blake*, 11 Ir. Eq. R. 138.)

to secure legacies,

An express trust of realty for the payment of legacies was held not to be barred by sect. 40. (*Watson v. Saul*, 1 Giff. 188. See note to sect. 40, *post*.)

to secure annuities.

A testator, who died in 1795, devised his real estates to trustees to sell, and out of the interest of the proceeds, and out of the rents of the estates, until they should be sold, to pay certain annuities. No payment had been made in respect of any of the annuities for more than twenty years before the bill was filed in 1837 for executing the trusts of the will, and for raising the arrears of the annuities by sale of the testator's real estates. The trustees had entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about eleven years prior to the filing of the bill. The defendant relied on the 42nd and 40th sections of this act, and *Sheppard v. Duke*, 9 Sim. 567. But the court held, that the plaintiff's right to the annuities was not barred by this statute, for the trustees were trustees to pay the annuities, and their possession of the estates, out of which the annuities were directed to be paid, continued down to the year 1826; therefore it was plain that the objection to the bill founded on the Statute of Limitations could not be supported. (*Ward v. Arch*, 12 Sim. 472.)

Sect 25 qualifies  
sect. 42 when land  
is vested in  
trustees upon ex-  
press trust,

This section also qualifies the provisions of sect. 42 (*post*), in the recovery of arrears of annuities, of arrears of interest on legacies, and of arrears of interest on a mortgage, when secured respectively by an express trust of realty.

to secure an-  
nuities,

A testator devised his real estate to trustees upon trust to pay certain annuities, which were to be increased in certain events, and a term of ninety-nine years was vested in other trustees for better securing the annuities, and, subject thereto, the estates were limited to the testator's sons for life, with divers remainders over. The first tenant for life entered into possession, and soon afterwards the events happened by which the annuities were to be increased. The original annuities were regularly paid, but no payment was made in respect of the increased annuities. After the death of the tenant for life, and much more than six years after the period when such increased payments ought to have been made, a bill was filed by one of the annuitants to have the whole arrears raised out of the estate of the tenant for life, and by sale or mortgage of the term. It was held, that the term being a subsisting term on which the trustees might obtain possession, the case was within the saving of this section, and that the annuitant was not barred by the operation of the 42nd section of this act from recovering the entire arrears. (*Cox v. Dolman*, 2 D., M. & G. 592; 17 Jur. 97; 22 Law J., Chanc. 427.)

In 1824, A., and B. as his surety, covenanted to pay an annuity for ninety years, and A. granted lands to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life to a trustee for 500 years, upon trust, in case the annuity should be in arrear for a month, and either before or after the decease of the surviving tenant for life, to sell for the purpose of raising the arrears of the annuity and securing future payments. B. became a bankrupt in 1827, A. in 1829. The last payment in respect of the annuity was made in 1831. Upon a bill filed by the annuitant, in 1854, one of the life estates still subsisting: it was held, that the

plaintiff was entitled to have the lands sold for the residue of the term according to the trusts, and to payment of all arrears. (*Snow v. Booth*, 2 K. & J. 132; 8 D., M. & G. 69.) 3 & 4 Will. 4, c. 27, s. 25.

A conveyance of real estate to trustees upon trust, in the first place, to secure payment of an annuity, is within this section. An owner of a reversionary interest in real estates, for the purpose of better securing an annuity, granted the estates to trustees upon trust, to permit him to hold and enjoy the same until default should be made in payment of the annuity; and in case of default, upon trust to sell the estates, and after payment of the costs attending the sale, to pay the arrears of the annuity, and invest the residue to meet the growing payments of the annuity, and subject thereto in trust for the grantor, his executors, administrators, and assigns absolutely: it was held, that an express trust was created for the benefit of the annuitant within this section, and that he was entitled to recover the whole of the arrears of the annuity as against the grantor and the subsequent incumbrancers, and was not limited to six years by the 42nd section of this act. (*Lewis v. Duncombe*, 29 Beav. 175. See *Round v. Bell*, 30 Beav. 121.)

A testator, who died in 1823, directed the trustees of his will to raise a legacy by sale of his real estate: it was held, that the legatee was not barred by the 42nd section of this statute from claiming interest on the legacy from the end of the first year after the testator's death. (*Gough v. Bult*, 16 Sim. 323.) to secure legacies,

Where a mortgage is secured by a term in a trustee, the mortgagee in foreclosing can have a general account of arrears of interest. (*Shaw v. Johnson*, 1 Dr. & Sm. 412.) to secure mortgage debts.

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3 & 4 Will. 4,  
c. 27, s. 25.

and other incumbrances on them, and retain a debt due to himself, and until the sale to keep down the interest on the charges, and pay the surplus over, but who did not sell, but took a transfer of the mortgage, and remained in possession for twenty-two years, during the first ten of which the interest exceeded the rents, was decreed to reconvey the estates. (*Latter v. Dashwood*, 6 Sim. 462. See also *Faussett v. Carpenter*, 5 Bligh, N. S. 75.)

As to the effect of fines formerly between trustee and *cestui que trust*, see Gilb. Ch. 62; *Bell v. Bell*, 1 Ll. & G. temp. Plunket, 59; *Earl Pomfret v. Lord Windsor*, 2 Ves. sen. 472, 481; *Reynolds v. Jones*, 2 Sim. & Stu. 206; 1 Sand. on Uses, 291, 3rd ed.; 5 Cruise Dig. 208—218.

Where there is no doubt as to the origin and existence of a trust in respect of property, of which, for a long series of years, the trustees have been in the beneficial enjoyment, lapse of time is no bar to the recovery of the property by the *cestui que trust*; but where any doubt exists, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust. (*Att.-Gen. v. Fishmongers' Co.*, 5 Jurist, 693; 5 M. & Cr. 16.)

Where estates were devised to trustees upon trust to sell and to pay debts, and subject thereto for the testator's infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent: on a bill for an account and conveyance of the estate, by one of the children and the representatives of another child, forty-five years after the testator's death, stating that they had recently discovered the facts, special inquiries were directed to ascertain whether they had any notice of the circumstances, whether they had in any manner released, and whether the trustee had advanced money to the amount of the value of the estate. (*Chalmer v. Bradley*, 1 Jac. & Walk. 51, where numerous cases on this subject are cited.)

Trustees in possession of land paid the rents by mistake for more than twenty years to a person not entitled; but it was held that the right of the actual *cestui que trust* was not barred. (*Lister v. Pickford*, 34 L. J., Ch. 582; 13 W. R. 827.)

Where *cestui que trust* in possession.

In general the possession of the *cestui que trust* is not adverse against the trustee if the possession of the former is consistent with the terms of the deed and the object of the trust. (*Keene v. Deardon*, 8 East, 248; *Smith v. King*, 16 East, 283.) A *cestui que trust* who is let into possession of the trust estate by the trustee becomes tenant at will to the latter, and while the estate at will remains the statute does not operate. (*Garrard v. Tuck*, 8 C. B. 231.) Articles of agreement for a lease for ninety-nine years from 1768 (which was never actually executed) were entered into, and the premises occupied pursuant to the articles from 1771 to 1867: held, that an actual direct trust was constituted between the owners of the fee, and those who held under the articles; and that the *cestui que trust* being in possession, the estate of the trustees was not destroyed by lapse of time. (*Drummond v. Sant*, L. R., 6 Q. B. 763.)

On 25th June, 1814, Sir George Bowyer granted six annuities, payable out of his life interest in real estate. On the 28th June, 1814, he appointed receivers of the estate, and directed them to apply the rents in payment of such annuities, and of any other annuities he might thereafter grant. By deed of the same date he vested his life estate in a trustee upon trust, if default should be made in payment of any of the annuities, or of any other annuities to be granted by him, to sell the real estate, and to apply the proceeds in payment of such annuities. On the 30th August, 1814, he granted three other annuities charged on the same estate; and on the same day he executed a deed, directing the receivers and trustee to pay the nine annuities. Notice of the last-mentioned deed was served on the receivers and trustee immediately after its execution. The rents of the estate were received by one of the receivers, and applied in payment of the first six annuities, but they were insufficient to pay the three latter annuities, and for forty years no payment had been made in respect of these three annuities. On a bill filed in 1855, by persons interested in those three



annuities, it was held (per *Turner*, L. J., confirming the decision of *Romilly*, M. R., 23 Beav. 609; 3 Jur., N. S. 968, *sed dubitante Knight Bruce*, L. J.), that the deed of direction made the receivers and the trustee express trustees for the three annuitants, subject to the rights of the six annuitants. (*Knight v. Bowyer*, 2 De G. & J. 421; 4 Jur., N. S. 569; 28 L. J., Chan. 521.) And that in cases of express trust, the Statute of Limitations is no bar to a demand of a *cestui que trust*, though the other *cestui que trusts* have for more than twenty years received from the trustee the whole of the rents to the exclusion of the claimant. (*Knight v. Bowyer*, 2 De G. & J. 421.) But where a legal estate was vested in trustees on trust for five tenants in common, and the trustees not acting, the whole rents were received by some of the tenants in common, not under the trustees, but in opposition to their claim; those who have received the whole rents in spite of the trustees acquired a title against the claim of another tenant in common who had been out of such receipt. (*Burroughs v. M'Creight*, 1 Jones & L. 290.)

The rule that a trust is not barred by length of time applies only as between *cestui que trust* and trustee, and not between *cestui que trust* and trustee on one side, and strangers on the other; for that would be to make the statute of no force at all, because there is hardly an estate of consequence without such a trust, and so the act would never take effect. Therefore, where a *cestui que trust* and his trustee have been both out of possession for the time limited, the party in possession has a good bar against both. (Per Lord Hardwicke, in *Llewellyn v. Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; and see *Townshend v. Townshend*, 1 Br. C. C. 550; *Clay v. Clay*, 3 Br. C. C. 639, n.; Ambl. 645; *Hercy v. Ballard*, 4 Br. C. C. 469; *Harmood v. Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 629; Sugd. V. & P. 610—612, 11th ed.)

On the question whether, when a stranger has acquired a title by possession against a trustee, the *cestui que trust* is also barred, see *Scott v. Scott*, 4 H. L. Ca. 1065, discussed in Darb. & Bos. Stat. Lim. 329—333.

The 25th section, providing for express trusts, renders lapse of time unimportant in all cases within the section, that is, between the *cestui que trust* and his trustee, until the trust is disturbed, and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property so held by him in trust. (*Law v. Bagwell*, 4 Dru. & War. 398.) In such a case a lapse of twenty years from the date of the conveyance will bar the *cestui que trust*, but it seems that time will not commence to run if the rights of the *cestui que trust* are reversionary, or if he be under disability at the date of the conveyance. (*Thompson v. Simpson*, 1 Dru. & War. 489; *Att.-Gen. v. Magdalen College*, 6 H. L. Ca. 215.)

Before the stat. 3 & 4 Will. 4, c. 27, time did not run against charities in a court of equity, neither were charities bound to the times expressed in the Statutes of Limitations, 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16. (Duke, 161; *Att.-Gen. v. Mayor of Coventry*, 3 Madd. 368; 2 Vern. 399; *Att.-Gen. v. Christ's Hospital*, 3 My. & K. 344; *Att.-Gen. v. Mayor of Bristol*, 2 Jac. & W. 321; *Att.-Gen. v. Poulden*, 8 Sim. 472; *Att.-Gen. v. Smythies*, 2 My. & K. 749; *Christ's Hospital v. Grainger*, 1 Hall & T. 533; 1 Mac. & G. 460; Shelford on Charities, p. 563.) At law the old Statute of Limitations operated against all claimants, although they held in trust for charities; but in the Court of Chancery, unless in the case of a purchaser for value, they had no operation. (43 Eliz. c. 4; Sugd. V. & P. 944, 945, 11th ed.) The stat. 3 & 4 Will. 4, c. 27, does not contain any saving in favour of charities.

A simple gift to a charity, without any express trust, is within the bar created by sect. 24. But property may be given upon express trust for a charity, so as to fall within the exception created by sect. 25. Sir *E. Sugden*, L. C., said, it appeared to him, that unless the case of a charitable trust can be brought within the saving of the 25th section, which operates between trustee and *cestui que trust*, it would fall within the general prohibition of the 24th section; for charities were only saved in equity from

3 & 4 Will. 4,  
c. 27, s. 25.

Where stranger in  
possession time  
bars both trustee  
and *cestui que trust*.

Where trustee  
alienates for value.

Charities.  
Law before the  
statute.

Present law.

Property given to  
charities without  
express trust.



3 & 4 Will. 4,  
c. 27, s. 25.

the operation of the former statutes, as trusts, although highly favoured ones; and now all trusts are barred by section 24 unless saved by section 25, and the court is not at liberty to introduce an exception into the act, which the legislature, providing generally for all trusts, have not thought it proper to enact. (*Commissioners of Donations v. Wybrants*, 2 Jones & L. 182, see pp. 194—196; *Att.-Gen. v. Magdalen College, Oxford*, 18 Beav. 223, 238.)

The stat. 9 Geo. 2, c. 36, not extending to Ireland, a testator by his will of the 4th of June, 1812, devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged. A schoolmaster was never appointed. In 1839, an information was filed to carry the said trust into execution. It was held, that the Statute of Limitations could not run until a schoolmaster was appointed. (*Att.-Gen. v. Persse*, 2 Dru. & War. 69.)

Express trusts  
for charities.

Property given upon express trust for a charity is within section 25. (*Commissioners of Donations v. Wybrants*, 2 J. & Lat. 182.) Where the attorney-general, having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred. Lands were given for the benefit of the poor of two parishes, and were placed under the management of the rectors and churchwardens of the two parishes, who, with the consent of the vestries, might lease them for ever to a college subject to a fixed rent-charge. Above sixty years after a lease (the fairness of which at the time of its execution was not impeached) the attorney-general filed an information against the lessees, praying that it might be cancelled: it was held, that the real plaintiffs in the suit were the poor of the two parishes, that they were in the situation of a *cestui que trust*, that the suit by information of the attorney-general (who had no independent rights) was a suit by them, that they could not maintain such a suit unless against their trustees, except within twenty years; that it was not such a suit, but was a suit against purchasers for value, and therefore that it was barred. (*Att.-Gen. v. Magdalen College, Oxford*, 18 Beav. 223; 6 H. L. C. 189.)

The decision in this case was held to govern a case where charity land had not been aliened in fee, but had been held under a lease for 500 years at a rent which had been regularly paid. (*Att.-Gen. v. Davey*, 4 De G. & J. 136; 19 Beav. 521; *Att.-Gen. v. Payne*, 27 Beav. 168.)

Purchasers with  
notice of charitable  
trusts.

It was formerly held that length of time would not protect a purchaser with notice of charitable trusts. (*Att.-Gen. v. Christ's Hospital*, 3 M. & K. 344. See *Att.-Gen. v. Mayor of Bristol*, 2 Jac. & W. 321; *Att.-Gen. v. Poulden*, 8 Sim. 472.) It seems now that time will commence to run in his favour from the date of the conveyance. (*Att.-Gen. v. Magdalen College, Oxford*, 6 H. L. C. 189. See *Att.-Gen. v. Flint*, 4 Hare, 147.) But where premises subject to charitable trusts, constituted by deed in 1726, were conveyed in 1819 to E. D. for valuable consideration, with notice of the deed of 1726: it was held, on information filed in 1870, by the attorney-general against the representatives of E. D., praying that the trusts of the deed of 1726 might be carried into execution, that E. D. having taken the premises as an express trustee with notice of the trusts of 1726, the claims of the charity were not barred by the statute as against his representatives. (*Att.-Gen. v. Davis*, 18 W. R. 1132.)

Account of rents  
against trustees  
for charities.

As to the length of time during which an account of rents will be directed in the case of trustees for charities, see the note to section 42, *post*.

### Fraud.

In cases of fraud,  
no time shall run  
whilst the fraud  
remains con-  
cealed.

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first

known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed (r).

3 & 4 Will. 4,  
c. 27, s. 26.

(r) An ejectment bill may properly be filed in a court of equity on the ground of fraud under this section. (*Chetham v. Hoare*, L. R., 9 Eq. 571.) But a case of concealed fraud cannot be set up on petition. (*Ex parte Breach*, 12 W. R. 769.)

Concealed fraud may be set up by ejectment bill in equity, but not on petition.

This section does not mean the case of a party entering wrongfully into possession, but it applies to a case of designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold. (*Petre v. Petre*, 1 Drew. 397. See *Dean v. Thwaite*, 21 Beav. 621.)

What is concealed fraud within this section.

In 1825, A., on his insolvency, omitted from his schedule (which he verified on oath) an estate to which he was entitled. In 1853, his assignee filed a bill against the assignees under a subsequent bankruptcy and others for the recovery of the property. It was held, that there had been a concealed fraud within this section. (*Sturgis v. Morse*, 24 Beav. 541.) This decision was affirmed on grounds independent of the question of concealed fraud. (3 De G. & J. 1.)

To prove that a fraud was concealed within the meaning of this section, it is not sufficient to show that the party was in such an imbecile or uncultivated condition of mind that it was scarcely possible, though the alleged fraud was by an open act, that he should have discovered the fraud, if the condition of his mind was not that of actual lunacy; for the court cannot possibly estimate for this purpose the chance which the state of mind and education of a man may afford of his making such discovery, and is therefore compelled to assume that every one, not actually a lunatic, is competent to judge of and to obtain advice concerning his rights, and to assert them if necessary. Therefore a suit cannot be maintained in equity, to set aside a compromise of an action to recover large estates made eighty years before, upon the ground that the compromise was a fraud upon the plaintiff in the action, and that he was a man of such dull intellect, that, though cognizant of all the facts, it was necessarily a concealed fraud as to him. (*Manby v. Berricks*, 3 Kay & J. 342.)

It is the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances of the case, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect. (*Charter v. Trevelyan*, 4 L. J. (N. S.) Chanc. 209; 11 Cl. & Fin. 740.) Circumstances of a fraudulent nature relating to a sale were not discovered until thirty-seven years after the date of the conveyance, and it was held that they furnished an answer to the objection arising upon the length of time during which the transaction had remained unimpeached. (*Ib.*)

The procuring instruments of conveyance and devise to be executed by a person of unsound mind is a fraud within this section of the act. (*Lewis v. Thomas*, 3 Hare, 26.) As to conveyance by a lunatic, see *Price v. Berrington*, 3 Mac. & G. 486.

As to what constitutes reasonable diligence in the discovery of concealed fraud within this section, see *Chetham v. Hoare*, L. R., 9 Eq. 571; *Vane v. Vane*, 21 W. R. 66.

Reasonable diligence in discovering fraud.

Though courts of equity will interpose in order to prevent those mischiefs which would probably result from persons being allowed at any distance of time to disturb the possession of another, or to bring forward stale demands; yet as its interference proceeds upon principles of conscience, it will not encourage nor in any manner protect the abuse of confidence, and therefore

When time bars in cases of fraud.

8 & 4 Will. 4,  
c. 27, s. 26.

no length of time will bar a fraud. (1 Fonbl. Eq. 331; *Cotterill v. Purchase*, Forrest, 61; *Alden v. Gregory*, 2 Eden, R. 230; *Whalley v. Whalley*, 1 MÉR. 436; *S.C.*, 3 Bligh, 1. As to length of time being no bar in cases of fraud, see also *Deloraine v. Browne*, 3 Br. C. C. 633; *Smith v. Clay*, *Ib.* 639, n.; *Hercy v. Dinwoody*, 4 Br. C. C. 258; 2 Ves. jun. 87; *Yate v. Moseley*, 5 Ves. 480; *Moth v. Atwood*, 5 Ves. 845; *Purcell v. Macnamara*, 14 Ves. 91; *Beckford v. Wade*, 17 Ves. 87; *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 607, 630; *Moore v. Blake*, 1 Ball & B. 62; *Medlicott v. O'Donnell*, *Ib.* 156; *Gould v. Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse v. Royal*, 12 Ves. 355; *Pickering v. Lord Stamford*, 2 Ves. jun. 272; *Byrne v. Frere*, 2 Molloy, 176; *Hatch v. Hatch*, 9 Ves. 292.) An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time. (*Gordon v. Gordon*, 3 Swanst. 400.) As to fraud in the case of levying fines, see *Langley v. Fisher*, 9 Beav. 90; 15 L. J., Ch. 73.

A court of equity will not impeach a transaction on the ground of fraud, where the fact of the alleged fraud had been within the knowledge of the party many years: but held that every new right of action in equity which accrued to the party must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant. (2 Sch. & Lef. 637.) Where a party is to be constituted a trustee, by the decree of a court of equity, founded on fraud or the like, his possession is adverse, and the Statute of Limitations will run from the time the circumstances of the fraud were discovered. (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank v. Smith*, 2 Y. & Coll. 58.) Thus, where the facts constituting the fraud had been in the knowledge of the party, and he had laid by for twenty-five years, relief was refused. (*Blennerhasset v. Day*, 2 Ball & B. 118.) But a party who had received money under a misapprehension of his rights was held not bound by it, as in the case of a contract for a disputed title, or the compromise of a litigated right. (*Ib.* 128.) The filing a bill within twenty years, although there has been some delay in prosecuting it, prevents time from operating as a bar. (Cas. temp. Talbot, 63.)

### Acquiescence.

Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

27. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act (s).

Acquiescence imports knowledge.

(s) If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence. (*Duke of Leeds v. Earl Amherst*, 2 Phill. C. C. 123.) Parties cannot be said to acquiesce in the claims of others, unless they are fully cognizant of their right to dispute them. (*Marker v. Marker*, 9 Hare, 16.) Where executors took upon themselves to distribute the personal property of a testator, in thirds, without consulting a legatee, and the shares were paid without her authority, upon her supposition that their construction of the will was right, it was held, that the legatee was not precluded from relief on the discovery of the mistake of the executors. (*Newton v. Ayscough*, 19 Ves. 539; *Brooksbank v. Smith*, 2 Y. & C. 59. See *Knatchbull v. Fearnhead*, 3 My. & Cr. 122.) Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it. (*Pickering v. Lord Stamford*, 2 Ves. jun. 583.)

Acquiescence generally.

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was held a bar to relief. (*Hicks v. Cooke*, 4 Dow.

17.) Long acquiescence by a party acquainted with the facts is a bar to equitable relief for setting aside a lease, upon the ground of fraud or mistake, although it might have been otherwise if the parties interested had questioned the lease recently after the transaction. (*Selsey v. Rhodes*, 2 Sim. & Stu. 41; 1 Bligh, N. S. 1.) An heir at law has also been held not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will. (*Tucker v. Sanger*, M'Clel. 424; 13 Price, 119.) An acquiescence of twenty-three years, with a knowledge of the will, is a good bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance, and that independently of the stat. 3 & 4 Will. 4, c. 27. (*Portlock v. Gardner*, 11 L. J. (N. S.) Ch. 313.) A wife was held to be bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death. (*Swanton v. Raven*, 3 Atk. 105.) Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by an act of parliament, it was held, that it was not competent for the shareholders to impeach such agreement in respect of the public interest. (*Gray v. Chaplin*, 2 Russ. 126.) Acquiescence will not be held to have taken place, so long as the same circumstances of undue influence on one side, and distress on the other, in which the oppression commenced, continue to operate. (*Purcell v. Macnamara*, 14 Ves. 106, 121, 122.)

3 & 4 Will. 4,  
c. 27, s. 27.

Length of time, when it does not operate as a statutory or positive bar, operates simply as evidence of acquiescence. A bar by length of time and by acquiescence are said not to be two distinct propositions. They constitute one proposition, and that proposition, when applied to a question of a breach of trust, is, that the *cestui que trust* assented to the breach of trust. A *cestui que trust*, whose interest is reversionary, is not bound to assert his title until it comes into possession, but the mere circumstance that he is not bound to assert his title does not bear upon the question of his assent to a breach of trust. He is not less capable of giving such assent when his interest is in reversion than when it is in possession. But where the trust is definite and clear, it seems that a breach of trust will not be held to have been sanctioned or concurred in by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession. (*Per Turner*, L. J., *Life Association of Scotland v. Siddal*, 3 De G., F. & J. 72, 74. See *Brown v. Cross*, 14 Beav. 105; *March v. Russell*, 3 M. & Cr. 31.) Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. It is a settled rule that a *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed of his rights, and of all the material facts and circumstances of the case. (*Per Turner*, L. J., *Life Assurance of Scotland v. Siddal*; *Cooper v. Greene*, 3 De G., F. & J. 74.)

Acquiescence in  
breaches of trust.

Acquiescence may have the same effect as an original agreement, and may bar the right of the party to relief in equity. But to fix acquiescence upon a party, it should unequivocally appear that he knew the fact upon which the supposed acquiescence is founded, and to which it refers. The doctrine of acquiescence does not apply where all the parties are under the influence of a common mistake. (2 Mer. 362.) In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is previously ascertained that the *cestui que trust* knew that his trustee had become the purchaser, for while the *cestui que trust* continues ignorant of that fact there can be no laches in not quarrelling with the sale upon that ground. (*Randall v. Errington*, 10 Ves. 427, 428; *Morse v. Royal*, 12 Ves. 335.) Lord Chancellor Eldon said, "It is established by all the cases, that if the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust, and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence; recollecting, in the conduct of that inquiry, how important it is on the one hand to secure

3 & 4 Will. 4,  
c. 27, s. 27.

the property of the *cestui que trust*, and on the other not to deter men from undertaking trusts." (3 Swanst. 64.) All *cestui que trusts*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, which was liable to objection, and openly or tacitly acquiesced in it during a considerable time, are held to have authorized or adopted such conduct, and precluded themselves from all remedy in that respect. (*Brice v. Stokes*, 11 Ves. 319; *Walker v. Symonds*, 3 Swanst. 64; *Ryder v. Bickerton*, 1b. 83, n.; *Underwood v. Sterens*, 1 Mer. 712; *Trafford v. Boehm*, 3 Atk. 444.) See further, as to acquiescence in breaches of trust, Lewin on Trusts, 661, *et seq.*, 5th ed.

Laches.

"Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits him to delay without losing his right, I conceive cannot be any equitable bar." (*Per Lord Wensleydale, Archbold v. Scully*, 9 H. L. 383.) A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years, and after her death her executrix filed a bill for their recovery. No explanation was given of the circumstances, and no proof of any intermediate payment. The bill was dismissed on the ground of great laches. (*Pattison v. Hawkesworth*, 10 Beav. 375.) See *Sibbering v. Earl of Balcarras*, 3 De G. & Sm. 737, where the court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years; and see the remarks of Lord St. Leonards in *Spackman v. Evans*, L. R., 3 H. L. 220.

Though the rule as to limitation by time does not apply in cases of express trust, yet as to them the general rule in equity is that stale demands are not to be encouraged. (*McDonnell v. White*, 11 H. L. C. 570.)



## 7. Limitation of Time between Mortgagor and Mortgagee.

### Time of Limitation fixed—Twenty Years.

Mortgagor to be barred at the end of twenty years from the time when the mortgagee took possession, or from the last written acknowledgment.

28. When a mortgagee shall have obtained the possession or receipt of the profits of any land, or the receipt of any rent, comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage but within twenty years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment of the title of the mortgagor or of his right of redemption shall have been given to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and in such case no such suit shall be brought but within twenty years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or in-



terest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage-money or land or rent by, from or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment, shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgaged \* money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage-money which shall bear the same proportion to the whole of the mortgage-money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage (t).

3 & 4 Will. 4,  
c. 27, s. 28.

\* *Lege mortgage.*

(t) Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section (*ante*, p. 182), was not barred of his ejectment by the 2nd and 3rd sections, inasmuch as the mortgagee's right had accrued more than twenty years previously. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 291.) These doubts have been removed by the following enactment.

By statute 7 Will. 4 & 1 Vict. c. 28, reciting that, "doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled 'An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto,' so far as the same relates to mortgages; and it is expedient that such doubts should be removed:" it is declared and enacted, "that it shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act, to make an entry or bring an action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, any thing in the said act notwithstanding."

7 WILL. 4 & 1 Vict.  
c. 28.

Mortgagees within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years after last payment of principal or interest.

Where a man by his will creates particular estates and remainders and then mortgages his estate, of course he and his devisees have only in common the period of time to claim against the mortgagee in possession, and the will cannot give to the devisees successive rights. (*Browne v. Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. R. P. Stat. 38. See *Raffety v. King*, 1 Keen, 601.)

Cases as to mortgagor's rights.  
Sect. 28.



3 & 4 Will. 4,  
c. 27, s. 28.

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the Statute of Limitations. (*Booth v. Purser*, 1 Ir. Eq. R. 33.) A solicitor who pays off a mortgage debt due from client, must be taken to act as the agent of the client; and if he receive the rents of the mortgaged property, the possession is that of the client, and time will not run against the client. (*Ward v. Carttar*, L. R., 1 Eq. 29.) A trust for sale of land by way of security for money lent is a mortgage within sect. 28. (*Locking v. Parker*, 21 W. R. 113.)

A mortgagee in possession for six years, without making any acknowledgment of the mortgagor's title, then purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer. It was held, that such possession was not adverse during the existence of the life estate so purchased, and that the stat. 3 & 4 Will. 4, c. 27, s. 28, was not therefore a bar to any suit for redemption by the remainderman or reversioner. (*Hyde v. Dallaway*, 2 Hare, 528; *Raffety v. King*, 1 Keen, 601.)

"I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years." (*Per Lord Cranworth, Alderson v. White*, 2 De G. & J. 109.)

A mortgagee, who holds property in pledge, is responsible for it in its integrity. Therefore, where a mortgagee of lands allowed the owners of adjacent coal mines to enter and work a mine for the purpose of exploring, which they did, and sold the coals, an account was directed against them all for the benefit of the mortgagor upon a bill to redeem, and the Statute of Limitations was held not to apply to a case of this kind, as between mortgagor and mortgagee. (*Hood v. Easton*, 2 Giff. 692.)

Where a mortgagee, who had not been in receipt of the rents and profits of the mortgaged premises for upwards of twenty years, nor received an acknowledgment as required by the 3 & 4 Will. 4, c. 27, nor had even known of his rights until informed thereof by a puisne creditor, was brought before the court by that creditor by an amendment made in 1837 by a supplemental bill to a bill filed in 1833, for the purpose of completing the title to a purchaser, so as to have distributed among the creditors of the estate certain funds, which had been impounded to indemnify the purchaser against an outstanding and apparently unsatisfied charge, of which the said mortgage formed a moiety: it was held, that the mortgagee's claim was not barred by 3 & 4 Will. 4, c. 27, which was held to be inapplicable, as the mortgagee did not come in the character of plaintiff, but as defendant, in a suit instituted prior to the passing of the statute. (*Murphy v. Sterne*, 1 Drury & Walsh, 236.)

Acknowledgments  
under sect. 28.

A mortgagee in fee, who had been in possession for more than twenty years, died in 1805, leaving a will, by which he devised the property to his eldest son in tail, with divers remainders over, and appointed him his executor and residuary legatee. In 1812, the person claiming under the will of the mortgagor filed a bill against the son to redeem, and the suit was compromised in 1814, on the terms of the son paying a sum for the equity of redemption, which was accordingly conveyed to him. He afterwards died without issue, and without having done any act to bar the entail created by his father's will. It was held, that his heir at law was entitled to the equitable fee, and that the remainderman under his father's will had no title in equity. It was considered that the son's acknowledgment revived the equity of redemption. (*Pendleton v. Rooth*, 1 De G., F. & J. 81; 29 L. J., Ch. 265. See Sugd. R. P. Stat. 113.) This case appears to have been decided according to the law before 3 & 4 Will. 4, c. 27. But in a case which was decided under that act, more than twenty years after a mortgagee had entered into possession, the mortgagor's solicitor wrote to the mortgagee, requesting to know when he could see the mortgagee upon the subject of the mortgage. The mortgagee replied by a letter, saying, "I do not see the use of meeting unless some one is ready with the money to pay me off:" it was held, that this letter was a sufficient acknowledgment in

Acknowledgments  
after twenty  
years' possession  
by mortgagee.

writing to exclude the application of the Statute of Limitations, although not written within twenty years after the mortgagee had entered into possession. (*Stansfield v. Hobson*, 3 De G., Mac. & G. 620; 22 L. J., Ch. 657. See Darb. & Bos. Stat. Lim. 364.) For acknowledgments of the mortgage title under the old law, see *Hodde v. Healey*, 6 Madd. 181; *Price v. Copner*, 1 S. & S. 347.

3 & 4 Will. 4,  
c. 27, s. 28.

In 1816, the mortgagee, under a mortgage created some years before, entered into possession of the mortgaged premises, and in 1827 he executed a transfer of his mortgage to another. The transferee thereupon entered into possession, and in 1828 executed a transfer of his mortgage to a second transferee, who then entered into possession. The mortgagor was not a party to either transfer, and had not from the time the original mortgagee entered into possession received any acknowledgment in writing of his equity of redemption. In 1833, the above stat. 3 & 4 Will. 4, c. 27, s. 28, was passed. In 1845, the representative of the mortgagor filed his bill for redemption against the representatives of the second transferee. It was held, that the statute operated retrospectively, by taking from the mortgagor the benefit of the acknowledgment which had already been made of the mortgage title in the transfers of 1827 and 1828, and that the suit (as to that estate) was therefore barred. (*Batchelor v. Middleton*, 6 Hare, 75.)

Sect. 28  
retrospective as  
to acknowledg-  
ments.

The reason is not apparent why the mortgagee should not be allowed to make an admission (in writing signed by himself) of his mortgage title to a third person, of which the mortgagor may have the benefit; the statute, however, requires that the admission should be made by the mortgagor himself or his agent, and by that the court is bound. (*Batchelor v. Middleton*, 6 Hare, 83, 84.)

Acknowledgment  
must be made to  
the mortgagor or  
his agent.

A. mortgaged an estate to B. for 1,000 years. B. died, having bequeathed the mortgage to his widow. She also died; and in 1822 her personal representatives entered into and continued in possession of the estate until 1838, when they sold and assigned the mortgage to C., who entered and continued in possession until 1843, when A.'s heir filed a bill to redeem, on the ground that the deed of assignment recited the mortgage, and conveyed the term to C., subject expressly to the equity of redemption of A., or his legal representatives. It was held, that the deed was not such an acknowledgment of the mortgagor's title as to make the estate redeemable. (*Lucas v. Denison*, 13 Sim. 584.) A mortgagee in possession of lands at Hendred, having received from the grandfather of the infant heir of the mortgagor a letter, the contents of which did not appear, wrote in answer as follows:—"Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you, which I am very willing to settle if your granddaughter is of age, I never told you any otherwise, as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business." It was held, that the letter was an acknowledgment of the heir's right to redeem the mortgage, and that when she came of age she was entitled to consider her grandfather as having acted as her agent, and consequently that she was entitled to redeem the mortgage at any time within twenty years after the letter was written. (*Trulock v. Roby*, 12 Sim. 402.) It was said that it was not necessary to make a person an agent to receive an acknowledgment, that he should have an actual authority to act. It was sufficient that the grandfather acted as the agent of his grandchild, and that she, when she came of age, adopted what he had done on her behalf. (*Ib.*)

Who is agent.

A letter written by a mortgagee in possession to the mortgagor's solicitors, containing a general denial of the mortgagor's title, with an additional statement that even if the mortgagor were entitled, he would derive no benefit from the account, was held not to amount to an acknowledgment within this section. (*Thompson v. Bonyer*, 11 W. R. 975.) Letters were held to amount to an acknowledgment in *Richardson v. Younge*, L. R., 10 Eq. 275.

It was questioned whether since the statute 3 & 4 Will. 4, c. 27, the bar created by twenty years' possession by a mortgagee is defeated by his having kept accounts of the rents received by him. (*Baker v. Whetton*, 14 Sim.

Whether mort-  
gagee's accounts  
amount to  
acknowledgment.

3 & 4 Will. 4,  
c. 27, s. 28.

Acknowledgment  
by one of several  
mortgagees.

Disabilities.

Cases as to mort-  
gagee's rights.

Where mortgagor  
tenant at will to  
mortgagee.

Operation of  
1 Vict. c. 28.

426.) But it is observed by Sir E. Sugden (Real Prop. Stat. 117, 2nd ed.), that keeping accounts "could hardly be held to supply the want of an acknowledgment; for during the twenty years prudence would require that an account should be kept, and after that period, when the right to redeem is barred, no one has a right to inquire how the owner, though formerly a mortgagee, has kept his accounts. The statute intended to put an end to such inquiries."

An acknowledgment of a mortgagor's title given by one only of two joint mortgagees, who were, on the face of the mortgage deed, shown to advance the money on a joint account as trustees, was held wholly inoperative. "The provision in this section as to acknowledgment by some of several mortgagees apply only where they have separate interests either in the money or the land." (*Pir Mellish, L. J., Richardson v. Younge, L. R., 6 Ch. 478.*)

It should be observed that there are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the 28th section. (Sugd. Real Prop. Stat., p. 118, pl. 45, 2nd ed.)

Where the mortgage deed contains no provision that the mortgagor may enjoy the land in the interval between the execution of the deed and default in payment of the mortgage-money, the mortgagee has an immediate right of entry upon the execution of the deed, and an ejectment must be brought within twenty years afterwards if no interest has been paid. W. B., seised in fee of land, by indentures of lease and release, bearing date respectively the 2nd and 3rd days of September, 1819, and executed by himself only, conveyed the same to T. R. in fee, with the proviso, that on payment by him to T. R. of 200*l.*, with interest, on the 25th March, 1820, the mortgagee, his heirs and assigns, should reconvey the mortgaged premises to the mortgagor, his heirs and assigns. The deed then contained a covenant, that in the event of default being made in payment of the above sum or any part thereof, it should be lawful for the mortgagee, his heirs and assigns, from time to time and at all times after such default, peaceably and quietly to enter into and enjoy the said premises, and also a covenant by the mortgagor for further assurance in case of such default. It was held, that the mortgagee had the right of possession under this deed from the time of its execution, and not merely from the 25th March, 1820, and therefore that an ejectment for the recovery of the premises brought by the heir at law of the mortgagee, within twenty years of the latter but not of the former date (no interest having been paid on the mortgage, nor any other act recognizing the title of the mortgagee done for twenty years from that date), was too late. (*Doe d. Roylance v. Lightfoot, 8 Mees. & W. 553; 5 Jur. 966. See Wilkinson v. Hall, 4 Scott, 301; 3 Bing. N. C. 508; Fisher v. Giles, 5 Bing. 421; 2 M. & P. 741; Shep. Touch. 272 (8th edit.); Thorp v. Facey, 35 L. J., C. P. 349.*)

Under certain circumstances a mortgagor in possession is held to be tenant at will to the mortgagee (see the note to 3 & 4 Will. 4, c. 27, s. 7, *ante*, p. 169), and time will not in that case run against the mortgagee until the tenancy is determined. (Darb. & Bos. Stat. Lim. 355.)

The lessor of the plaintiff was the assignee of a mortgage made more than twenty years before ejectment was brought, but the mortgagor had, within twenty years, paid interest on the mortgage. The defendant had been let into possession more than a year before the mortgage by the mortgagor, and suffered by him as a favour to occupy the premises without payment of rent and without any written acknowledgment. The mortgagor's right of entry as against the defendant accrued under the 3 & 4 Will. 4, c. 27, less than twenty years before the mortgage, but more than twenty years before the ejectment brought: it was held, that the 7 Will. 4 & 1 Vict. c. 28, preserved to the lessor of the plaintiff, being a mortgagee, the same right of entry as if the 3 & 4 Will. 4, c. 27, had not passed, and that the defendant's possession never having been such as before the stat. 3 & 4 Will. 4, c. 27, would have been adverse to the lessor of the plaintiff, he was entitled to recover, though the mortgagor's right of entry, within

the meaning of the 3 & 4 Will. 4, c. 27, had accrued before the mortgage, and was barred under that statute by lapse of time, before commencement of the ejectment. (*Doe d. Palmer v. Eyre*, 17 Q. B. 366; 20 L. J., Q. B. 431; 15 Jur. 1031. See also *Eyre v. Walsh*, 10 Ir. C. L. R. 346.)

3 & 4 Will. 4,  
c. 27, s. 28.

Where A. mortgaged land, of which B. was in possession, to C. for a thousand years, and B. continued in possession for upwards of twenty years from the mortgage without having paid rent to A. or to any one, but interest was paid under the mortgage within twenty years from the time of the ejectment being brought: it was held, that, under 7 Will. 4 & 1 Vict. c. 28, the title of those claiming under C. was not barred. (*Ford v. Ager*, 2 H. & C. 279; 11 W. R. 1073.)

In *Searle v. Colt* (1 Y. & Coll., N. S. 36), a question was raised but not determined with reference to the right of the grantee of an annuity charged on land to take proceedings to recover his annuity, after twenty years' possession and receipt of the rents and profits by the grantor, punctual payment of the annuity, and no acknowledgment in writing of the grantee's title. It was contended that the grantee, never having been in possession or receipt of the profits of the land, and consequently never having being dispossessed, the time must be considered to have run against him from 1810 (when the annuity was granted) by virtue of the 3rd section. In support of this construction, *Dearman v. Wyche* (9 Sim. 570), was cited, and it was said, that although the stat. 7 Will. 4 & 1 Vict. c. 28, withdrew mortgages from that construction, yet it applies to that species of incumbrance only.

On a purchase of lands which were under mortgage, the purchaser paid the principal and interest due on the mortgage, and took a conveyance, in which the mortgagor and mortgagee joined, of the premises, and of the mortgagor's equity of redemption and all the residue of his interest: it was held, that the purchaser was a person "claiming under" a mortgage within the stat. 7 Will. 4 & 1 Vict. c. 28, and that the twenty years' limitation under 3 & 4 Will. 4, c. 27, s. 2, ran from the paying off of the mortgage and interest. (*Doe d. Baddeley v. Massey*, 17 Q. B. 373.) If estates A., B. and C. are included in one mortgage, and the owner of A. pays the interest, the mortgagee's remedy against B. and C. is preserved. (*Chinnery v. Evans*, 11 H. L. 115; 13 W. R. 20.)

Person "claiming  
under" a mort-  
gage.

Where an equity of redemption is put in settlement, though the tenant for life is the party bound to pay the interest upon the mortgage, yet the mere laches of the mortgagee to demand such interest from the tenant for life will not prejudice his claim against those in remainder. (*Wrixon v. Vize*, 2 Dru. & War. 192; *Loftus v. Swift*, 2 Sch. & L. 642.)

Where a tenant for life of a mortgaged estate by deed admitted the payment of interest on the mortgage, this was not a sufficient acknowledgment of the debt, as against the remainderman, to prevent the Statute of Limitations from operation. (*Gregson v. Hindley*, 10 Jur. 383.)

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death, and the same rule applies where the mortgagee is a tenant in common with others of the mortgaged estate. (*Wynne v. Styan*, 2 Phill. C. C. 303.)

A Welsh mortgage is a conveyance of an estate redeemable at any time on payment of the principal, with an understanding that the profits in the meantime shall be received by the mortgagee without account in satisfaction of interest. (See *Talbot v. Braddyl*, 1 Vern. 395; *Lawley v. Hooper*, 3 Atk. 280; *Yates v. Hambly*, 2 Atk. 237.) But it is probable that at the present day a court of equity will decree an account against the mortgagee of the rents and profits, whether the value was excessive or not beyond the interest, and notwithstanding the agreement that the profits shall be retained in lieu of interest. (*Fulthorpe v. Forster*, 1 Vern. 477; see Coote on Mortgages, 207, 212; 5 Jarm. Conveyancing, by Sweet, 96, 101.) A Welsh mortgagee has no remedy to compel redemption or foreclosure (*Longuet v. Scamen*, 1 Ves. sen. 406), but if a man be permitted to hold over twenty years after the debt has been fully paid, it seems that the mortgagor would be barred. (*Fenwick v. Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd. pp. 616—618.) As to Welsh mortgages,

Welsh mortgages

3 & 4 Will. 4,  
c. 27, s. 28.

see further *Teulon v. Curtis*, Younge, 610; *Hartpoole v. Walsh*, 5 Br. P. C. 267, Toml. ed.; *Balfe v. Lord*, 2 Dr. & War. 480; Fisher on Mortgages, 7.

## 8. Limitation of Time as to Church Property and Advowsons.

### Church Property.

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole, but within two incumbencies and six years, or sixty years.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period of sixty years; and after the said thirty-first day of December, one thousand eight hundred and thirty-three, no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period (*u*).

Law before the statute.

(*u*) Before this act, ecclesiastical corporations, and generally all ecclesiastical persons seised in right of their churches, were not within any of the Statutes of Limitation, and therefore could not bar their successors, by neglecting to bring actions for recovery of their possessions within the time prescribed for other persons, although an ecclesiastical person, who was guilty of such neglect, would himself have been barred. (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546. See 3rd Real Prop. R. 58—62.)

Although the Statute of Fines, 4 Hen. 7, c. 24 (*ante*, p. 147), did not operate as a bar to the successors of bishops, rectors, or other ecclesiastical persons entitled to lands in respect of offices for life, yet each particular person was bound by a lapse of five years in his own time after the fine had been levied. (*Runcorn v. Doe d. Cooper*, 5 B. & C. 696; 8 D. & R. 450; *Croft v. Horrel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College case*, 11 Rep. 67.)

The act 2 & 3 Will. 4, c. 71, for shortening the time of prescription in certain cases, extends to any ecclesiastical person, but tithes are excepted from that act. (*Ante*, p. 2.)

Where an ancient rent was payable out of lands A. and B., and the owner of the lands sold B. and charged others to indemnify the purchaser, and continued to pay the whole rent, no payment having been made by the purchaser of B. and the period prescribed by this section had elapsed, yet it was held that the purchaser's estate was still liable; for by the very terms of this section the period of limitation is to commence when the right to make an entry or distress or to bring an action or suit has first accrued, and to ascertain this terminus recourse must be had to the third section, which defines it to be when the person in possession or receipt of the rent shall,



while entitled thereto, have been dispossessed or have discontinued the possession or receipt of it. But here there was a continued receipt of the whole of the rent from the owner of A. and his ancestors, and as there was a common liability to its payment attaching on B., all the payments made by the owner of A. were sufficient to prevent the bar of the statute from operating in favour of the owner of B. The statute never began to run. (*Archbishop of Dublin v. Lord Trimleston*, 12 Ir. Eq. Rep. 251; Sugd. on Real Prop. Stat. 153, 2nd ed.; conf. *Woodcock v. Titterton*, 12 W.R. 864.)

3 & 4 Will. 4,  
c. 27, s. 29.

### Advowsons.

#### Time of Limitation fixed.

30. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person shall bring any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any church, vicarage or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years (x).

No advowson to be recovered but within three incumbencies or sixty years.

(x) If a stranger present to a benefice, the recovery of that presentation depends on the statutes 13 Edw. 1, c. 5, s. 2, and 7 Anne, c. 18. "And the law stands upon this reasonable foundation—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby." (3 Steph. Com. 531.)

Limitation of the right to recover presentations.

By stat. 1 Mary, sess. 4, c. 5, it was enacted, that the stat. 32 Hen. 8, c. 2, should not extend to a writ of advowson, *quare impedit*, assize of *darrein presentment*, nor *jure patronatus*, but the time of seisin to be alleged in such cases should be as it was at the common law before the making of the said statute, which was from the time of the commencement of the reign of Rich. 1. Before the statute of Mary, if the incumbent of an advowson had lived sixty years and died, and a stranger had presented, the patron could not maintain *quare impedit* or *darrein presentment*. (See Plowd. 371 b; Co. Litt. 115 a.)

Limitation of right to recover advowsons.

The limitation of the right to recover advowsons laid down by 3 & 4 Will. 4, c. 27, s. 30, was in accordance with a suggestion of Blackstone. (3 Steph. Com. 565, where the old law is stated.) See *Robinson v. Marquis of Bristol*, 20 L.J., C. P. 208.

The limitations prescribed by 3 & 4 Will. 4, c. 27, were expressly applied to a bishop's rights by 6 & 7 Vict. c. 54, s. 3, which is as follows:— "And whereas doubts have been entertained whether the several periods by the said act (3 & 4 Will. 4, c. 27), limited for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, apply to the case of a bishop claiming to have right to collate to or bestow any ecclesiastical benefice in his diocese, and it is expedient that all such doubts should be removed; be it therefore enacted, that the several periods limited by the said act or by this act for bringing any *quare impedit* or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, shall apply to the case of any bishop claiming a right as

Bishops' rights.  
6 & 7 Vict. c. 54,  
s. 3.



3 & 4 Will. 4,  
c. 27, s. 30.

patron to collate to or bestow any ecclesiastical benefice, and that such right shall be extinguished in the same manner and at the same periods as the right of any other patron to present to or bestow any ecclesiastical benefice : provided always, that nothing herein contained shall be deemed to affect the right of any bishop to collate to any ecclesiastical benefice by reason of lapse."

### Lapse.

Incumbencies  
after lapse to be  
reckoned within  
the period, but  
not incumbencies  
after promotions  
to bishoprics.

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid ; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbent thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop (y).

Lapse.

(y) Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse*. (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12.) The six months commence from the time the patron has notice of the avoidance ; (2 Burn, Eccl. Law, 327;) but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice. (Ib. 329.) If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron. (Com. Dig. Eglise, (H. 9).) But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron. (*Apperley v. Bishop of Hereford*, 3 Moore & Scott, 192; S. C., 9 Bing. 681.) If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop; (Com. Dig. Eglise, (H. 11);) and if neither the bishop nor archbishop present, then to the crown, which is not confined to any time. (Cro. Car. 335; Plowd. 498.) It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse. (3 Moore & Scott, 114.) So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted. (Hutt. 24; Hob. 152, 154; 2 Inst. 273.) So after a lapse to the king, if the patron's clerk be presented, instituted and inducted, and die incumbent, before the king has taken advantage of the lapse, his right is gone. (Owen, 2-5; Cro. Eliz. 44, 119; 7 Rep. 28.)

Prerogative presentation.

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative presentation*. This right of the crown was formerly doubted, (*Wentworth v. Wright*, Owen, 144,) but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the crown is lost. (2 Bl. Rep. 770; *Rex v. Bishop of London*, 1 Show. 464; S. P., Show. P. C. 185; Com. Dig. Eglise, (H. 6); *Archbishop of Armagh v. Att.-Gen.*, 2 Br. P. C. 514.) If after a grant of the next presentation to a living the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death

or resignation of the king's presentee. (*Calland v. Troward*, 2 H. Bl. 324 ; 8 Br. P. C. 71 ; 6 T. R. 439, 778.) The right of the crown to present to an English benefice, upon the appointment of the incumbent to a bishopric, is not barred by the crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christ's Church, in New Zealand. (*Reg. v. Eton College*, 8 Ell. & Bl. 610.)

3 & 4 Will. 4,  
c. 27, s. 31.

The right of presentation given to the universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20 ; 1 Will. & M. c. 26, s. 2, and 12 Anne, st. 2, c. 14, s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter. (*Edwards v. Bishop of Exeter*, 7 Scott, 652 ; 5 Bing. N. S. 652 ; 3 Jur. 725. See *Cottingham v. Fletcher*, 2 Atk. 155.) By statute 12 Anne, st. 2, c. 14, the presentation to any benefice by any Roman Catholic is void. And by stat. 11 Geo. 2, c. 17, s. 5, every grant made of any advowson or right of presentation, collation, nomination or donation, by any person professing the Catholic religion, or by any mortgagee or trustee of such person, is void, unless it be for valuable consideration to a Protestant purchaser. (See 9 & 10 Vict. c. 59.)

Universities.

An advowson *donative* being in the patron's disposal by his own deed of donation, without presentation, institution or induction, (Co. Litt. 344 a,) is not subject to lapse, (*ib.* ; *Fairchild v. Gayre*, Cro. Jac. 63 ; *Britton v. Wade*, *ib.* 515,) unless such be the terms of the foundation, or unless the donative be augmented by Queen Anne's bounty, in which case it is subject to lapse, by statute 1 Geo. 1, st. 2, c. 10, ss. 6, 14, in case there be no nomination within six months. (See *Mutter v. Chauvel*, 1 Mer. 475.) As to proof of augmentation, see 11 East, 478. The ordinary may, by ecclesiastical censures, compel the patron of a donative to fill the church. (3 Salk. 140 ; *Rees v. Bishop of Chester*, 1 T. R. 396.)

Advowson donative.

By stat. 21 Hen. 8, c. 13, if a person having a benefice with cure of souls, of the yearly value of 8*l.* or above, was instituted and inducted into any other benefice with cure of souls, the first benefice became void. (See, on the construction of this statute, *Boteler v. Allington*, 3 Atk. 453 ; *Botham v. Gregg*, 4 Moore & S. 230 ; *Halton v. Cove*, 1 B. & Ad. 530.) The stat. 1 & 2 Vict. c. 106, ss. 1—13, has repealed the stat. 21 Hen. 8, c. 13, and made new provisions as to pluralities, which provisions apply generally to all persons and benefices without distinction of value. By the 11th section of 1 & 2 Vict. c. 106, institution into a second benefice *ipso facto* avoids the first. (See *Storie v. Bishop of Winchester*, 9 C. B. 62 ; *Ex parte Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58, of the same statute, when the clerk is in prison.) Further provisions are made relating to the holding benefices in plurality by statute 13 & 14 Vict. c. 98.

Pluralities.

### *Estates subsequent to Estates Tail in Advowsons.*

32. In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

When person claiming an advowson in remainder, &c. after an estate tail, shall be barred.

### *Extreme Period of Limitation One Hundred Years.*

33. Provided always, and be it further enacted, that after the said thirty-first day of December, one thousand eight hundred

No advowson to be recovered after 100 years.

3 & 4 Will. 4,  
c. 27, s. 33.

and thirty-three, no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title (z).

(z) It will be observed that there is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least. (1 Dart, V. & P. 272, 4th ed.) An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. Sir W. Blackstone observes, that instances are not wanting, wherein two successive incumbents have continued for upwards of 100 years: and states as an instance, that two successive incumbents of the rectory of Chelsfield-cum-Farnborough, in Kent, continued 101 years; of whom the former was admitted in 1650, the latter in 1700, and died in 1751. (3 Chit. Bl. Comm. 250; Co. Litt. 115 a.)

### Final Extinction of Right.

At the end of the period of limitation the right of the party out of possession to be extinguished.

34. At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished (a).

Effect of this section.

(a) This section of the act is new in principle, as the former statutes of limitation were held not to bar the *right* but merely the *remedy*; but this bars the right as well as the remedy. (See 1 Wms. Saund. 283 a, n.; 2 B. & Ad. 413; 1 B. & Ald. 93; 1 Ld. Raym. 422.) The old Statute of Limitations was held to operate as an extinguishment of the remedy of the one and not as giving the estate to the other, where one heir in gavelkind had disseised the other, and been in the sole possession sixty-two years. (1 Bl. R. 678.) The old statutes only barred the remedy, but did not touch the right; possession at all times gave a certain right, but, under the new act, when the remedy is barred, the right and title of the real owner are extinguished, and are in effect transferred to the person whose possession is a bar. (*Incorporated Society v. Richards*, 1 Dru. & War. 289.) The effect of the act is to make a parliamentary conveyance of the land to the person in possession after the statutory period has elapsed. (*Per Parke, B., Doe v. Sumner*, 14 M. & W. 42.)

Nature of the interest of the person in possession.

It has been suggested that the title gained by a wrongdoer who has been in possession, which may be limited by rights yet remaining unextinguished, is commensurate with the interest which the rightful owners have lost by the operation of the statute, and must therefore have the same legal character and be freehold, leasehold or copyhold accordingly. (Darb. & Bos. Stat. Lim. 390.) Mr. Hayes' view is as follows: "The wrongdoer must be considered

according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance." (1 Hayes, Conv. 270, 5th ed.) The latter view seems to be taken by Mr. Dart (Vend. & Purch. 370, 4th ed.) See further an article, 11 Jur., N. S. 151 (Part 2).

3 & 4 Will. 4,  
c. 27, s. 34.

A person in possession of land without other title has, even before time has run in his favour under this statute, a devisable interest. (*Asher v. Whitlock*, L. R., 1 Q. B. 1; *Keeffe v. Kirby*, 6 Ir. C. L. R. 591; *Clarke v. Clarke*, L. R., 2 C. L. 395.)

Person in possession has a devisable interest.

Before this statute twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years, provided they were less than twenty. (*Doe d. Harding v. Cooke*, 7 Bing. 346; see *ante*, p. 152.) And the effect of this section would probably be to give the right to the possessor for twenty years even against the party in whom the legal estate formerly was, and, but for the act would still be, where he had not obtained the possession till after the twenty years, but then it is apprehended that such twenty years' possession must be either by the same person or by several persons claiming one from the other by descent, will or conveyance. (*Doe d. Carter v. Barnard*, 13 Q. B. 945, 952.)

In ejectment the lessor of the plaintiff relied on her own possession for thirteen years, and her husband's before her for eighteen years, but in so doing showed that her husband died leaving children. The defendant, in whom the legal estate was before the twenty years, had turned the lessor of the plaintiff out of possession. It was held, first, that the possession of the lessor of the plaintiff, not being connected by right with that of her husband, sect. 34 of stat. 3 & 4 Will. 4, c. 27, did not give her the right of possession against the defendant. (*Doe d. Carter v. Barnard*, 13 Q. B. 945; 18 L. J., Q. B. 306. See *Doe d. Humphrey v. Martin*, 1 Car. & M. 32; *Doe d. Hughes v. Dyball*, 3 Car. & P. 610.) Possession is *prima facie* evidence of title, and, no other interest appearing in proof, evidence of a seisin in fee. But in this case the lessor of the plaintiff not only proved her own possession, but that of her husband before her, for eighteen years, which was *prima facie* evidence of his seisin in fee; and as he died in possession, and left children, it was *prima facie* evidence of the title of the heir, against which the possession of the lessor of the plaintiff for thirteen years could not prevail; and therefore she had proved the title to be in another, of which the defendant was entitled to take advantage.

Though by this section the right is extinguished at the end of twenty years, still adverse possession by a succession of independent trespassers for a period exceeding twenty years confers no right on any one of them who has not himself had twenty years' uninterrupted possession, except as furnishing a defence to a trespasser in possession against an action by the rightful owner. (*Dixon v. Gayfere*, 17 Beav. 421; 23 L. J., Chan. 60.) After both the trustees and *cestui que trust* had been out of possession more than twenty years, an ejectment was brought by A. B., the heir of the trespasser, in the name of the trustee, and he obtained judgment. The trustee, who disclaimed all personal interest, then instituted a suit seeking to have the rights declared as between the rightful owner and the heir of the trespasser, and the court by its receiver took possession. A. B. afterwards instituted a suit against the trustee and the rightful owner to recover the property. It was held that, the court being in possession, this statute had conferred no right and did not apply, and that the court was bound to ascertain and declare the rights of the parties as if the statute did not exist. (*Ib.*) The Master of the Rolls put the case of a series of trespassers, each adverse to one another and to the rightful owner, taking and keeping possession of an estate in succession for various periods, each less than twenty years, but exceeding in the whole twenty years: and he said "At law, no doubt, the person possessed of the legal estate would obtain possession, or if the legal estate could not be shown to be in anyone, the last possessor, that is,

Possession by succession of independent trespassers.

3 & 4 Will. 4,  
c. 27, s. 34.

the person actually in possession, would hold the property; but not by reason of the validity of his own title, but by reason of the infirmity of the title of the claimants." (17 Beav. 430.) This opinion as to the legal rights of the parties was doubted by *Cockburn*, C. J. (*Asher v. Whitlock*, L. R., 1 Q. B. 4.) It seems that in such a case the first adverse possessor might maintain ejectment against a subsequent possessor, by whom he has been expelled. (Dart, V. & P. 371, 4th ed.; Darb. & Bos. Stat. Lim. 392.)

Purchaser com-  
pelled to accept  
title depending on  
the statute.

The court will compel a purchaser to take a title depending upon parol evidence of adverse possession under this statute. A testator by his last will and testament, after appointing certain lands to his eldest son, George, gave all the residue of his real estate among his six younger sons, subject to the payment of his debts and some charges. Shortly afterwards, he obtained a conveyance of certain freehold property, which was the subject of the controversy in the present suit, and died without having altered in any respect or republished his will, leaving his eldest son of full age. Upon the death of the testator, in 1791, the six younger sons entered into the possession, *inter alia*, of the after-acquired property, and so continued until the present time: George, the eldest son, died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of George during his life or after his death by his heir at law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839, the premises were sold under a decree of the court, pronounced in a suit instituted by a judgment creditor of the testator, in which suit the infant heir was a party defendant. Subsequently to this sale the heir died, and the suit was not revived against the next heir. The abstract of title stated all the above matters, and was verified by two affidavits deposing as to the fact of the possession and receipt of rent by the younger sons: it was held, upon objections to the title on the part of the purchaser, that by the operation of this statute, such a title had been created as the purchaser was bound to take. (*Scott v. Nixon*, 3 Dru. & War. 388.) In the subsequent case of *Tuthill v. Rogers* (6 Ir. Eq. R. 441; 1 Jones & L. 86), *Sugden*, L. C., observed, that the above decision had been acquiesced in, and in conformity with it he should be compelled in principle to adopt the same construction against the rights of the crown, if the case came within the provisions of the act 48 Geo. 3, c. 47, by which the right of the crown is barred, and the estate actually transferred and vested in the person who has held adverse possession for sixty years. (See *Lethbridge v. Kirkman*, 25 L. J., Q. B. 84; *Moulton v. Edmonds*, 1 De G., F. & J. 250.)

Extinguished  
title cannot be  
revived.

The effect of this and the second section as to land, is, that after twenty years' possession adverse to a title it is extinguished, so that it cannot be revived or re-vested by a re-entry after that period, upon the doctrine of remitter, because such an application of that doctrine requires that the former title should be in existence, at the time of the re-entry, and the express provision in the statute that no person shall be deemed in possession of lands merely by reason of an entry thereon, applies to cases of such re-entry. (*Brassington v. Llewellyn*, 27 L. J., Ex. 297; 1 F. & F. 27.)

Right to rents  
extinguished by  
this section.

The operation of this section in extinguishing the right to rents was doubted in *Hanks v. Palling* (6 El. & Bl. 659), but there appears to be no sufficient foundation for this doubt. (Sugd. R. P. Stat. 9.)

Pleading.

Where a Statute of Limitations extinguishes the right and does not merely bar the remedy, the defence under such statute need not be pleaded specially, and therefore in an action of replevin evidence of the lapse of twenty years since the last payment of rent may be given under a plea in bar of *non tenuit*. (*De Beauvoir v. Owen*, L. J. 1850, Ex. Ch. 177; 5 Exch. 166; *Owen v. De Beauvoir*, 16 Mees. & W. 547.)

The appointment of receivers in a suit in chancery, at the instance of judgment creditors of a former owner, is not such an interruption of possession as will prevent an indefeasible title being acquired by an adverse possession for twenty years under this section. (*Groome v. Blake*, 8 Ir. C. L. R. 428.)



Receipt of Rent.

8 & 4 Will. 4,  
c. 27, s. 35.

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Receipt of rent to  
be deemed receipt  
of profits.

9. Abolition of Real and Mixed Actions, &c.

36. No writ of right patent, writ of right quia dominus remisit curiam, writ of right in capite, writ of right in London, writ of right close, writ of right de rationabili parte, writ of right of advowson, writ of right upon disclaimer, writ de rationalibus divisio, writ of right of ward, writ de consuetudinibus, et servitiis, writ of cessavit, writ of escheat, writ of quo jure, writ of secta ad molendinum, writ de essendo quietum de theolonia, writ of ne injuste vexes, writ of mesne, writ of quod permittat, writ of formedon in descender, in remainder, or in reverter, writ of assize, of novel disseisin, nuisance, darrein presentment, juris utrum, or mort d'ancestor, writ of entry sur disseisin, in the quibus, in the per, in the per and cui, or in the post, writ of entry sur intrusion, writ of entry sur alienation, dum fuit non compos mentis, dum fuit infra ætatem, dum fuit in prisona, ad communem legem, in casu proviso, in consimili casu, cui in vita, sur cui in vita, cui ante divortium, or sur cui ante divortium, writ of entry sur abatement, writ of entry quare ejecit infra terminum, or ad terminum qui præteriit, or causa matrimonii prælocuti, writ of aiel, besaiel, tresaiel, cosinage, or nuper obiit, writ of waste, writ of partition, writ of disceit, writ of quod ei deforceat, writ of covenant real, writ of warrantia chartæ, writ of curia claudenda, or writ per quæ servitia, and no other action real or mixed (except a writ of right of dower, or writ of dower unde nihil habet (b) or a quare impedit (c), or an ejectment (d)), and no plaint in the nature of any such writ or action (except a plaint for freebench or dower), shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-four.

Real and mixed  
actions abolished  
after the 31st  
December, 1834.

(b) The right to bring real actions is preserved for a limited time by sections 37 and 38 (*post*). (See *Davies v. Lowndes*, 6 Man. & Gr. 529; 1 Phill. C. C. 328; and also *Nesbit v. Rishton*, 11 Ad. & Ell. 244; 6 Ad. & Ell. 103; 9 Ad. & Ell. 426; 2 P. & D. 706.) It seems that an action of debt does not necessarily lie for rent in consequence of the abolition of real actions. (*Vorley v. Leigh*, 2 Exch. 450.)

By the Common Law Procedure Act, 1860, 23 & 24 Vict. c. 126, s. 26, no writ of right of dower or writ of dower *unde nihil habet*, and no plaint for freebench or dower in the nature of any such writ, and no *quare impedit* shall be brought after the commencement of this act (10th October, 1860), in any court whatsoever, but where any such writ, action, or plaint would now lie, either in a superior or in any other court, an action may be commenced by writ of summons issuing out of the Court of Common Pleas, in the same manner and form as the writ of summons in an ordinary action, and upon such writ shall be indorsed a notice that the plaintiff intends to declare in dower or for freebench, or in *quare impedit*, as the case may be.

Dower, writ of  
right of dower  
and *quare impedit*  
abolished by 23 &  
24 Vict. c. 126,  
s. 26.



3 & 4 Will. 4,  
c. 27, s. 36.

The service of the writ, appearance of the defendant, proceedings in default of appearance, pleadings, judgment, execution, and all other proceedings and costs upon such writ shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons; and the provisions of "The Common Law Procedure Act, 1852," and of "The Common Law Procedure Act, 1854," shall apply to the writ and pleadings and proceedings thereupon. (23 & 24 Vict. c. 126, s. 27.)

Dower.

A writ of right of dower laid when a widow had dower of part of the lands in the same vill, for then she could not have dower *unde nihil habet* against the same tenant. (Com. Dig. Dower (G. 1). See Roscoe on Real Actions, 29.) Dower *unde nihil habet* was a writ of right in its nature, and lay in all cases where a woman had a right of dower, except where she had part from the same tenant in the same vill where she then demanded it. (Com. Dig. Dower (G. 2). See Roscoe on Real Actions, 39; 2 Wms. Saund. 43—45 d, notes; Roper on Husband and Wife, by Bright, pp. 391—431, where the mode of proceeding is fully explained.) And a plaint in the nature of a writ of *dower* lay in the manor court. (4 Rep. 30 b. See *Roe v. Coggan*, 6 East, 431, n.; *Scott v. Kettlewell*, 19 Ves. 335; *Widomson v. Earl of Harrington*, 1 Jac. & Walk. 532; 1 Scriven on Cop. 562, *et seq.*, 3rd ed.)

To entitle a woman to damages in dower, it must be alleged and proved that the husband died seised of an estate of inheritance. (*Jones v. Jones*, 2 C. & J. 601; *S. C.*, 2 Tyrw. 531.)

Equitable relief in case of dower.

Courts of equity show great indulgence to a dowress on account of the great difficulty of determining *à priori* whether she could recover at law, ignorant of all the circumstances, and the person against whom she seeks relief having in his possession all the information necessary to enable her to establish her rights. (6 Ves. 89.) Therefore a court of equity will assist a woman claiming dower, by putting out of her way a term which prevents her obtaining possession at law; but that is only as against an heir; (*Lord Dudley and Ward v. Lady Dudley*, Prec. Ch. 241;) or volunteer not a purchaser; (*Lady Radnor v. Rotherham*, Prec. Ch. 65; but see *Williams v. Lambe*, 3 Br. C. C. 264, and note by Eden;) the heir or volunteer being considered as claiming in no better right than she does; and see *Wilkins v. Lynch* (1 Hayes' Ir. Rep. 98). If the right to dower is not controverted, the Court of Chancery has a concurrent jurisdiction. (*Mundy v. Mundy*, 2 Ves. jun. 122.) But where there was any doubt as to the legal right to dower, the practice of the Court of Chancery formerly was to put the widow to bring her writ of dower at law. (*D'Arcy v. Blake*, 2 Sch. & Lef. 391.) But it appears that now the court will itself determine the legal right. (1 Dan. Ch. Pr. 1035, 5th ed.)

Plea of purchase for valuable consideration without notice.

Upon the point whether a plea of a purchase for valuable consideration without notice be an answer to a bill by a dowress against a *bonâ fide* purchaser, Lord *Thurlow* held, that such a plea would bar an *equitable*, but not a *legal* title; (*Williams v. Lambe*, 3 Br. C. C. 264;) which was followed in *Collins v. Archer* (1 Russ. & M. 292), where it was held, that such a plea would not be available against a *legal* title on a bill filed for on account of tithes. But this has been disapproved of, and is opposed to later decisions. (See *Payne v. Compton*, 2 Y. & Coll. 457; *Bowen v. Evans*, 2 J. & Lat. 263; *Att.-Gen. v. Wilkins*, 17 Beav. 285; Sugd. V. & P. 1071, 11th ed.; 1 Story's Eq. Jurisp. 510—512.)

If the wife be divorced *à mensâ et thoro*, a court of equity will not assist her in recovering dower, but leave her to her remedy at law. (*Shute v. Shute*, Prec. Chan. 111; Shelford on the Law of Marriage and Divorce, 420.)

As to the recovery of arrears of dower, see 3 & 4 Will. 4, c. 27, s. 41, *post*. And as to the law of dower generally, see the notes to 3 & 4 Will. 4, c. 105, *post*.

*Quare impedit*.

(*o*) In a proceeding by *quare impedit* the plaintiff must prove that he, or those under whom he claims, have made a presentation to the living. This is the only legal evidence of the right. If it were otherwise, any person might set up a claim to present a clerk without a shadow of right,

and contrary to reason and common sense. (*Cook v. Elphin*, 5 Bligh, N. S. 126.) In another case, where a party claimed to present in the fourth turn in right of one of four coparceners, it was held sufficient to allege in the declaration a presentation by the ancestor under whom all the coparceners claimed. (*Gully and others v. Bishop of Exeter*, 10 B. & Cr. 584; 5 Bing. 171; see 2 M. & P. 105; 4 Bing. 525.) An advowson descended to four coparceners, A., B., C. and D., who agreed to present in succession, according to their seniority. When the third turn came, C. had died, leaving two co-heirs, E. and F., between whom the right to present was disputed. F., however, presented, and on the next avoidance E. presented. It was held that the presentation by E. and F. were to be counted, though they were usurpations on the rights of F. and D. respectively, and that on the seventh avoidance F. would be again entitled to present. (*Richards v. Earl of Macclesfield*, 7 Sim. 257. See *Pyke v. Bishop of Bath and Wells*, Bac. Abr. tit. Joint Tenants (H.), vol. iv. p. 482, 7th edit.)

3 & 4 Will. 4,  
c. 27, s. 36.

In *quare impedit* the ordinary could not counterplead the patron's title by setting up title in the Queen by lapse. (*Stone v. Bishop of Winchester*, 9 C. B. 62.) It was not competent to the bishop to dispute the title of the patron, at least before collation, as two persons are never permitted to dispute concerning the title of a third in his absence. (*Apperley v. Bishop of Hereford*, 3 Moore & Scott, 102. See *Elvis v. Archbishop of York*, Hob. 316; and the 1st resolution in *Holland's case*, 4 Rep. 75 b.) As to a right of nomination by a majority, see *Earl Harrington v. Bishop of Lichfield*, 4 Bing. N. C. 77; 7 Scott, 371. If a deanery is in the presentation of the crown as patron, or if the crown has a right to nominate a person to the chapter, to be by them presented to the bishop for institution to the deanery, (a right of which many instances occur, and which is fully recognized in the books,) the proper remedy to admit the nominee of the crown is by *quare impedit*, and the Court of Queen's Bench never interferes by mandamus when that writ lies. (*Reg. v. Chapter of Exeter*, 12 Ad. & E. 512; see p. 534.)

By statute 4 & 5 Will. 4, c. 39, costs might be recovered in actions of *quare impedit*, and if plaintiff was nonsuited, &c., the defendant was, with the exception mentioned in the act, to have judgment. A bishop who was a defendant in *quare impedit*, who failed upon demurrer, might be exempted from costs by the certificate of the court under that act. (*Edwards v. Bishop of Exeter*, 6 Bing. N. C. 146; 7 Scott, 652, 679.)

(d) An *ejectment* is a possessory action, wherein the title to lands and tenements may be tried, and the possession recovered in all cases where the party claiming title has a *right of entry*, whether such title be to an estate in fee, fee tail, for life or for years. (See 15 & 16 Vict. c. 76, ss. 168—221; 17 & 18 Vict. c. 125, s. 93; 2 Archbold's Pr., by Prentice, 1015—1080 (12th ed.).)

Ejectment.

### Saving Clauses.

37. Provided always, and be it further enacted, that when on the said thirty-first day of December, one thousand eight hundred and thirty-four, any person who shall not have a right of entry to any land shall be entitled to maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought at any time before the first day of June, one thousand eight hundred and thirty-five, in case the same might have been brought if this act had not been made, notwithstanding the period of twenty years hereinbefore limited shall have expired (e).

Real actions may  
be brought until  
the 1st June, 1835.

(e) See *Foot v. Collins*, 1 My. & Cr. 250.

3 & 4 Will. 4,  
c. 27, s. 38.

Saving the rights  
of persons entitled  
to real actions  
only at the com-  
mencement of the  
act, &c.

38. Provided also, and be it further enacted, that when, on the said first day of June, one thousand eight hundred and thirty-five, any person whose right of entry to any land shall have been taken away by any descent cast, discontinuance or warranty, might maintain any such writ or action as aforesaid in respect of such land, such writ or action may be brought after the said first day of June, one thousand eight hundred and thirty-five, but only within the period during which, by virtue of the provisions of this act, an entry might have been made upon the same land by the person bringing such writ or action if his right of entry had not been so taken away (*f*).

(*f*) The rights preserved by this saving were required to be enforced within the time allowed by the act, where a right of entry existed. By a will in 1789, an estate was devised to A. G. M. for life, with remainder as he should by deed or will appoint; and in default of appointment, remainder to the heirs of his body, with remainder over. In 1790, A. G. M. levied a fine to the use of himself in fee, and afterwards died without issue: it was held in an ejectment by the lessors of the plaintiff, claiming as heirs at law of A. G. M., that the fine created a discontinuance, and gave a tortious fee to A. G. M., and that his heir at law was consequently entitled to recover in ejectment, the remainders over being divested, and the rights of the remaindermen only capable of being enforced by real action. In such a case this section preserves the right of the remainderman to bring a formedon. (See *Doe d. Gilbert v. Ross*, 7 Mees. & W. 102; *Seymour's case*, 10 Rep. 96 a; *Doe d. Cooper v. Finch*, 4 B. & Ad. 283; 1 Nev. & M. 130; *Doe d. Jones v. Jones*, 1 B. & C. 238; 2 D. & R. 373; Sugd. V. & P. 613 (11th ed.); 1 Hayes, Conv. 237, 5th ed.) See further, as to proceedings in formedon, *Tolson v. Watson*, 3 Bing. N. C. 770; *Tolson v. Fisher*, 3 Bing. N. C. 783; 4 Scott, 569; *Tolson, dem., Watson, ten.*, 5 Scott, 77.

### Descent cast, Discontinuance and Warranty.

No descent,  
warranty, &c. to  
bar a right of  
entry.

39. No descent cast, discontinuance, or warranty (*g*), which may happen or be made after the said thirty-first day of December, one thousand eight hundred and thirty-three, shall toll or defeat any right of entry or action for the recovery of land.

Descent.

(*g*) A mere entry is not possession. Continual or other claim will no longer preserve any right of entry, or distress or action. (*Ante*, sects. 10, 11, p. 179.) By the common law, descents of corporeal inheritances in fee simple took away the entry of the party who had right (Litt. s. 385); as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim (Litt. s. 414); and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee. (*Smyth v. Tyndall*, 2 Salk. 685.) The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry (Litt. l. 3, c. 6); nor did it affect copyhold or customary estates, where the freehold is in

the lord (*Doe d. Cook v. Danvers*, 7 East, 299); nor cases where the party has not any remedy but by entry as a devisee. (Co. Litt. 240 b; 7 East, 321. On descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F) (G) (H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment.)

3 & 4 Will. 4,  
c. 27, s. 39.

A *discontinuance* of estates in lands and tenements is defined by Lord Coke to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter." (Co. Litt. 325 a.) At common law, an estate might be discontinued five ways:—1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release with warranty. A grant by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), does not work any discontinuance. A feoffment made after 1st October, 1845, has no tortious operation. (8 & 9 Vict. c. 106, s. 4.)

Discontinuance.

A discontinuance of an estate tail could only be made by a tenant in tail in possession (*Doe d. Jones v. Jones*, 1 Barn. & Cress. 243); and where tenant for life joined with a remainderman in tail in making a lease for lives, it was held not to create a discontinuance. (*Trevilian v. Lane*, Cro. Eliz. 56. See 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a.) But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance; thus, where lands were limited to A. for five hundred years, remainder to B. in tail, remainder to C. in tail, reversion to B. in fee; and B. levied a fine with proclamations to the use of himself in fee: it was held, that although the estate for years of A. continued, the estate of B. was discontinued, and the remainder in tail to C. divested. (*Doe v. Finch*, 1 Nev. & Mann. 180; and see the notes to that case, where much learning on the subject of discontinuance, &c. is collected; *S. C.*, 4 B. & Ad. 283.) As to discontinuance, see Bac. Abr. and Com. Dig. *Discontinuance*; Co. Litt. 325 a, 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe d. Gilbert v. Ross*, 7 Mees. & W. 125.

As to the law of warranty, see Com. Dig. *Guaranty*; Co. Litt. 365 a, 393 b, and notes by Butler; Bac. Abr. *Warranty*; Shepp. T. 181—203. In a case, where A., tenant for life, remainder to B. his wife for life, remainder to the heirs of the body of B. by A. to be begotten; and C. the issue of A. and B., in their lifetime levied a fine come ceo, &c., without proclamations, but containing a clause of warranty; and C. survived A. and B., and died leaving issue D.: it was held, that the right of entry of D. was taken away by the effect of the warranty. (*Doe d. Thomas v. Jones*, 1 Crompt. & Jerv. 528; *S. C.*, 1 Tyrw. 506.) By stat. 3 & 4 Will. 4, c. 74, s. 14, all warranties of lands which shall be made after the 31st December, 1833, by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. (See *post*.)

Warranty.

[Sections 40, 41, 42 of this act are inserted pp. 236, 249, *post*.]

## 10. Limits of the Act.

### Spiritual Courts.

43. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no person claiming any tithes, legacy or other property, for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity (*h*).

Act to extend to  
the spiritual  
courts.

3 & 4 Will. 4,  
c. 27, s. 43.

Recovery of  
legacies by action  
at law.

(h) The mode of recovering personal legacies in the ecclesiastical courts is stated in 3 Hagg. Eccl. R. 161, 162. A legatee could not maintain a suit in the ecclesiastical court to recover his legacy when there are only equitable and not legal assets. (*Barker v. May*, 9 B. & C. 489.) See now, however, 20 & 21 Vict. c. 77, s. 23, by which it is provided that the Court of Probate, to which the jurisdiction of the ecclesiastical courts has been transferred, shall entertain no suit for legacies.

No action at law lies against an executor for a pecuniary legacy (*Deaks v. Strutt*, 5 T. R. 690. See *Mayor of Southampton v. Graves*, 8 T. R. 593; *Atkins v. Hill*, Cowp. 284; *Hawkes v. Saunders*, Cowp. 289, *contra*); nor against an administrator to recover a distributive share; nor against his executor, although he has promised to pay. (*Jones v. Tanner*, 7 B. & C. 542; 1 M. & R. 420. See *Johnson v. Johnson*, 3 Bos. & P. 169.) But an action at law lies against an executor to recover a specific chattel bequeathed after his assent to the bequest. (*Doe v. Guy*, 3 East, 120; 4 Esp. 154; *Paramour v. Yardley*, Plowd. 539; *Westwick v. Wyer*, 4 Rep. 28 b.) And under peculiar circumstances, an action of assumpsit for money had and received, and on an account stated, was held to be maintainable by a residuary legatee against an executor for the plaintiff's share of the residue, "on the ground of a certain sum being received and retained to the plaintiff's use;" the defendant had ceased to hold the money in his character of executor. (*Hart v. Minors*, 2 Cr. & M. 700.) The plaintiff and three others being residuary legatees, the defendants, as the executors named in the will, accounted with them; and having paid to the latter the respective sums due to them thereon, took from them and from the plaintiff a release, but did not pay the plaintiff his share, he having consented to allow it to remain in their hands: it was held, that the money, not being retained by the defendants in their character of executors, the plaintiff was entitled to recover it in an action at law. (*Gregory v. Harman*, 1 M. & P. 209; 8 C. & P. 205; *The Corporation of Clergymen's Sons v. Swainson*, 1 Ves. sen. 75; *Reech v. Kennegal*, *Ib.* 123; *Rogers v. Soutten*, 2 Keen, 598; *Bothe v. Crampton*, Cro. Jac. 612; *Davis v. Reyner*, 2 Lev. 3; *Goring v. Goring*, Yelv. 10; *Rann v. Hughes*, 7 T. R. 350, n.; *Childs v. Monins*, 2 Brod. & Bing. 460; 5 B. Moore, 282; *Bradley v. Heath*, 3 Sim. 543; *Holland v. Clark*, 1 Y. & Coll. N. C. 151. See Wms. Exors. 1783—1787, 6th ed.) In an action against executors upon an account stated for a legacy, it is competent to the plaintiff to impeach any particular item or items on the credit side of the account. (*Rose v. Savory*, 2 Scott, 199; 1 Hodges, 269; *Gorten v. Dyson*, 1 Brod. & B. 219; *Moert v. Moessard*, 1 M. & P. 8; *Wasney v. Earnshaw*, 4 Tyrw. 806; *Roper v. Holland*, 8 Ad. & Ell. 99; 4 Nev. & M. 868.) A testator devised lands in fee, after the determination of certain life estates, to A., B. and C., as tenants in common, subject to and charged with the payment of 200*l.*, which he thereby bequeathed to and to be equally divided among the children of his niece. A. and B., during the life of one of the tenants for life, granted their reversion in two undivided third parts of the lands to mortgagees for 500 years: it was held, that an action of debt could not be maintained against the termors for a share of the 200*l.* so bequeathed. (*Braithwaite v. Skinner*, 5 M. & W. 313.)

### Scotland and Ireland.

Act not to extend  
to Scotland nor to  
advowsons in  
Ireland.

\* *Leges* present.

44. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit\* to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland (i).

(i) The provisions of 3 & 4 Will. 4, c. 27, relating to advowsons, &c., were extended to Ireland by 6 & 7 Vict. c. 32, and 7 & 8 Vict. c. 27. See now 32 & 33 Vict. c. 42.

The colonies

This act applies to New South Wales. (*Day v. Day*, L. R., 3 P. C. 751.) As to India, see *Re Peat's Trusts*, L. R., 7 Eq. 302; *Hay v. Gordon*, 21 W. R. 11. By the law of Lower Canada the period of prescription is thirty



years. (*Herrick v. Sixby*, L. R., 1 P. C. 436; *Macdonald v. Lambe*, ib. 539.)

3 & 4 Will. 4,  
c. 27, s. 44.

A party insisting upon the Statute of Limitations, as a bar to a demand against him, must set up that defence upon the first opportunity; otherwise a party is contesting a question of right, when in fact there was no legal question to be decided; for if the statute be a bar, the cause ought to stop when the defence is set up. (*Costello v. Burke*, 2 Jones & L. 669.)

Pleading the  
Statutes of Limi-  
tation in equity.

It seems that at law a defendant may have the benefit of a Statute of Limitations, which extinguishes a right, without pleading it. (*De Beauvoir v. Owen*, 5 Exch. 166.) It has been decided in equity that, upon motion for a decree, a defendant may have the benefit of 3 & 4 Will. 4, c. 27, although it is only set up by his affidavit (*Green v. Snead*, 30 Beav. 231); and the same has been held in Ireland. (*Shaw v. Keighron*, L. R., 8 Eq. 574.) In *Rock v. Callen* (6 Hare, 581), which was a case under 3 & 4 Will. 4, c. 27, s. 42, *Wigram*, V.-C., laid down that it would be improper to permit a defendant at the hearing of the cause to insist upon the statute if he has not set up that defence upon the pleadings. In *Cummins v. Adams* (2 Ir. Eq. R. 393), it was said that when a defendant seeks to have the advantage of the 42nd section of 3 & 4 Will. 4, c. 27, he must, in general, rely upon it in his pleading. But in that case a defendant who omitted to rely upon the statute, expressly denied the existence of the debt in his answer in such terms as were considered to amount substantially to a reliance upon the statute, and the court did not deprive him of the benefit of the statute. In a case which arose under 21 Jac. 1, c. 16, a defendant, not being required by the bill to do so, did not file any answer. The cause came on upon a motion for a decree, when the defendant at the bar pleaded the statute, and the court, holding that a defendant who intends to set up such a defence ought to do so by answer, disallowed the objection thus taken. (*Holding v. Barton*, 1 Sm. & G., App. 25. And see *Harrison v. Bormell*, 10 Sim. 382; *Ridgway v. Wharton*, 3 D., M. & G. 692.)

Must the defence  
be raised on the  
pleadings.

Where a bill was filed for an account of mesne rents and profits, under circumstances in which 21 Jac. 1, c. 16, was applicable by analogy, the account was not limited to six years, but was taken from the time the plaintiff's title accrued, because the defence of the statute was not raised by the pleadings. (*Monypenny v. Bristow*, 2 Russ. & M. 117.)

When it appears on the face of the bill that the cause of the suit accrued more than the statutory period before the filing of the bill, a defendant need not plead the statute, but may demur. (*Smith v. Fox*, 6 Hare, 386; *Prance v. Simpson*, Kay, 680; *Rolfe v. Gregory*, 8 Jur., N. S. 606; 10 W. R. 711. And see the earlier authorities collected, Daniell, Ch. Pr. 479.) But it seems that he cannot raise the objection of lapse of time, without reference to the statute, by demurrer. (*Deloraine v. Browne*, 3 Br. C. C. 643; *Wilson v. Furness R. Co.*, 18 W. R. 89.)

The defence may  
be raised by de-  
murrer.

The defence of the statute may also be raised by plea; as to which see Daniell, Ch. Pr. 551, *et seq.* The cases in which it is necessary that a plea should be supported by answer, and the rules for framing a joint plea and answer, are given in Daniell, Ch. Pr. 528, *et seq.* A plea of this statute ought not to deny by answer statements in the bill, which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea ought to be confined to those statements in the bill, which allege facts ancillary to or as affording evidence of statements which are directly negatived by the requisite averments in the plea. (*Dearman v. Wyche*, 9 Sim. 570.) A plea relying upon the 40th section of this act should both state the commencement of the period of limitation and negative the cases of exception in that section. A plea was held defective which did not expressly aver that the action was not brought within twenty years next after a present right to receive the sum secured by the judgment had accrued. (*Fortescue v. McKone*, 1 Jebb & S. 341.) Averments in a plea of the Statute of Limitations, negativing facts that would defeat the plea, but which are not stated in the bill, are surplusage, but do not vitiate the plea. A plea of the Statute of Limitations need not negative the usual *general* allegation that the defendant has in his custody documents relating to the matters contained in the bill. (*Forbes v. Shelton*, 8 Sim. 335.)

By plea.



3 & 4 Will. 4,  
c. 27, s. 44.

Plea to a bill of  
discovery.

The Statute of Limitations, notwithstanding it is a defence at law, may be pleaded to a bill of discovery in aid of an action brought, provided it has been pleaded to the declaration. If the action was commenced before the bill was filed, the plea must aver that the cause of action did not accrue within six years before the action was brought. (*Macgregor v. East India Co.*, 2 Sim. 452.) A plea of the Statute of Limitations to a bill of discovery in aid of an ejectment was allowed. (*Scott v. Broadwood*, 2 Coll. C. C. 447.) Where no relief can be had at law, on account of lapse of time, a suit for discovery and relief in an action at law cannot be sustained. (*Fisher v. Price*, 11 Beav. 199.) Where a bill for redemption of a mortgage stated the payment of interest within twenty years, and the defendant simply pleaded the statute, it was held that the plaintiff, after replication, might compel the production of documents in the defendant's possession to prove the statement of payment of interest, although the bill contained no charge as to documents. (*Parkinson v. Chambers*, 1 K. & J. 72.)

A plea, pleading first the statute 21 Jac. 1, c. 16, and afterwards the stat. 9 Geo. 4, c. 14, is not double; for those acts, although passed at different times, are to be considered as making jointly one law. (*Forbes v. Shelton*, 8 Sim. 335.) Leave was given to file a double plea to an ejectment bill, namely, not heir, and secondly the Statute of Limitations. (*Bampton v. Birchall*, 4 Beav. 558.) To a bill filed for an account of coal against the representatives of the lessees of a mine, the defendants pleaded the Statute of Limitations in respect of the account, and averred that they had not taken upon themselves the performance of the covenants in the lease. It was held, that this being a plea of the statute, and a plea of liability never incurred, the two things were inconsistent. The defendants also pleaded the statute as to further accounts of coal obtained from land not comprised in the original lease; and the defendants then averred that they had practised no fraud or concealment in obtaining such coal. It was held, that this raised an issue not contained in the bill, and not supporting the plea, and was inconsistent with the plea. Separate pleas may be put in to separate parts of a bill. (*Emmott v. Mitchell*, 14 Sim. 432.) Where a bill was filed for the accounts of an alleged partnership, a plea of no partnership, accompanied by an answer raising the defence of laches and the Statute of Limitations, was held bad for duplicity. (*Mansel v. Feeny*, 2 J. & H. 313.)

By answer.

A defendant insisting upon the benefit of the statute by answer, shall, at the hearing, have the like benefit of the statute as if he had pleaded it. (*Norton v. Turvill*, 2 P. Wms. 144.) And where the defendants by their answer claimed the benefit of the "Statute" of Limitations, it was held that they were entitled to the benefit of any statute of limitations applicable to their case. (*Adams v. Barry*, 2 Coll. 290.) An application for leave to file a supplemental answer for the purpose of enabling the defendant to raise the defence of the Statute of Limitations was refused. (*Perovial v. Caney*, 14 Jur. 473.)

In the joint answer of a husband and wife to a creditor's bill for payment out of an estate of which the wife was administratrix, the wife alone set up the Statute of Limitations as a defence to the suit: it was held, that the interest of the wife was not so merged in the coverture that the court would disregard her separate defence, and that the statute was for the protection of the estate sufficiently pleaded by the wife alone. (*Beeching v. Morphem*, 8 Hare, 129.) And a plea of the statute by a tenant in tail was held, under the circumstances of the case, to enure for the benefit of all the defendants. (*Morley v. Morley*, 5 D., M. & G. 610.)

Proceedings under  
5 & 6 Will. 4,  
c. 55.

As to pleading the statute in proceedings under 5 & 6 Will. 4, c. 55 (Ireland), see *Costello v. Burke*, 2 J. & Lat. 665. In *Welsh v. Welsh* (1 Jones & Carey, 232), it was decided that a defendant who does not rely on the statute in his answer cannot resort to it in his discharge. This was doubted in *Drought v. Jones* (2 Ir. Eq. R. 306); but it seems to be approved by Lord St. Leonards. (R. P. Stat. 151.)

Pleading the  
statutes at law.

As to pleading the statutes of limitation at law, see Bullen & Leake, 689, *et seq.*; Darb. & Bos. Stat. Lim. 427.

By the Common Law Procedure Act, 1852, so much of the act 2 & 3 Will. 4, c. 39, s. 10, as relates to the duration of writs and to alias and pluries writs, and to the proceedings necessary for making the first writ in any action available to prevent the operation of any statute, whereby the time for the commencement of any action may be limited, is repealed. (15 & 16 Vict. c. 76, s. 10.)

3 & 4 Will. 4,  
c. 27, s. 44.

Process to save  
the statute at law.

No original writ of summons shall be in force for more than six months from the day of the date thereof, including the day of such date, but if any defendant therein named may not have been served therewith, the original or concurrent writ of summons may be renewed at any time before its expiration, for six months from the date of such renewal, and so from time to time during the currency of the renewed writ, by being marked with a seal bearing the date of the day, month and year of such renewal, such seal to be provided and kept for that purpose at the offices of the masters of the said superior court, and to be impressed upon the writ by the proper officer of the court out of which such writ issued, upon delivery to him by the plaintiff or his attorney of a *præcipe*, in such form as has heretofore been required to be delivered upon the obtaining of an alias writ; and a writ of summons so renewed shall remain in force and be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, and for all other purposes, from the date of the issuing of the original writ of summons. (15 & 16 Vict. c. 76, s. 11; 16 & 17 Vict. c. 113, s. 28, as to Ireland.)

Renewal of writ  
of summons to  
save the Statute  
of Limitations,  
and for other  
purposes.

Within six months of issuing a writ of summons the plaintiff's attorney paid the proper fees at the office for its renewal under sect 11 of the 15 & 16 Vict. c. 76, but he inadvertently neglected to get the seal of the court impressed upon it; after the lapse of six months the omission was discovered. There having been no default in their officer, the court refused to order the seal to be impressed *nunc pro tunc*, in order to prevent the running of the statute. (*Nazer v. Wade*, 31 Law J., Q. B. 5.)

Under that act a concurrent writ of summons can only be issued within six months from the time of issuing the original writ. (*Cole v. Sherard*, 11 Exch. 482.) Where a writ of summons has been issued before that act came into operation, and has been duly continued up to that time, the first renewal under that act is *quasi* the original writ. (*Ib.*)

It is questionable whether the six months for which the renewed writ of summons under the 11th section of the 15 & 16 Vict. c. 76, is to be available, are to be reckoned inclusively or exclusively of the date of the renewal. The officer, assuming the former to be the proper construction, having declined to seal a writ which upon that assumption was tendered a day too late, the court, without expressing any opinion as to whether or not he had rightly construed the act, directed him to seal it *nunc pro tunc*. (*Black v. Green*, 15 C. B. 262; *Anon.*, 18 Jur. 1017; 24 Law J., C. P. 1; *S. P.*, *Anon.*, 18 Jur. 1104; 24 Law J., Q. B. 23.)

The court will not allow a writ of summons resealed too late to take a case out of the provisions of the Statute of Limitations by mistake of the attorney, to be resealed *nunc pro tunc* for this purpose. (*Bailey v. Owen*, 9 W. R. 128.)

As to process to save the Statute of Limitations, see 2 Arch. Pr., Q. B., by Prentice, 12th ed., pp. 1245, 1246, and *Black v. Green*, 15 C. B. 262.

No judgment in any cause shall be reversed or avoided for any error or defect therein unless error be commenced or brought and prosecuted with effect within six years after such judgment signed or entered of record. (15 & 16 Vict. c. 76, s. 146; 16 & 17 Vict. c. 113, s. 166, Ireland.)

Limitations in  
practice at law.

Error to be  
brought within  
six years.

Proviso for dis-  
abilities.

If any person entitled to bring error as aforesaid shall be at the time of such title accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person shall be at liberty to bring error as aforesaid, so as such person commences or brings and prosecutes the same with effect within six years after coming to or being of full age, discover, of sound memory or return from beyond the seas, and if the opposite party shall at the time of the judgment signed or entered of record be beyond the seas, then error may be brought, provided the proceedings be commenced and prosecuted with effect within six years after the return of

3 & 4 Will. 4,  
c. 27, s. 44.

Error in revenue  
cases.

Limitations in  
practice in equity.

Enrolment of  
decree.

Appeal and re-  
hearings in the  
Court of  
Chancery.

Appeals to the  
House of Lords.

Revivor and  
supplement.

Bills of review.

Decree carried  
into execution  
after lapse of  
time.

such party from beyond seas. (15 & 16 Vict. c. 76, s. 147; 16 & 17 Vict. c. 113, s. 168, Ireland.)

No judgment in any cause on the revenue side of the Exchequer shall be reversed or avoided for any error or defect therein, unless error be commenced and prosecuted with effect within six years after such judgment signed or entered of record: provided, that if the party entitled to bring error be at the time of such title accrued within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, the court or judge may allow error to be brought at any other time. (22 & 23 Vict. c. 21, s. 18.)

No enrolment of any decree or order shall be allowed after the expiration of five years from the date thereof. But the Lord Chancellor or the Lords Justices shall be at liberty on motion and notice to all parties, where it shall appear to him or them under the peculiar circumstances of the case to be just and expedient, to enlarge that period. [Cons. Ord. XXIII., Rule 28. See *Beavan v. The Countess of Mornington*, 8 H. L. C. 525; and the cases cited in Morgan, Ch. Acts and Orders, 4th ed. 497.]

No appeal from any decree or order, or any rehearing of the case upon which such decree or order is founded, shall be allowed, unless the same is set down for hearing, and the requisite notice thereof duly served within five years from the date of such decree or order respectively. But the Lord Chancellor or the Lords Justices shall be at liberty, where it shall appear to him or them under the peculiar circumstances of the case to be just and expedient, to enlarge that period. (Cons. Ord. XXXI., Rule 1. See note (b), Morgan, Ch. Acts and Orders, 4th ed. 521.)

No petition of appeal from any decree or sentence of any court of equity in England or Ireland will be received by the House of Lords, after two years from the signing or inrolling, or extracting of such decree or sentence, and the end of fourteen days from the first day of the meeting of parliament next ensuing such two years, unless the person entitled to such appeal be within the age of twenty-one years, or covert, *non compos mentis*, imprisoned, or out of Great Britain and Ireland; in which case such person may bring his appeal within two years next after his full age, discoverture, coming of sound mind, enlargement out of prison, or coming into Great Britain or Ireland, and fourteen days from the first day of the meeting of parliament next ensuing such two years. In no case shall any person be allowed a longer time, on account of mere absence, to lodge an appeal, than five years from the date of the last decree or interlocutor appealed against. (Standing Order, H. L., No. CIII.; Lords' Journ., 24th May, 1725; 22nd June, 1829; 6 Cl. & Fin. 976. See *De Burgh v. Clark*, 4 Cl. & Fin. 562; *Attwood v. Small*, 6 Cl. & Fin. 232, 309; *Beavan v. The Countess of Mornington*, 8 H. L. C. 525.)

The statutes of limitation may be pleaded to a bill of revivor, provided there has been no decree in the original suit. (Mitford, Pl. 272. *Bland v. Davison*, 21 Beav. 312.) After decree the right to file a bill of revivor or supplement is not barred by the statutes, and depends on the discretion of the court. (*Alsop v. Bell*, 24 Beav. 451; *Parkinson v. Lucas*, 28 Beav. 627.)

Bills of review have been generally disallowed after twenty years have elapsed from the time of pronouncing a decree which has been signed and inrolled, by analogy to the statute 10 & 11 Will. 3, c. 14. (4 Burr. 1963; 1 Br. P. C. 95; 5 Br. P. C. 460; 6 Br. P. C. 395.) But persons under any of the disabilities specified in that statute are allowed the further period of five years after their removal. (*Lytton v. Lytton*, 4 Br. C. C. 458.)

A decree establishing a charge was carried into execution, though not proceeded on for forty years, where there was an acknowledgment within twenty years of the subsistence of the charge. (*Barrington v. O'Brien*, 1 Ball & B. 173; 2 *Ib.* 144; see 19 Ves. 587.) A decree to carry into execution an erroneous decree being reversed, the cause was remitted, with leave to amend the bill, by adding parties and making a better case as to the original claim, notwithstanding the lapse of sixty years from the date of the deed by which the debt was secured, and of forty years from the date of the erroneous decree. As between the plaintiff creditor and the debtor

there is no presumption from lapse of time, in such a case and upon such a state of the pleadings, that the debt has been paid; but other creditors, whose debts ought to have been provided for by the decree, might have a right to raise that question. (*Hamilton v. Houghton*, 2 Bligh, 169.)

No defendant in any court holden under the act 9 & 10 Vict. c. 95, shall be allowed to set off any debt or demand claimed, or recoverable by him from the plaintiff, or to set up by way of defence, and to claim and have the benefit of infancy, coverture, or any Statute of Limitations, or of his discharge under any statute relating to bankrupts, or any act for relief of insolvent debtors, without the consent of the plaintiff, unless such notice thereof as shall be directed by the rules made for regulating the practice of the court shall have been given to the clerk of the court; and in every case in which the practice of the court shall require such notice to be given, the clerk of the court shall, as soon as conveniently may be after receiving such notice, communicate the same to the plaintiff by the post, or by causing the same to be delivered at his usual place of abode or business, but it shall not be necessary for the defendant to prove on the trial that such notice was communicated by the plaintiff to the clerk. (9 & 10 Vict. c. 95, s. 76.)

88. Where the defendant intends to rely on (*inter alia*) the Statute of Limitations, his notice shall contain the particulars hereinafter mentioned, with reference to such grounds of defence; provided, that in case of non-compliance with those rules which apply to such six grounds of defence, and of the plaintiffs not consenting at the hearing to permit the defendant to avail himself of such defence, the judge may, on such terms as he shall think fit, adjourn the hearing of the cause, to enable the defendant to give such notice.

92. Where the defendant intends to rely on the defence of any Statute of Limitations, he shall give notice thereof in writing to the registrar of the court, at least five clear days before the return day of the summons.

97. In all cases mentioned in the last six rules, the party thereby required to give the notice shall, unless otherwise expressly ordered, at least five clear days before the day of hearing, deliver to the registrar of the court as many copies thereof as there are opposite parties, and an additional copy to be filed; and the registrar shall, within twenty-four hours from the time of receiving the same, transmit by post one copy of such notice to each of the opposite parties.

220. Successive summonses may be issued without leave of the court for the purpose of preventing the operation of any statute whereby the time for the commencement of any action is or may be limited, and the first and each subsequent summons shall be in force for twelve calendar months from the time of issuing the same, including the day of such issuing; and such subsequent summons shall be issued before the expiration of the previous summons, and entered in the plaint book of the court: provided that on entering the plaint in the first instance, the usual fee shall be paid, but for such subsequent summonses no further fee shall be paid, nor shall it be necessary that any attempt be made to serve the first summons or any successive summonses, unless the plaintiff require the same, and such successive summonses shall be a continuance of the action on and from the day on which the first summons was issued.

221. Where a summons has been served in due time to prevent the operation of any Statute of Limitations, and either party dies after such service, and after the lapse of the period within which it is provided that an action may be brought, proceedings may be taken by or against the surviving party, or by or against the personal representative of the deceased party, within one year from the day of holding the court at which the summons required the defendant to appear. (Pollock & Nicol's County Court Practice, pp. 396, 464, 482.)

3 & 4 Will. 4,  
c. 27, s. 44.

Practice in the  
county court as to  
the Statutes of  
Limitation.

Notices to be  
given to the clerk  
of county court  
of special de-  
fences, who shall  
communicate the  
same to the  
plaintiff.

Rules of the  
county court as  
to the Statute of  
Limitations.

Summonses in  
county court to  
save Statute of  
Limitations.

3 & 4 Will. 4,  
c. 27, s. 40.

## II. LIMITATION OF TIME FOR THE RECOVERY OF MONEY CHARGED ON LAND, LEGACIES, ARREARS OF DOWER, RENT AND INTEREST.

### *Charges and Legacies.*

Money charged upon land and legacies to be deemed satisfied at the end of twenty years, if there shall be no interest paid or acknowledgment in writing in the meantime.

40. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage (*a*), judgment (*b*), or lien (*c*), or otherwise charged upon or payable out of any land or rent, at law or in equity (*d*), or any legacy (*e*), but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same (*g*), unless in the meantime some part of the principal money, or some interest thereon, shall have been paid (*h*), or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or *his agent*, to the person entitled thereto, or his agent (*i*); and in such case no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given (*k*).

This section extended to cases of claims to estates of intestates.

The act 23 & 24 Vict. c. 38, s. 13, enacts, "that after the thirty-first day of December, one thousand eight hundred and sixty, no suit or other proceeding shall be brought to recover the personal estate, or any share of the personal estate, of any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment or acknowledgment, or the last of such accountings, payments or acknowledgments, if more than one was made or given" (*f*).

### MORTGAGES.

(*a*) This section relates to actions brought to recover money, and these actions, in case of mortgages, are either upon the covenant usually inserted in the mortgage deed, or on the bond which commonly accompanies it. (*Doe d. Jones v. Williams*, 5 Ad. & Ell. 296.) This section may be pleaded to a bill of foreclosure, which is in fact a suit for the recovery of the money secured by the mortgage. (*Dearman v. Wyche*, 9 Sim. 570; approved of in *Du Vigier v. Lee*, 2 Hare, 326; and *Sinclair v. Jackson*, 17 Beav. 405.) Lord *St. Leonards*, however, considers that a foreclosure suit is not within this section. (*Wrixon v. Vize*, 3 Drn. & War. 104; Sugd. R. P. Stat. 121.)

Presumption of payment.

Before this statute it seems that if the mortgagor continued in possession, and there had been neither payment nor demand of any principal or interest for twenty years, that it was sufficient to raise the presumption of payment (1 Ch. R. 59, 105; *Trash v. White*, 3 Br. C. C. 289; *Chris-*



*topher v. Sparke*, 2 Jac. & Walk. 228; *Cooke v. Soltau*, 2 Sim. & Stu. 154; *contra Joplis v. Baker*, 2 Cox, 118; *Leman v. Newnham*, 1 Ves. sen. 51); but such presumption was liable to be rebutted by circumstances, and payment of interest on part of the debt was sufficient to keep the whole alive. (*Loftus v. Smith*, 2 Sch. & Lef. 642.)

3 & 4 Will. 4,  
c. 27, s. 40.

(b) This section applies to a case in which a judgment is sought to be enforced against the personal estate, as well as to a case in which it is sought to be enforced against the land of the debtor. The intention of the legislature was that no proceeding whatever should be taken on a judgment after the lapse of twenty years from the time when the money secured by it became due, unless there was some payment on account or acknowledgment in writing within that period. (*Watson v. Birch*, 15 Sim. 523; 16 L. J., Ch. 188; but see *Henry v. Smith*, 2 Dru. & War. 391.) Proceedings to revive a judgment are also within this section. (*Watters v. Lidwill*, 9 Ir. L. R. 362.) A writ of *scire facias*, however, will issue to revive a judgment given as a collateral security for the payment of an annuity, although more than twenty years have elapsed since it was signed, if payments of the annuity within that time have been made. (*Williams v. Welch*, 3 Dowl. & L. 565.)

JUDGMENTS.

In *Wall v. Walsh* (I. R., 4 C. L. 103), it was held that a writ of revivor is not an action upon a judgment within sect. 20 of the C. L. P. Act, 1853 (Ireland), and that the period of limitation in such proceedings is still regulated by 3 & 4 Will. 4, c. 27, s. 40.

A *scire facias* on a judgment is not a mere continuation of a former suit, but creates a new right. A judgment was obtained in 1813. It was revived by *scire facias*, in 1828. A bill was filed in 1838, in the Court of Exchequer in Ireland, against the representatives of the debtor, praying for an account, and that the principal and interest due on the judgment might be satisfied out of the debtor's personal or real estate. On a plea of this statute, it was held, that the *scire facias* created new rights, and that the plea was no bar to the suit. (*Farrell v. Gleeson*, 11 Cl. & Fin. 702. See *Farran v. Beresford*, 10 Cl. & Fin. 319.) Revivor of a judgment on a *scire facias*, although there be no change of parties, gives a new present right to the conusee so as to prevent the operation of this section. (*Re Blake*, 2 Ir. Ch. R. 643. See *Darb. & Bos. Stat. Lim.* 123.) Where an action of debt is brought on a judgment and judgment recovered, time runs against the former judgment from its own date, and not from the date of the latter judgment. (*Watters v. Lidwill*, 9 Ir. L. R. 362; *Kealy v. Bodkin*, *ib.* 383.) A revivor by *scire facias* against the conusor of a judgment is sufficient to keep the judgment alive as against the terre-tenants of an estate of which the conusor was seised at the date of the rendition of the judgment, but which he had conveyed away before the issuing of the *scire facias*. (*Murray v. Clarke*, 4 Ir. C. L. R. 610.) It seems, however, that a judgment of revivor will not revive the original judgment as against lands of the conusor which have come previous to the revivor into the hands of persons neither parties nor privies to the revivor; nor will a judgment of revivor against an executor revive the original judgment against the heir, or *vice versa*. (*Kirkwood v. Lloyd*, 11 Ir. Eq. R. 561; 12 Ir. Eq. R. 585; *Re Bodkin*, 12 Ir. Ch. R. 61.) As to revivor against a person in possession of lands under a settlement, see *Ryan v. Cambie*, 2 Ir. Eq. R. 328; *Franks v. Mason*, 9 Ir. Eq. R. 358.

Revivor.

Lands bound by  
a revivor of  
judgment.

For the proceedings to revive a judgment see 15 & 16 Vict. c. 76, ss. 128—134; Arch. P., Q. B., by Prentice, pp. 1112—1129 (11th ed.); and 19 & 20 Vict. c. 97, s. 10, by which a person entitled to revive a judgment, &c. is not entitled to any longer time for doing so by reason of his being beyond the seas, or imprisoned at the time his right accrued.

A decree of a court of equity for the payment of a specific sum is included under judgment in this section. (*Dunne v. Doyle*, 10 Ir. Ch. R. 502.)

Decree in equity.

The Statute of Limitations does not begin to run against a judgment entered on a *post obit* bond, until the death occurs upon which the bond is payable. (*Barber v. Shore*, 1 Jebb & S. 610; *Tuckey v. Hawkins*, 4 C. B. 655, *post*; *Gilman v. Chute*, 11 Ir. L. R. 442; *Kennedy v. Whaley*, 12 Ir. L. R. 54.) As to the running of time in the case of judgments entered

Judgment on *post obit* bond, when time begins to run.



8 & 4 Will. 4,  
c. 27, s. 40.

When time ceases  
to run in case of  
claims brought in  
under decree in  
administration  
suit.

*Berrington v.  
Evans.*

Creditors not  
coming in in the  
ordinary course.

*Sterndale v.  
Hankinson.*

Trust.

Presumption of  
satisfaction of  
judgments.

on bonds, see *Re Earl of Kingston's Estate*, I. R., 8 Eq. 485; *Re Keay's Estate*, I. R., 3 Eq. 659.

When a judgment creditor had allowed twenty years to elapse without taking steps to recover his debt, and then ascertained that during the twenty years a suit had been instituted for the benefit of the specialty creditors of his debtor, and that under a decree in the suit they had received part payment of their debts, and that there was money in court available for payment of the remainder: it was held, that he was barred by this section of the act from proving his debt before the master, and receiving payment rateably with the other creditors, the statute providing that such a claim should not be made after twenty years, unless in the meantime part of the money, either principal or interest thereon, should have been paid, or some acknowledgment should have been given in writing. Those being the only exceptions in the act, in which nothing was said of the case of a bill being filed by one creditor for the benefit of the rest, the court considered the case as a proceeding in equity to recover money upon a judgment upon which twenty years had run, and that it came within none of the exceptions of the statute. (*Berrington v. Evans*, 1 Y. & Coll. 484.) A creditor who does not come in regularly to prove his demand under the decree in a suit instituted by another creditor on behalf of all the creditors, cannot rely on the suit as having been his from the beginning, so as thereby to avoid the bar of 3 & 4 Will. 4, c. 27. (*O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390. See also *Watson v. Birch*, 15 Sim. 523; *Hutchins v. O'Sullivan*, 11 Ir. Eq. R. 443; *Forster v. M'Kenzie*, 17 Beav. 414.)

Before the passing of this statute it was held that although a creditor's demand was in strictness barred by the rule of equity and by analogy to the old Statute of Limitations, yet, that rule would not be applied against him, if he had delayed his suit, relying on the prosecution of an existing suit by another creditor on behalf of himself and other creditors. (*Sterndale v. Hankinson*, 1 Sim. 393; followed in *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 361; *Brown v. Lynch*, 4 Ir. Eq. R. 316.) The doctrine of *Sterndale v. Hankinson* applies to suits instituted after as well as before the passing of 3 & 4 Will. 4, c. 27. (*Carroll v. Darcy*, 10 Ir. Eq. R. 321. See also *Birmingham v. Burke*, 2 J. & Lat. 714.) Lord St. Leonards (R. P. Stat. 126) considers, that perhaps *Sterndale v. Hankinson* may be still law, although the rule is to be cautiously applied since 3 & 4 Will. 4, c. 27. The suit must in effect be the suit of the creditor, one under which he would have a clear right to prosecute his demand, and of which he was fully aware; and his demand must be such as would not have been barred if he had himself filed the bill actually before the court; and, irrespective of the statute, he would be bound in order to avail himself of the suit to conform to the general orders of the court, and not to be guilty of gross laches. (See Darb. & Bos. Stat. Lim. 456; Fisher on Mortgages, 378.)

A mortgagee's suit for foreclosure and sale, instituted in 1811, during the lifetime of a debtor, is not such a suit as will prevent the Statute of Limitations running against a judgment creditor of that debtor, inasmuch as the judgment creditor could not have instituted such a suit. (*Bennett v. Barnard*, 12 Ir. Eq. R. 229.) See, as to the effect of pending suits in stopping the running of time under the statute, the note to sect. 24, ante, p. 199.

In *Dillon v. Cruise* (3 Ir. Eq. R. 70), it was decided, that where a trust is created for the payment of debts, the rights of a judgment creditor to the benefit of that trust is not affected by the 40th section of this act.

Before this statute it appears that if a judgment creditor had lain by for twenty years without any effort to enforce his judgment, and it had not been acknowledged by the debtor within that time, it was presumed to be satisfied. (Peake's Ev. 25, n.; Coote on Mortgages, p. 76. See 4 Anne, c. 16, s. 12; *Kemys v. Ruscomb*, 2 Atk. 45.) It was held, that the presumption arising from lapse of time of a judgment having been satisfied, was not rebutted by evidence of the debtor having been in extremely embarrassed circumstances, and, in the opinion of those who knew him, incapable of paying the debt secured by the judgment. (*Willaume v. Gorges*, 1 Campb. 217. See also *Grenfell v. Girdlestone*, 2 You. & Coll. 662; *White v. Parnter*, 1 Knapp, 228, 229.)

(c) A vendor's lien for unpaid purchase-money is within this section; and not being an express trust within sect. 25, his right to recover will be barred in twenty years. (*Toft v. Stephenson*, 7 Hare, 1; 1 D., M. & G. 28.) As to when time commences to run, see *Toft v. Stephenson*, 5 D., M. & G. 735.

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c. 27, s. 40.

VENDOR'S LIEN.

Where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be conveyed (*Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth v. Symmons*, 15 Ves. 329), or be not conveyed (*Smith v. Hibbard*, 2 Dick. 730; *Charles v. Andrews*, 9 Mod. 152), and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*Winter v. Lord Anson*, 3 Russ. 488), gives the vendor a lien on the land for the money. But the application of this doctrine depends upon circumstances showing the intention of the parties; see the principle stated by *Bacon*, V.-C. (*Re Albert, &c. Co., Ex parte Western, &c. Society*, L. R., 11 Eq. 179.)

Nature of the  
lien.

Thus, where a vendor took a mortgage of part of the estate, his lien over the rest of the estate was held to be excluded (*Capper v. Spottiswoode*, Tambl. 21); and where he took a mortgage of the whole estate for part of the unpaid purchase-money his lien for the balance was lost. (*Bond v. Kent*, 2 Vern. 281. See 1 Sch. & Lef. 135.) So there is no lien where the vendor takes a mortgage of another estate (6 Ves. 760), or a charge upon stock (*Nairn v. Prowse*, 6 Ves. 752); nor where the consideration for the conveyance was expressed to be the covenant for the payment of an annuity and a sum in gross in the event of the purchaser's marriage. (*Clark v. Royle*, 3 Sim. 499. See *Stuart v. Ferguson*, 1 Hayes, 452.) Nor where a vendor, in lieu of the price of 3,000*l.*, agreed to accept an annuity of 100*l.* a year for the joint lives of the vendor's intended husband and herself, in case the purchasers should so long live, the purchaser engaging that his personal representatives should within three months after his decease, in certain events but not in all events, pay a further sum of 3,000*l.* (*Parrott v. Sweetland*, 3 Myl. & K. 655.)

When lost.

So where A. agreed to purchase an estate from B., and upon the estate being conveyed to grant a life annuity to B. to be secured by bond, it was held that B. had no lien. (*Dixon v. Gayfere*, 21 Beav. 118; 1 De G. & J. 655.) See further, as to lien in the case of a sale in consideration of an annuity, *Matthew v. Bowler*, 6 Ha. 110; *Buckland v. Pocknell*, 13 Sim. 406. And where land was purchased under the Lands Clauses Act for the construction of a public work, the consideration being a yearly rent-charge, it was held there was no lien. (*Earl of Jersey v. Briton Ferry, &c. Co.*, L. R., 7 Eq. 409.) The vendor was, under the circumstances, held to have lost his lien as against the mortgagees of the purchaser in *Cood v. Pollard*, 9 Price, 544; *Smith v. Evans*, 28 Beav. 59. For the lien in the case of purchases with trust money, see *White v. Wakefield*, 7 Sim. 401; *Muir v. Jolly*, 26 Beav. 143. A covenant between vendor and purchaser that the purchase-money should be repaid within two years after re-sale discharges the vendor's lien. (*Ex parte Parker*, 1 Glyn & J. 228.)

The lien, however, may subsist notwithstanding a personal security is given for the money, whether by bond, bill of exchange (*Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 Ves. & B. 306; *Ex parte Peake*, 1 Madd. 346) or promissory note. (*Gibbons v. Baddall*, 2 Eq. Cas. Abr. 682, n. b.) The taking drafts which are dishonoured will not *per se* deprive the vendor of his right of lien. (*Hughes v. Kearney*, 1 Sch. & Lef. 136; see *Grant v. Mills*, 2 Ves. & B. 306.) A vendor was held not to have waived his lien on the estate sold, by taking the promissory note of the vendee and receiving its amount by discount. (*Ex parte Loaring*, 2 Rose, 79.) And where part of the purchase-money for an estate was, in pursuance of the agreement for the purchase, secured by the bond of the purchaser payable after the death of the vendor with interest, it was held that the vendor had a lien for the amount. (*Winter v. Lord Anson*, 3 Russ. 488.) So where a purchaser gave a bond for the purchase-

When not lost.

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c. 27, s. 40.

Against whom it  
prevails.

Is assignable.

In the case of  
sales to a railway  
company.

At common law.

MONEY CHARGED  
UPON OR PAYABLE  
OUT OF LAND.

money, payable by instalments, the lien was not lost. (*Collins v. Collins*, 31 Beav. 347.) Nor is the lien lost by an improper payment to the vendor's solicitors. (*Wrouth v. Dames*, 25 Beav. 369.)

The lien prevails against the purchaser and his heir; against volunteers claiming under him; against sub-purchasers with notice; sometimes against sub-purchasers without notice. (*Rice v. Rice*, 2 Drew. 85; Sugd. V. & P. 682, 14th ed.) And against assignees whether in bankruptcy or claiming under an assignment for the benefit of creditors. (*Famell v. Heelis*, Amb. 724.)

The lien is assignable by parol (*Dryden v. Frost*, 3 Myl. & Cr. 670), but the assignee will take it subject to any prior incumbrances created by the vendor. (*Lacy v. Ingle*, 2 Ph. 413.)

A vendor of land to a railway company who have entered and used it for the purpose of their railway, is entitled to the same lien on land for the unpaid purchase-money and the same remedies for enforcing it as an ordinary vendor. See *Wing v. Tottenham, &c. R. Co.*, L. R., 8 Ch. 740 (where the vendor was held entitled to a sale); *Munns v. Isle of Wight R. Co.*, L. R., 5 Ch. 414 (where an order was made for a receiver), and the cases there quoted.

The word "mortgage" in 17 & 18 Vict. c. 113, has been extended by 30 & 31 Vict. c. 69, so as to include the lien. As to a lien on real estate for an unpaid legacy, see *Barker v. Barker*, L. R., 10 Eq. 438.

An unpaid vendor has not at law any lien on the title deeds for his purchase-money. (*Goode v. Burton*, 1 Ex. 189. See also *Hope v. Booth*, 1 B. & Ad. 498; *Baker v. Dewey*, 1 B. & C. 704; *Lampon v. Corke*, 5 B. & Ad. 606; *Oxenham v. Esdaile*, 3 Y. & J. 362; *Hooper v. Ramsbottom*, 4 Camp. 121; *Harding v. Ambler*, 3 M. & W. 279.)

See further on this subject, *Mackreth v. Symmons*, 1 White & Tud. L. C. Eq. 289.

(d) It was questioned in *Pawsey v. Barnes* (20 L. J., Ch. 393; 15 Jur. 943), whether the share of the produce of real estate, devised to trustees upon trust to sell, was a sum charged upon or payable out of land within this section. (See *Bowyer v. Woodman*, L. R., 3 Eq. 313, p. 252, *post*.)

In 1807, a devisee of one undivided third part of real estates, which were subject to a term of 5,000 years to raise money for payment of debts and legacies created by the will of a testator, executed a mortgage in fee of such third part to bankers in trust to raise by sale or mortgage a debt due to them within three calendar months with interest, and also from time to time to raise any further advances which they might make. In 1809, a suit was instituted for administration of the estate of the testator. The mortgagees were not parties to that suit, they being in ignorance of their interest; but they were made parties to a supplemental suit in 1841. No steps had been taken by the mortgagees to raise any money under the deed of 1807: it was held, that their claim was barred by the 2nd, 24th and 40th sections of this act, as no proceedings had been taken to substantiate the claim, and no part of principal or interest had been paid. The existence of the prior term did not affect the question, because the statute makes no distinction between a reversion and property in immediate possession. (*Humble v. Humble*, 24 Beav. 535; 3 Jur., N. S. 1289. See *Re Birmingham's Estate*, L. R., 5 Eq. 147, *ante*, p. 163.)

Money due on a bond by an ancestor is not a sum of money payable out of land within this section. (*Roddam v. Morley*, 2 K. & J. 336; 1 De G. & J. 1.) A testator being indebted by bond devised real estate to his son for life, with remainder, subject to a term for the payment of legacies, to his grandson in tail, and died. Upwards of twenty years after the date of the latest of the bonds the tenant for life and his assignee for value filed a bill against the tenant in tail and the legatees, alleging that the tenant for life had paid off the bonds and seeking to stand in the shoes of the obligees as against the inheritances. The tenant in tail pleaded the statute, the other legatees did not. Held, that the payment of the bonds by the tenant for life did not constitute him an incumbrancer on the estate, and that the bonds themselves being more than twenty years old the presumption was

that they had been satisfied. (*Morley v. Morley*, 5 D., M. & G. 610; 25 L. J., Ch. 1.) 3 & 4 Will. 4, c. 27, s. 40.

In 1816, A. mortgaged an estate to B., and covenanted to pay the mortgage-money; and, in July, 1817, A., and B. as his surety, conveyed the property to C., on trust to sell and pay, first, a debt due from A. to C., which A. and B. also covenanted to pay; and, secondly, to pay B.'s debt. In August following, A. executed to B. an equitable charge on other property to secure the same debt. In 1834, C. sold the estate, and applied the produce in part payment of his demand. In 1842, a bill was filed by B. against A. to realize the equitable charge: it was held, that, until the trust of the deed of July, 1817, was exhausted in 1834, the covenant in the deed of 1816 subsisted wholly unaffected by time; that the debt and the personal remedy to recover it subsisted at the time the bill was filed, and that the equitable charge was therefore then operative. (*Bennett v. Cooper*, 9 Beav. 252; 10 Jur. 507; 15 Law J., Ch. 315.)

The statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest of the charge ought to be paid is receivable by, and belongs to, the same person who is entitled to the interest. In 1773, a tenant for life paid off a charge of 25,000*l.* affecting the settled estates. He died in 1837, having in the meantime taken no steps for keeping the charge alive: it was held, that notwithstanding more than twenty years had elapsed, and that there had been no part payment or acknowledgment, the charge still existed in favour of his representatives, and had not been defeated by this section. (*Burrell v. Earl of Egremont*, 7 Beav. 206. See *Lord Kensington v. Bouverie*, 7 D., M. & G. 144; *Baldwin v. Baldwin*, 4 Ir. Ch. R. 501; *Lord Carbery v. Preston*, 13 Ir. Eq. R. 455.) To bring a charge within the operation of this section, there must be a hand to receive as well as a hand to pay, and the party to receive must be capable of releasing and giving a discharge. (*McCarthy v. Daunt*, 11 Ir. Eq. R. 29; *Carroll v. Hargrave*, 1 R., 5 Eq. 123.)

In 1812, A. conveyed lands on trust to pay an annuity, and subject thereto for himself in fee. By a settlement in 1825 he charged the lands with a sum to be raised at his death, and in 1830 he mortgaged the lands by depositing the title deeds and the deed of 1812. The mortgagee, who in 1832 first had notice of the settlement, in 1834 entered and continued in possession, and in 1835 bought in the annuity. A. died in 1866. Held, that the mortgagee had not acquired a title by possession as against the trustees of the settlement of 1825. (*Thorpe v. Holdsworth*, L. R., 7 Eq. 139.)

An express trust by deed or will for the payment of portions out of land may, notwithstanding the expiration of twenty years, be enforced against a trustee under the exception in sect. 25, or under the exception grafted upon it. (*Young v. Lord Waterpark*, 13 Sim. 204; affirmed on appeal, 15 L. J., Ch. 63; *Blair v. Nugent*, 3 J. & Lat. 658; *Larson v. Ford*, L. R., 2 Eq. 97.) A person entitled to a sum of money charged upon land assigned it to trustees, in trust to secure the payment of a debt, and after payment thereof in trust for himself: it was held, that he could not, as against his creditor, insist that the trust was barred by the Statute of Limitations. (*Heenan v. Berry*, 2 Jones & L. 303.) Express trust.

In 1806, bonds for payment of money were given by B., with warrants of attorney to confess judgment. The conditions were to pay the principal upon the death of B., with interest on the first bond from the day of its date, and on the latter from the day of the death of the obligor. The obligees were T., a son of the obligor, and C., in whom the bonds were vested as trustees of the marriage settlement of G. upon trusts for the benefit of the children of the marriage. In 1807, the real estates of B. were settled upon T., one of the obligees, subject to a term of 300 years, for raising 5,000*l.*, which was to be applied in satisfying a debt, and the remainder was to go towards payment of judgment and specialty debts then owing by B. The obligor died in 1816, leaving his son T. his executor, who survived his co-trustee C., and died in 1836. On the death of T., R. came into possession

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of the estates. On a bill filed by the children of G. against R. and his children, who were entitled to the estates subject to the term, and also against the owners of the term, praying for an account and payment of the amount due on the bonds, and that the same might be decreed to be well charged on the lands included in the term: it was held, that the bonds did not come within the description of judgment and specialty debts now due and owing, and therefore were not a charge upon the estate subject to the term, but that the children of G. were entitled to be paid out of the general assets of the obligor, of which the money to be raised by the term formed part. (*Burrowes v. Gore*, 6 H. L. Cas. 907; 4 Jur., N. S. 1245.) It was held, also, that the Statute of Limitations was inapplicable, because, although the money was secured by bonds, that was only an additional mode of securing the discharge of a trust which could not be discharged until the person who entered into the obligation, who was in the nature of a trustee, actually paid the money; and, further, because the person who was to pay the money to the trustees was liable beyond his legal obligation, which liability could only be got rid of by actual payment. (*Ib.*) See further the note to sect. 25, *ante*, p. 201 *et seq.*

#### LEGACIES.

(e) Doubts were entertained whether this section extended to any legacies not charged on land; but it has been held to be also applicable to legacies payable out of personal estate only. (*Paget v. Foley*, 2 Bing. N. C. 679; 3 Scott, 120; 1 Jebb & S. 343; *Sheppard v. Duke*, 9 Sim. 569; *Henry v. Smith*, 2 Dru. & War. 391; *O'Hara v. Creagh*, 1 Long. & T. 65.)

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such, having been barred by lapse of time, it was held, that it could not be claimed under the charge of debts. (*Piggott v. Jefferson*, 12 Sim. 26.)

#### Share of residue.

Residuary property was held to be within this section, where a present right to receive the residue had accrued thirty years ago, and it was not contended that any suit was necessary for ascertaining the amount of the residue. (*Prior v. Horniblow*, 2 Y. & Coll. 201.) With regard to the meaning of the word "legacy" in this section, *Shadwell*, V.-C., was inclined to think that, where the act speaks of a legacy, it does in effect speak of a share of a residue; and it does not make any difference between a share of a residue and a legacy. But then that appeared to him to be a very important point, on which he was not bound to give an opinion then. (*Christian v. Devereux*, 12 Sim. 271.)

More than twenty years after the death of the testator, the representative of one of his executors and the residuary legatee under his will filed a bill against the representative of the co-executor to recover residuary assets of the testator alleged to have been possessed by the co-executor. It was held that the plaintiffs were barred by this section as to assets possessed by the executor more than twenty years before the filing of the bill, but they were not barred as to assets possessed by him since that time. (*Adams v. Barry*, 2 Coll. 290.) Where a fund is set apart to answer an annuity, the Statute of Limitations cannot be set up against the residuary legatee on the death of the annuitant forty years afterwards; but it can as against a pecuniary legatee whose legacy was payable on the testator's death. (*Bright v. Larcher*, 27 Beav. 130; 4 De G. & J. 608.)

Where the person liable for the payment of a legacy and the person entitled to receive it are the same, no question of limitation under the statute can arise. (*Binns v. Nichols*, L. R., 2 Eq. 256.)

Where a testator's estate is so heavily charged with mortgages that it is uncertain whether a legatee will ever be paid his legacy, it seems to be doubtful whether it can be said that he has a present right to receive it within this statute. (*Ravenscroft v. Frisby*, 1 Coll. C. C. 22.) Legatees whose legacies were charged on real estate, subject to prior charges, were not affected by lapse of time so long as any of the prior charges subsisted. (*Faulkner v. Daniel*, 3 Hare, 212. See, however, *Proud v. Proud*, 11 W. R. 101.) Where a testatrix bequeathed legacies payable out of a fund to which she was entitled in reversion, it was held that a present right to



receive the legacies did not accrue until the reversion fell in. (*Earle v. Bellingham*, 24 Beav. 448.) Ordinarily the right to receive a legacy accrues twelve months after the testator's death. (*Benson v. Maude*, 6 Mad. 15.) See further, as to a present right to receive under this section, p. 244, *post*.

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c. 27, s. 40.

An annuity payable out of personalty only is a legacy within this section. (*Re Ashwell's Will*, Johns. 112.) As to whether such an annuity, unsecured by bond or covenant, would be extinguished by twenty years' non-payment, see Sugd. R. P. Stat. 138; Darb. & Bos. Stat. Lim. 126.

Annuities.

An express trust for the payment of legacies out of land is not barred by the lapse of twenty years under this section. (*Watson v. Saul*, 1 Giff. 188. For what constitutes such a trust see note to sect. 25, *ante*, p. 205.) The case of personalty bequeathed to executors upon express trusts appears to be different. In *Cadbury v. Smith* (L. R., 9 Eq. 37), which was the case of a legacy, *Romilly*, M. R., said: "It has been determined in *Scott v. Jones* (4 Cl. & F. 382) and that class of cases, that if a testator gives real and personal estate in trust to pay debts and legacies, that is no bar to the Statute of Limitations; for if a testator merely imposes upon his executors that which it is their regular duty to do, he does not, except as to real estate, create a trust." Where, however, a sum of money was bequeathed to an executor upon the trusts of a will, and was severed by him from the testator's estate, and the interest applied upon the trusts of the will, it was held that the executor had constituted himself a trustee, and that a suit to make the executor account was not barred by this section. (*Phillipo v. Munnings*, 2 Myl. & Cr. 309; explained in *Harcourt v. White*, 28 Beav. 309.) And where a legacy was bequeathed to A., and the executor stated in his residuary account that he had retained in trust the amount of A.'s legacy, and afterwards paid over the residue, it was held that he had constituted himself a trustee for A., and that A.'s remedy was not barred by this section. (*Tyson v. Jackson*, 30 Beav. 384.) As to the period when the character of an executor is merged in that of trustee, see the authorities given in Darb. & Bos. Stat. Lim. 119, and *Charlton v. Earl of Durham*, L. R., 4 Ch. 433.

Express trust.

M., having appointed his daughter and her husband his residuary legatees and executors, and having bequeathed 2,000*l.* to his daughter for her separate use, died in 1841. The husband paid all M.'s debts and legacies except this 2,000*l.* In 1866, the testator's daughter died, indebted to the plaintiff for money lent to her upon the credit of her separate estate. It was held, that a trust had been created for the separate use of the testator's daughter, and that the plaintiff's right to enforce it against her husband was not barred by this section. (*Hartford v. Power*, 1 R., 2 Eq. 204; 16 W. R. 822.)

As to the effect of an order in lunacy in preserving the right to recover a legacy, see *Re Walker*, L. R., 7 Ch. 120.

In an early case it was decided that the Statute of Limitations could not be pleaded in bar to a suit for a legacy, although it had been due twenty years. (*Anon.* Freem. C. C. 22; see also 1 Vern. 256.) But though the statute could not be pleaded, yet in many cases it was adopted where there was no fraud, and the parties had permitted the assets to be distributed without claiming the legacy for thirty-five or forty years, and was a good defence by way of answer upon the ground of raising a presumption of payment. (*Higgins v. Cramford*, 2 Ves. jun. 572; *Pickering v. Stamford*, *Ib.* 582; *S. C.*, 4 Br. C. C. 214; *Jones v. Turberville*, *Ib.* 115; *S. C.*, 2 Ves. jun. 11.) And it seems that the lapse of twenty years after the testator's death without any demand of the legacy would have been sufficient to afford a presumption of payment. (*Montessor v. Williams*, 1 Rop. on Leg. 792 (2nd ed.)) In the case of *Campbell v. Graham* (1 Russ. & Myl. 453), in which this doctrine was much considered, a party bought a legacy, which was assigned to him twenty-seven years after the testator's death, and four years more elapsed before the filing of the bill: and it was held, that he was barred by length of time, and on an appeal to the House of Lords such decision was affirmed. (2 Cl. & Finn. 429.) Under particular circumstances, thirty-nine years was held not sufficient to raise the pre-

Presumption of  
payment of  
legacies.



3 & 4 Will. 4,  
c. 27, s. 40.

sumption of the payment of legacies. (*Shields v. Rice*, 3 Jur. 970.) But it has been held, that a legatee might recover a legacy, though ten years had elapsed without any demand. (*Lee v. Brown*, 4 Ves. 362.) From mere lapse of time the only presumption that can be drawn is this; that which ought to have been done at the commencement of the period has been done at the end. Presumption of payment of a legacy from mere length of time cannot be inferred where such payment is out of the ordinary course of transactions. A payment *in presenti* of a sum due *in futuro* cannot be presumed without evidence of it. (*Prior v. Horniblow*, 2 Y. & Coll. 206.) Legacies charged on real estate were held, under the circumstances of the case, to be payable, notwithstanding the lapse of more than forty years from the testator's death to the filing of the bill; the stat. 3 & 4 Will. 4, c. 27, not being applicable. (*Ravenscroft v. Frisby*, 1 Coll. 16; 13 Law J. (N. S.) Ch. 153.)

Claims to estates  
of intestates.

(f) The provisions of 3 & 4 Will. 4, c. 27, s. 40, have been extended to the case of claims to the estates of persons dying intestate by 23 & 24 Vict. c. 38, s. 13; but no provision appears to have been made for the case of claims to a residue undisposed of by will. It has been held, that this section is no bar to a claim made by the next of kin of an intestate to leaseholds of the intestate which had been retained by the administrator, who was also heir-at-law to the intestate, under a belief that the property was freehold. (*Reed v. Fenn*, 35 L. J., Ch. 464; 14 W. R. 704.) See also, as to lapse of time in the case of claims to an intestate's estate, *Cresswell v. Dewell*, 4 Giff. 460; 12 W. R. 123.

"Present right to  
receive."

(g) It seems difficult to attach any definite meaning to the words "*present right*," &c., and to say whether those words mean such a right as the party could render effectual, or whether the disability to proceed effectually either at law or in equity prevents the right from being considered as having accrued within the meaning of this section. (See *Dillon v. Cruise*, 3 Ir. Eq. R. 82.) This section appears to be capable of two interpretations; the one construing the terms within twenty years next after a present right to receive the same to mean, within twenty years after the first present right to receive the same accrued to any person; the other construing them to mean within twenty years next after a present right, established or accrued under any of the securities mentioned in this clause. (2 Jebb & Symes, 109.) It will be observed that the word "*first*" does not precede the word "accrued" in the 40th section as it does in the 2nd section, and the omission of that word may in many cases make a material difference in the construction of this section. (*Ryan v. Gamble*, 2 Ir. Eq. R. 334.) *Tindal*, C. J., said, "by the words, 'present right to receive the same,' we understand an immediate right without waiting for the happening of any future event." (*Farran v. Beresford*, 10 Cl. & Finn. 334.) See the cases as to a present right to receive a legacy, *ante*, p. 242.

Disabilities.

The present right to receive must accrue to some persons capable of giving a discharge for or release of the same; and accordingly, where a legacy was bequeathed to an infant, time was held to run from the period when she attained her majority. (*Piggott v. Jefferson*, 12 Sim. 26.) When time has commenced to run against the right of a legatee to recover his legacy, and the executor is subsequently found a lunatic, time will nevertheless continue to run. (*Boldero v. Halpin*, 19 W. R. 320.)

PART PAYMENT.

(h) The entering into the receipt of rents and profits by a mere equitable mortgagee was held sufficient to keep the personal remedy for the mortgage debt from being barred by 21 Jac. 1, c. 16. (*Brocklehurst v. Jessop*, 7 Sim. 438.) But where a bond was entered into as a collateral security for money secured by mortgage, and the interest being in arrear, the mortgagee took possession, and remained in possession upwards of twenty years without taking interest otherwise than by the receipt of rents and profits, it was doubted whether his remedy on the bond was not barred by the Statute of Limitations. (*White v. Hillacre*, 3 Y. & Coll. 597.) See, however, *Williams v. Welch* (3 D. & L. 565, *ante*, p. 237), where it was held, that payments of an annuity kept alive the right to revive a judgment which had been given as collateral security for the annuity.

A payment of principal or interest of a sum of money charged on land

by a person expressly or impliedly authorized to make it will be equivalent to a payment by the party liable, so as to prevent the operation of the statute. But a payment by a mere stranger will not. (*Homan v. Andrews*, 1 Ir. Ch. Rep. 106. See *Linsall v. Bonson*, 2 Bing. N. C. 245.) The person designated in this section as the person by whom money is payable must evidently mean, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed. The money is payable by him in the only sense in which it is payable by any one. Unless he pay it he will lose his land, and it is obviously in that sense that the statute in such a case speaks of the money as payable. (*Toft v. Stephenson*, 1 De G., M. & G. 40; quoted by *Bacon*, V.-C., L. R., 12 Eq. 54.) The words in sect. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment, and the signing of an acknowledgment. (*Chinnery v. Evans*, 11 H. L. Cas. 115; 13 W. R. 20.) The payment of interest on an Irish mortgage, made by a receiver appointed over the estates mortgaged, is a payment by an agent of the party liable within this section. But the payment of interest on a mortgage by a mere stranger would not be a payment within this section. (*Id.*) On the death of a mortgagor, in 1833, his widow (who was entitled to dower) took possession of the mortgaged estate, with the consent of her sons who were co-heirs, and she paid interest on the mortgage. In 1858, the mortgagee instituted a suit to realize his mortgage, in which it did not appear that any interest had been paid by one of the co-heirs during the interval: it was held, that this co-heir was bound by the payments, the widow being regarded either as his agent, in which case the payment of interest had been made on his behalf, or else as a stranger, in which case the co-heir himself was barred. (*Ames v. Manning*, 26 Beav. 583.)

3 & 4 Will. 4,  
c. 27, s. 40.

In 1824, a legatee, who was entitled to a legacy charged upon land devised to a tenant for life, mortgaged it to another; and at the same time the legatee and the tenant for life, as surety, gave a bond to the mortgagee as a collateral security for the amount. The legatee died in 1847, and the tenant for life in 1851. The mortgagee had received, previous to and in 1846, interest in part from the tenant for life. It was held, that the payment by the co-obligor and surety was sufficient to keep the debt alive against the principal debtor, notwithstanding 19 & 20 Vict. c. 97, ss. 5, 14. (*Seager v. Aston*, 26 L. J., Ch. 302; 5 W. R. 548.) The plaintiff, being indebted to his bankers in a considerable balance, assigned to them an annuity to secure 200*l.*, part of that balance; and afterwards mortgaged to them the equity of redemption of a leasehold estate to secure his general balance of 1,500*l.* The bankers received the annuity to an amount which exceeded the debt of 200*l.* and interest: and it was held, that the surplus was a payment sufficient to keep the mortgage debt alive within this section. (*Staley v. Barrett*, 26 L. J., Ch. 321; 5 W. R. 188.)

Where a testator devised part of his real estates charged with the payment of half his debts to A., and the other part of his real estates charged with the payment of the other half of his debts to B., and A. had made payments of interest on a bond debt of the testator within twenty years: it was held, that these payments did not keep alive the debt against B. (*Dickenson v. Teasdale*, 1 De G., J. & S. 52.) If estates A., B. and C. are included in one mortgage, and payments of interest are made out of the rents of A., these payments are sufficient to keep alive the remedy of the mortgagee against estates B. and C. Thus, in 1776, a mortgage was created of three estates in the counties of Cork, Kerry and Limerick. In 1784, a receiver was appointed under the provisions of the Irish Act, 11 & 12 Geo. 3, c. 10, who entered into possession of the Limerick estate only, out of the rents of which the interest on the mortgage continued to be paid. In 1790, the mortgagor sold the equity of redemption in the Cork and Kerry estates, and assigned certain outstanding charges to a trustee for the protection of the purchaser, but no reference was made to the mortgage. It was held by the House of Lords, that the mortgage debt was kept alive by the payments of interest against the Cork and Kerry estates. (*Chinnery v. Evans*,

3 & 4 Will. 4,  
c. 27, s. 40.

ACKNOWLEDG-  
MENTS IN  
WRITING.

Who is agent.

By whom an  
acknowledgment  
may be made.

11 H. L. Cas. 115; 13 W. R. 20.) See also *Pears v. Laing*, L. R., 12 Eq. 41, and the cases quoted under 3 & 4 Will. 4, c. 42, s. 5, *post*.

(i) Under the 40th section the acknowledgment of the right must be given in writing, signed by the person by whom the same shall be payable or his *agent*, to the person entitled or his *agent*. Under the 42nd section the acknowledgment must be given to the person entitled to the interest or his *agent*, signed by the person by whom the same was payable or his *agent*. The words of these two sections being nearly the same, it seems to be the more convenient course to arrange the decisions as to acknowledgments under both these sections in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 183, 214.

In reference to this and the other sections, where the acknowledgment to or by the party interested or his *agent* is made sufficient (see *ante*, p. 183), it will be necessary to consider who is in law the agent and by what acts he is so constituted, where no direct proof of agency is produced. An agent need not be authorized in writing. (*Coles v. Trecothick*, 9 Ves. 250.) Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority. (*James v. Bright*, 5 Bing. 533.) When one means to act as agent for another, a subsequent ratification by the other is always equivalent to a prior command. (*Foster v. Bates*, 12 Mees. & W. 233.) See *Trulock v. Robey*, 12 Sim. 407, *ante*, p. 215, where the vice-chancellor, said: "It is not necessary to make a person an agent, that he should have an actual authority to act; it is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf." And see generally, as to the extent and nature of an agent's authority, *Pole v. Leask*, 28 Beav. 562, affirmed in H. L., 9 Jur., N. S. 829. In *Toft v. Stephenson* (1 De G., M. & G. 28), an inquiry was directed as to the agency of an attorney who had acknowledged a debt.

The principle of some of the cases, as *Whippy v. Hillary* (3 B. & Ad. 399, *post*), and *Routledge v. Ramsay* (8 Ad. & Ell. 221), decided upon the statute 9 Geo. 4, c. 14, although in language different from that of 3 & 4 Will. 4, c. 27, ss. 40, 42, may be applicable to some cases arising under the latter statute. (*Holland v. Clark*, 1 Y. & Coll. N. C. 169.) See the cases under 9 Geo. 4, c. 14, quoted *post*.

All that the act of 3 & 4 Will. 4, c. 27, ss. 40, 42, requires is, that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. Thus, where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment of a debt in writing *signed by the trustee* or his agent, was held to be sufficient to preserve the creditor's right of suit for twenty years after the acknowledgment was given; but such an acknowledgment will not impose on the trustee any personal liability to pay the debt. (*Lord St. John v. Boughton*, 9 Sim. 219.) In 1811, an agreement was entered into for the purchase of freehold land, and the purchaser was immediately put into possession. In 1827, the purchaser before any conveyance was made to him and before he had paid any part of the purchase-money, died, having devised the land to trustees. The trustees disclaimed and others were appointed by the Court of Chancery. In 1834, the attorney of these trustees wrote to the assignees of the vendor (who had become bankrupt), stating that the purchase-money was ready to be paid on the purchase being completed. On a bill filed by the assignees in 1844, to enforce the lien: it was held, that the trustees were persons by whom the purchase-money was payable within the meaning of this section; also that the acknowledgment of their attorney in 1834 was sufficient within the meaning of the exception in the act to withdraw the case from its operation, and for this purpose to bind the *cestui que trusts*. (*Toft v. Stephenson*, 1 De G., Mac. & G. 28; 7 Hare, 1.) An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage, does not preclude a *puisne* mortgagee from relying on the statute. (*Bolding v. Lane*, 1 De G., J. & S. 122; 11 W. R. 386. See

the remarks on this decision in *Chinnery v. Evans*, 11 H. L. Cas. 115; 13 W. R. 20.) In *Re Fitzmaurice's Minors* (15 Ir. Ch. R. 445), where the tenant for life of the equity of redemption in a mortgaged estate gave a written acknowledgment to the mortgagee, it was held that the mortgagee's right to recover more than six years' interest was kept alive against the remainderman.

3 & 4 Will. 4,  
c. 27, s. 40.

In admitting acknowledgments, under the 40th section, to the person entitled or his agent, the court has not restricted itself within narrow limits. If it be made in a schedule, affidavit or answer, it is sufficient, although it may be said that in those cases it is made to the court and not to the party. *Sugden*, L. C., thought the decisions right, and that they proceeded upon a liberal but yet a fair and just construction of the statute. (3 Jones & L. 677.) In December, 1821, A. and B., creditors of D. deceased, jointly advanced a sum of money to save leaseholds of D. from eviction for non-payment of rent; as between themselves the money was advanced in equal moieties: to a bill filed by B. against A., and the devisees in trust of D., to raise the sum so advanced, the trustees, in April, 1824, put in an answer admitting the payment of the salvage money. In a suit instituted in January, 1844, for a sale of D.'s estate, A. filed a charge on foot of his salvage claim: it was held, that the acknowledgment contained in the answer of April, 1824, was sufficient to take the claim out of the bar of this section. (*Blair v. Nugent*, 3 Jones & L. 673). In a case where it was contended that an acknowledgment by the debtor to a third person took a case out of this section, *Alderson*, B., said that will not do; there must be that from which a continuing contract may be inferred. If a man were to write a letter to a third person acknowledging the debt, it would not take it out of the statute. Lord Tenterden's Act, 9 Geo. 4, c. 14, explains that. (*Grenfell v. Girdlestone*, 2 Y. & Coll. 676.) In order that an acknowledgment may have the effect of taking a demand out of the operation of the 42nd section of this statute, the acknowledgment must appear to have been made with a view of rendering the party making it liable to the demand, and it must have been made to the party entitled to make the demand. (See *Grenfell v. Girdlestone*, 2 Y. & Coll. 676). Therefore, where a bill was brought against two executors for payment of a legacy bequeathed to the plaintiff's wife, and for arrears of interest accrued since her death; and the plaintiff, with the view of taking his demand for interest out of the operation of the 42nd section of the statute, relied on certain letters written by one of the executors to his the plaintiff's attorney: it was held,—1st. That the letters had not the effect ascribed to them by the plaintiff, because they had been written by the party not for the purpose of charging himself but of throwing the burden of payment on the co-executor; 2ndly. That even if they had been written for the purpose of charging himself, it was questionable whether they would avail the plaintiff, inasmuch as they were written before the plaintiff had taken out letters of administration to his wife. (*Holland v. Clarke*, 1 Y. & Coll. N. S. 151.)

To whom.

A bill was filed in April, 1840, by a party as administrator of his wife, seeking the recovery of the principal and interest of a legacy of 150*l.* bequeathed to her by a testator who died in 1811. The legatee attained her majority when the legacy vested, and married before the year 1825. In December, 1825, the two executors of the testator gave the plaintiff a written acknowledgment, whereby they separately and jointly acknowledged that they owed the plaintiff 150*l.* for the legacy and 50*l.* interest thereon. It was held to be clear that this document precluded the defendants from all benefit under this section. (*Holland v. Clarke*, 1 Y. & Coll., Ch. 151.) The mortgagees of the works and tolls of a harbour company agreed in 1818 that the exchequer loan commissioners making an advance of money under the provisions of the acts of parliament regulating them, the tolls of the harbour should be applied, first, in paying interest on the commissioners' advances: secondly, in paying interest on prior mortgages; and, thirdly, in reduction of the principal until it was paid off. The tolls being insufficient to keep down the interest on the advances, the commissioners sold the subject of their security to a railway company, with notice of the

What amounts to  
an acknowledg-  
ment.

3 & 4 Will. 4,  
c. 27, s. 40.

agreement. In 1833, before the sale to the railway company, one of the mortgagees wrote to the treasurer of the harbour company complaining of nonpayment of interest. The treasurer replied that no interest had been paid since 1821, as the income of the harbour left but a small surplus, after payment of expenses; but that he was at all times willing to give information to the mortgagees, or to any other gentleman who had embarked property in the undertaking. It was held, that the agreement and the correspondence took the case out of the statute, both as to principal and interest. (*Jortin v. South-Eastern R. Co.*, 6 De G., Mac. & G. 270; 1 Jur., N. S. 433; 24 Law J., Ch. 343.) A judgment was obtained on a joint bond and warrant of attorney against A. and B. in 1815; B. had joined in these as a security for A. On the 20th March, 1820, A. wrote to V.'s agent, "You have inclosed 150*l.* to my credit on account of V.'s interest;" and by the account book kept by V.'s agent (since dead), there appeared an entry by the agent of 17th March, 1820, charging himself with a bill for 30*l.* drawn by A., and 100*l.* cash from A. In 1822, V.'s attorney applied by letter to B. calling for the amount of payment of the above debt, and B. on that occasion wrote to V.'s attorney, acknowledging the receipt of his letter, "applying for payment of his, B.'s and A.'s joint bond." And soon after B.'s agent wrote a letter to V.'s attorney, enclosing a proposal of terms upon which matters should be arranged by A., and said, "this being done, it is hoped the judgment against B. will be satisfied." The bill was filed in 1839, for an account of the sum due on the judgment: it was held, that it appeared that there was a payment on account of interest, and a sufficient acknowledgment to take the case out of the 40th section of this statute, and that the statute was retrospective. (*Vincent v. Willington*, 1 Longfield & T. 456.) It seems that an affidavit made in the suit may be a sufficient acknowledgment within the 42nd section of this act. (*Tristram v. Harte*, 1 Longfield & T. 186.) An acknowledgment of a judgment debt in the will of the debtor is sufficient to take it out of the operation of this section. (*Millington v. Thompson*, 3 Ir. Ch. R. 236.) Where certain suits were pending, in which A. and B. were defendants, and a reference was made to the master to report the incumbrances affecting the freehold lands of A., and amongst others he reported B., a creditor by a judgment affecting them for a certain sum: it was held, that this was not such an acknowledgment in writing by the agent of A. and B., or his agent, as will take the case out of the Statute of Limitations, the master's report not being an acknowledgment in writing within the meaning of the act, nor can the master be deemed an agent. The act contemplates such writing as may be evidence of a right, and the agent such a one as is acting directly under authority. The master's report is a public document, and not the property of either party; he acts judicially, and the report is his act, and not the act of the suitor; he is appointed by the Lord Chancellor's authority, and his acts are binding, whether he is recognized as the agent or not. (*Hill v. Stanell*, 2 Ir. L. R. 302; 2 Jebb & S. 389.) In this case the creditor who was held to be barred was not a party to the suit. (See *Wrixon v. Vize*, 3 Dru. & War. 123.) An admission of debt in an insolvent's schedule has been held to be a sufficient acknowledgment within sect. 40. (*Barrett v. Birmingham*, 4 Ir. Eq. R. 537; *Morrrough v. Power*, 5 Ir. L. R. 494; *Hanan v. Power*, 8 Ir. L. R. 505.)

Master's report.

Insolvent's  
schedule.

When must the  
acknowledgment  
under sect. 40 be  
made.

Decisions on this  
section applicable  
to questions under  
16 & 17 Vlt.  
c. 113, s. 22.

In *Harty v. Davis* (13 Ir. L. R. 23), it was decided that it is competent for the conusor of a judgment, by an acknowledgment given, no matter how long after the rendition of the judgment, provided it be within twenty years before the commencement of the action or suit, to keep the claim alive in favour of the person entitled to it; in fact, that this section operates only as a suspension of the remedy and not as an extinguishment of the right. (See *Waring v. Waring*, 5 Ir. Ch. R. 6; but see *contra*, *Gregson v. Hindley*, 10 Jur. 383; *Homan v. Andrews*, 1 Ir. Ch. R. 106.)

(k) Decisions upon this section are applicable to questions raised upon sect. 22 of the C. L. P. Act (Ireland) 1853. (*Cronin v. Dennehy*, 1 R., 3 C. L. 289).



*Arrears of Dower.*

3 & 4 Will. 4,  
c. 27, s. 41.

*Time of Limitation fixed Six Years.*

41. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit (*l*).

No arrears of dower to be recovered for more than six years.

(*l*) In equity, as at law, there was before this act no limitation to a claim of the *arrears* of dower. (*Oliver v. Richardson*, 9 Ves. 222.) And though at law, by the death of the heir, the widow lost all arrears incurred in his lifetime, (*Mordaunt v. Thorold*, 3 Lev. 375,) yet in equity, if she had filed her bill before the death of the heir, she was entitled to the mesne profits (*Curtis v. Curtis*, 2 Br. C. C. 620) from the time her title accrued, (*Dormer v. Fortescue*, 3 Atk. 130,) provided that she had made an entry; (*Tilley v. Bridger*, 2 Vern. 519; *Prec. in Ch.* 252;) and so in case of her death were her representatives. (*Wakefield v. Child*, 1 Fonbl. Eq. 159, n.) See 3 & 4 Will. 4, c. 105, for amending the law of dower, *post*; *Bamford v. Bamford*, 5 Hare, 203; and *Marshall v. Smith*, 5 Giff. 87; 13 W. R. 198.

*Arrears of Rent or Interest.*

*Time of Limitation fixed Six Years.*

42. After the said thirty-first day of December, one thousand eight hundred and thirty-three, no arrears of rent (*m*) or of interest in respect of any sum of money charged upon or payable out of any land or rent (*n*), or in respect of any legacy (*o*), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due (*p*), or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (*q*): provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years (*r*).

No arrears of rent or interest to be recovered for more than six years.

(*m*) This section is prospective in its operation, and not retrospective, and therefore does not affect parties to any suits which were commenced before its provisions took effect. (*Paddon v. Bartlett*, 3 Ad. & Ell. 884; 5 Nev. & M. 883; *Peyton v. M'Dermot*, 1 Dru. & Walsh, 198.) In *Vincent v. Willington*, 1 Longfield & T., the statute was held to be retrospective as to acknowledgments.

This section not retrospective.

By statute 21 Jac. 1, c. 16, s. 3, actions of debt for arrearages of rent must have been commenced and sued within six years after the cause of such actions had accrued. This statute was confined to actions for arrears

ARREARS OF RENT.  
Old law.



3 & 4 Will. 4,  
c. 27, s. 42.

Arrears of tithe  
rent-charge.

Arrears of tithes.

Rent reserved.

Periodical pay-  
ment.

Fee-farm rent.

of rent upon a demise without deed, and did not extend to cases of rent reserved by specialty. (*Freeman v. Stacey*, Hutton, 109.)

Section 42 was held in Ireland to include tithe rent-charge. (*Ecclesiastical Commissioners v. Marquis of Sligo*, 5 Ir. Ch. R. 46.) Not more than two years' arrears of any tithe commutation rent-charge is recoverable by distress or entry under statute 6 & 7 Will. 4, c. 71, ss. 81, 82. If the half-yearly payments of a rent-charge under that act be in arrear, and no sufficient distress found, the owner of the rent-charge may recover such arrear for a period not exceeding two years, by assessment and writ of *habere possessionem*, under the 82nd section, although no attempt to distrain has been made at the end of each or any but the last of the half years, and although at the end of one or more of such previous half years there may have been a sufficient distress for the amount then due. (*In re Camberwell Rent-charge*, 4 Q. B. 151; 3 Gale & D. 365.)

The statute 21 Jac. 1, c. 16, s. 8, could not be pleaded in an action of debt under the 2 & 3 Edw. 6, c. 13, for not setting out tithes. (*Talory v. Jackson*, Cro. Car. 513; see 1 Mod. 246.) But by statute 53 Geo. 3, c. 127, s. 5, "No action shall be brought for the recovery of any penalty for the not setting out tithes, nor any suit instituted in any court of equity, or in any ecclesiastical court, to recover the value of any tithes, unless such action shall be brought, or such suit commenced, within six years from the time when such tithes became due." In bills for an account of tithes, courts of law and equity have a concurrent jurisdiction; and inasmuch as in a court of law arrears of tithes can be recovered only for six years before the commencement of the action, so in a court of equity the account will be carried back only six years previous to the filing of the bill. (*Collins v. Archer*, 1 Russ. & Myl. 284; see *Chichester v. Sheldon*, Turn. & Russ. 253; S. C., 3 E. & Y. 1102; *Garrard v. Schollar*, 3 Gwill. 1045; 2 E. & Y. 282; *Goode v. Waters*, 20 Law J., Ch. 72.) Since 5 & 6 Will. 4, c. 74, if any tithe, oblation, or composition not excepted in 7 & 8 Will. 3, c. 6, or exceeding 10*l.* yearly value, due from any one person, is in arrear, it must be proceeded for before two justices; and if the title of the claimant, or liability of the party sought to be charged, is undisputed, two years' arrears may be there recovered; whereas if such title or liability is denied *viâ voce* before the justices, or at any time in writing, the claimant may proceed by suit in equity, and recover six years' arrears. (*Robinson v. Purday*, 16 Mees. & W. 11.)

So long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by nonpayment, except that under this act the amount to be recovered is limited to six years. (*Archbold v. Scully*, 9 H. L. C. 360.) In the case of a lessee who has forfeited his lease by nonpayment of rent, the question as to what amount of arrears he will be required to pay to entitle himself to relief in equity, or to have proceedings stayed at law, is discussed. Darb. & Bos. Stat. Lim. 153 - 156. For the period during which an account of mesne rents will be directed in equity, see *post*.

A testator bequeathed 250*l.* to B., to be chargeable on lands, and to be paid by yearly payments and instalments of 20*l.* per annum from the day of her marriage, with consent, but not until then; and, in case B. should intermarry without such consent, then she should be entitled to 1*s.*; such portion of 250*l.* to be paid and payable by yearly instalments of 20*l.* per annum from the day of her marriage, but not until then, with power to B. or her lawful husband to distrain in case of nonpayment of the 20*l.* And the testator desired that his two sons (to whom he devised the lands) should contribute jointly and severally to support and clothe B. in a reasonable manner; and that, upon doing so, no interest should arise upon the 250*l.*; but if they neglected such support and clothing, he desired that the 250*l.* should be liable to interest at 6*l.* per cent. until B.'s marriage, but by no means after: it was held, that the instalments were periodical payments of a sum of money charged upon lands, and as such within this section. (*Uppington v. Tarrant*, 12 Ir. Ch. R., N. S. 268, 269.)

A. was from the 2nd July, 1805, till the 10th July, 1841, (when he was found a lunatic,) and B., his committee, had ever since been, seised as of

fee of two-thirds of a fee-farm rent of 20*l.* 5*s.* *per annum*, payable on 29th September and 25th March, created by letters patent, 29 Hen. 8. No payment of this rent, or of any part thereof, had been made since March, 1831, nor had there been any acknowledgment in writing relating thereto. It was held, that the case was governed by this section, and consequently that neither the lunatic nor his committee was entitled to recover, in the year 1847 or the year 1844, any part of the arrears of the two-third parts of the fee-farm rent which accrued due from 29th September, 1831, to the 29th September, 1837, inclusive. (*Humfrey v. Gery*, 7 C. B. 567.)

3 & 4 Will. 4,  
c. 27, s. 42.

The 2nd section of the act provides for the case where the right or title to an annuity is disputed. (See *ante*, p. 144.) The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due. (*James v. Salter*, 3 Bing. N. C. 552.) Arrears of rent, or of an annuity secured by deed, may be recovered for twenty years under the statute 3 & 4 Will. 4, c. 42, s. 3, notwithstanding the 42nd section of 3 & 4 Will. 4, c. 27. (*Paget v. Foley*, 2 Bing. N. C. 679; *Strachan v. Thomas*, 4 P. & Dav. 229; 12 Ad. & Ell. 536; see *post*.)

Annuities.

An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by the interpretation clause of this act, *ante*, p. 131, and therefore no more than six years' arrears are recoverable. (*Ferguson v. Livingston*, 9 Ir. Eq. R. 202; *Francis v. Grover*, 5 Ha. 39.) But in *Wheeler v. Howell* (3 K. & J. 189), arrears of an annuity charged on a reversionary interest in land were held to be recoverable more than six years after the same became payable. (See, however, *Vincent v. Going*, 1 J. & Lat. 697; *Sinclair v. Jackson*, 17 Beav. 405.) An annuity bequeathed out of personalty is not within this section. (*Roch v. Callen*, 6 Ha. 531; *Re Ashwell's Will*, Johns. 112.) Lord St. Leonards considers that the words in this section "arrears of interest in respect of any legacy" might well be held to include an annuity which is payable out of personalty and no charge upon the land. (R. P. Stat. 138.)

(n) "Sect. 40 enumerates mortgages, liens, judgments; but sect. 42 adopts the previous general description of money 'charged upon or payable out of land,' a description which includes every security, omitting the enumeration which it was unnecessary to repeat. The enactments are identical. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other." (Sugd. R. P. Stat. 139. See *Bolding v. Lane*, 3 Giff. 574.)

ARREARS OF  
INTEREST.

The trustees of a turnpike road, pursuant to a power given to them by act of parliament, mortgaged to J. M. such share and proportion of all the tolls as the money advanced by him should bear to the whole principal amount advanced on the tolls. The security was continued by various acts of parliament, but no interest was paid in respect of such mortgage for thirty years and upwards. It was held, in a suit instituted by the representative of J. M. against one of the trustees of the road, seeking payment of all the arrears of interest due to him out of all the tolls, that he was not barred by the Statute of Limitations from recovering the whole of such arrears (tolls not being within the meaning of the act), but that the other mortgagees on the tolls were necessary parties to a suit for that purpose. (*Mellish v. Brooks*, 3 Beav. 22; 4 Jur. 739.)

(1) ON MORT-  
GAGES.

A canal company conveyed, under their common seal, the canal works and rates to a mortgagee, to hold until the sum borrowed, with interest, should be repaid. There was no covenant to repay. It was held, that under this section, although the mortgagee could recover the principal within twenty years, yet his remedy for arrears of interest was limited to six years. There being no covenant or engagement to pay, but simply a conveyance of the canal, there was not the species of action of covenant, or of debt upon bond or other specialty, referred to in the statute 3 & 4 Will. 4, c. 42, s. 3, *post*. (*Hodges v. Croydon Canal Co.*, 3 Beav. 86.)

And where a woman executed a mortgage of a reversionary interest to which she was entitled in a share of certain moneys, the proceeds of lands devised upon trust for sale, it was held that her estate was "money payable out of land" within this section, and that the mortgagee could not

8 & 4 Will. 4,  
c. 27, s. 42.

Cap. 27, sect. 42,  
and cap. 42, sect. 3.

*Hunter v.*  
*Nockolds.*

Arrears of interest  
recoverable in  
foreclosing.

In redeeming, and  
in suits to recover  
surplus purchase-  
money.

Tacking.

Cases in Ireland.

recover more than six years' interest. (*Bowyer v. Woodman*, L. R., 3 Eq. 313.)

In some of the cases in England under 8 & 4 Will. 4, c. 27, a difficulty arose in consequence of 8 & 4 Will. 4, c. 42, s. 3 (p. 258, *post*); and the courts treated the provision of the second act as an exception out of the enactments of the former. (See *Paget v. Foley*, 2 Bing. N. C. 690; *Strachan v. Thomas*, 12 Ad. & E. 558.) In *Du Vigier v. Lee* (2 Ha. 326), it was held that a mortgagee whose mortgage debt was secured also by a bond and covenant, was entitled to recover twenty years' arrears of interest in a foreclosure suit. This decision was, however, overruled by Lord Cottenham in *Hunter v. Nockolds* (1 Mac. & G. 640; 19 L. J., Ch. 177), where he laid down that the effect of the conjoint enactment is, that no more than six years' arrears of rent or interest in respect of any sum charged upon or payable out of any land or rent shall be recovered by way of distress, action or suit, other than and except in actions on covenant or debt on specialty, in which case the limitation is twenty years. (See *Harrison v. Duignan*, 2 Dru. & War. 298; *Hughes v. Kelly*, 3 Dru. & War. 482.)

It has since been held, in several cases, that in a foreclosure suit a mortgagee cannot recover more than six years of interest, although the mortgage debt is secured by covenant. (*Sinclair v. Jackson*, 17 Beav. 405; *Shaw v. Johnson*, 1 Dr. & Sm. 412; *Round v. Bell*, 30 Beav. 121.) The case is different where there is a trust to secure the money (see the cases as to trust, *post*, p. 254); but it makes no difference that the property mortgaged is reversionary. (*Sinclair v. Jackson*, 17 Beav. 405. See, however, *Wheeler v. Howell*, 3 K. & J. 198.)

In *Mason v. Broadbent* (33 Beav. 296), Lord Romilly, M. R., assumed as settled law that a mortgagor could redeem by payment of the principal of the mortgage debt and six years' interest; and accordingly held that where the mortgaged estate had been sold by a trustee for the mortgagee under a power of sale, and the mortgagor filed a bill to recover the surplus money, the mortgagee could not retain more than six years' arrears of interest. In *Edmunds v. Waugh* (L. R., 1 Eq. 418), however, *Kindersley*, V.-C., said, that there would be no justice in such a construction of the statute as should allow the mortgagor to redeem on payment only of six years' interest: and in the case of a sale, similar to that in *Mason v. Broadbent*, the purchase-money having been paid into court, and the mortgagee's trustees having petitioned for payment out of the fund, he held that the petition was not a suit to recover arrears of interest within this section, and that the trustees were entitled to more than six years' arrears of interest.

In *Elvy v. Normood* (5 De G. & Sm. 240), it was held that the heir of a mortgagor who had covenanted for himself and his heirs to pay the mortgage debt and interest, could not redeem without paying twenty years' arrears of interest, as the mortgagee was entitled to tack the arrears of interest to the debt as against the heir. Since 8 & 4 Will. 4, c. 104, a mortgagee of freeholds may tack his simple contract debt in a foreclosure suit as against the heir of the mortgagor. (*Thomas v. Thomas*, 22 Beav. 341.) As to a mortgagee of copyholds, see *Rolfe v. Chester*, 20 Beav. 610. The question of tacking must be raised on the pleadings. (*Sinclair v. Jackson*, 17 Beav. 405.)

To an action of covenant upon an indenture of demise for rent the defendant pleaded the 8 & 4 Will. 4, c. 27, s. 42, and it was held, in Ireland, that that statute did apply to such a case. (*Bruen v. Nolan*, 1 Jebb & Sym. 346, n.) But as the statute 8 & 4 Will. 4, c. 42, did not apply to Ireland, the result was not the same as that which followed in England. (*Paget v. Foley*, 2 Bing. N. C. 67.) See also, in Ireland, *Armstrong v. Lloyd*, 2 Ir. L. R. 70; *Wilson v. Jackson*, 2 Ir. L. R. 1; *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390. Provisions similar to those contained in 8 & 4 Will. 4, c. 42, have since been applied to Ireland by 3 & 4 Vict. c. 105, ss. 32—36, and 16 & 17 Vict. c. 113, s. 20, *et seq.*

In a foreclosure suit, the defendants, some of whom were minors, by their answer relied on the Statute of Limitations as disentitling the plaintiff to

more than six years' interest. In the progress of the cause, an order was made upon consent, in pursuance of which a payment was made to the plaintiff on account of his demand. It was held, that, although such payment would have defeated the bar of the statute set up by the answer, had the transaction taken place between *adults*, yet as the interests of *minors* were concerned, the payment ought to be considered as made without prejudice to the rights, and subject to the equities of the parties in the cause, and ought not, therefore, to be permitted to defeat the defence relied upon by the answer. It is questionable how far the officer is authorized to decide between *the parties* in a cause upon a pleading by way of discharge, filed in the office, relying on the Statute of Limitations. (*Thwaites v. M'Donough*, 2 Ir. Eq. R. 97.)

3 & 4 Will. 4,  
c. 27, s. 42.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section of the act, and only six years' arrears of interest can be recovered for such debts. In relation to the Statutes of Limitations, the rights of judgment creditors for arrears of interest, as against the real and personal estates of their debtor, are equal and co-extensive. As far as the bar of the statute operates for the protection of the real estate, to the same extent the personal estate is protected; the statute 3 & 4 Vict. c. 105 (Ireland), s. 26, enacts, that every judgment debt due upon any judgment not confessed or recovered for any penal sum for securing principal and interest shall carry interest, &c. The interest thus given is subject to the limitations of the statute 3 & 4 Will. 4, c. 27, s. 42. (*Henry v. Smith*, 2 Dru. & War. 381.) Where the interest as well as the principal is secured by the judgment, it seems that in Ireland twenty years' arrears can be recovered in an action on the judgment. (16 & 17 Vict. c. 113, s. 20.) A judgment creditor of a tenant in fee, in remainder after an estate for life, is not entitled to recover out of the lands arrears of interest which accrued due during the existence of the tenancy for life, and more than six years before the commencement of the suit. (*Vincent v. Going*, 1 Jones & L. 697. See *Wheeler v. Howell*, 3 K. & J. 198; *Sinclair v. Jackson*, 17 Beav. 405.)

(2) ON JUDGMENTS.

Formerly a judgment did not carry interest, but interest might be recovered at law, in the shape of damages, by an action on the judgment. (*Gaunt v. Taylor*, 3 Myl. & K. 302.) Now it is enacted by 1 & 2 Vict. c. 110, ss. 17, 18 (*post*), that every judgment debt shall carry interest at the rate of 4l. per cent. from the time of entering up the judgment until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Decrees and orders of courts of equity, and in bankruptcy and lunacy, and rules of the superior courts of common law, ordering the payment of money, &c. to any person, are to have the same effect as judgments in the courts of common law. (3 & 4 Vict. c. 105, s. 27, Ireland.) As to interest on debts generally, see the note p. 256, *post*.

1 & 2 Vict. c. 110,  
ss. 17, 18.

A contract for the sale of an estate, made in March, 1811, stipulated that the purchase-money should be paid on the 13th May following. The money was not paid, but the purchaser entered into possession, and he and those claiming under him continued in possession. In 1849, a bill was filed to enforce the vendor's lien on the estate for the purchase-money. It was held, by *Turner*, L. J., that the principal had not become payable, as no title had as yet been shown by the vendor, and that the interest could not be due within sect. 42 until the principal money became payable. He said that the interest became due upon completion, although it was to be calculated from the inception of the contract. (*Toft v. Stephenson*, 5 D., M. & G. 735.)

(3) ON UNPAID  
PURCHASE-MONEY.

On a bill to enforce a charge acquired by a judgment creditor on the estate of the debtor a receiver was appointed, and at the hearing a reference as to incumbrances on the estate was directed. A claim for a sum charged upon the estate, carried in before the master under such inquiry by one who was not a party to the suit, was held to take the charge as to the interest out of this section, and the incumbrancer was held to be entitled to the arrears of interest for six years antecedent to the claim carried in before the master. (*Greenway v. Broomfield*, *Handley v. Wood*, 9 Hare, 201.)

(4) ON CHARGES.

8 & 4 Will. 4,  
c. 27, s. 42.

(5) ON LEGACIES.

Express trusts.

(o) Arrears of interest on legacies can only be recovered for six years, calculated from the filing of the bill. (*Hughes v. Williams*, 3 Mac. & G. 683; *Chappell v. Rees*, 1 D., M. & G. 393; *Re Walker*, L. R., 7 Ch. 120.) As to interest on legacies, see 2 Wms. Exors. 1319; *Lord v. Lord*, L. R., 2 Ch. 782; *Re Richards*, L. R., 8 Eq. 119.

(p) It was formerly decided in Ireland, that no more than six years' arrears of interest of money charged upon lands could be recovered, although the deed creating the charge vested the lands in trustees to secure it. (*Burne v. Robinson*, 1 Dr. & Walsh, 688; see also *Knox v. Kelly*, 6 Ir. Eq. R. 279.) But it is now settled that where there is an express trust, sect. 25 applies and the claim is not barred by sect. 42. So held in the case of annuities secured on realty (*Ward v. Arch*, 12 Sim. 472; *Mansfield v. Ogle*, 24 L. J., Ch. 700; *Cox v. Dolman*, 2 D., M. & G. 592; *Snow v. Booth*, 8 D., M. & G. 69; *Lewis v. Duncombe*, 29 Beav. 175; *Knight v. Bowyer*, 2 De G. & J. 421); in the case of an annuity payable out of personalty (*Playfair v. Cooper*, 17 Beav. 187); in the case of a mortgage secured by a term in a trustee (*Shaw v. Johnson*, 1 Dr. & Sm. 412); in the case of a simple contract debt charged by will on real estate (*Blower v. Blower*, 7 W. R. 101); and in the case of interest on a legacy directed to be raised by a sale of realty. (*Gough v. Bult*, 16 Sim. 323; *Kellett v. Kellett*, L. R., 5 Eq. 298.) See the note to sect. 25, *ante*, p. 201, and also the cases as to express trusts quoted under sect. 40, *ante*, p. 236, *et seq.*

Acknowledgments.

(q) See the cases as to acknowledgments under this section given *ante*, p. 246. In *Bolding v. Lane* (1 De G., J. & S. 122), Lord Westbury said that the words in this section, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay the interest, but all the persons against whom the payment of such arrears might be enforced.

Possession of prior incumbrancer.

(r) The exception in this clause of the act is, where a man has an estate and there are several incumbrances on it, and one of the incumbrancers enters into possession, there another creditor shall not be prejudiced by that possession, if he come for relief within a year after the prior creditor has been removed from the possession. If a prior mortgagee or other incumbrancer is in possession, the right of the subsequent creditor to recover interest during the full period of such possession, although that period may exceed six years, is saved, provided he is so vigilant as to come within one year after the determination of that possession. A judgment creditor who has the first security upon the estate, and gets into possession, is a prior incumbrancer in possession within this proviso. (*Henry v. Smith*, 2 Dru. & War. 390.) The prior incumbrance referred to in this exception is one which affects the estate or interest upon which the subsequent incumbrance is also a charge. (*Vincent v. Going*, 1 J. & Lat. 697). A. being entitled to a mortgage on certain lands vested in a trustee for him, agrees that a subsequent annuity creditor should have precedence over his debt, and joins in a demise of the lands to a trustee for the annuitant, but his trustee who had the legal estate did not join in the demise. A. remains in possession until the death of the grantor of the annuity. It was held, that the annuitant was not debarred from recovering more than six years' arrears, as the annuitant fell strictly within the literal terms of the exception in this section. (*Drought v. Jones*, 2 Ir. Eq. R. 303, "a doubtful authority;" Sugd. R. P. Stat. 146, n.) See also *Montgomery v. Southwell*, 2 Con. & Law. 268.

The nature and object of this exception is explained by Lord Westbury in *Chinnery v. Erans*, 11 H. L. Ca. 115. There a mortgage having been created of certain estates, the mortgagor subsequently sold the equity of redemption and assigned some outstanding charges to a trustee for the purchaser, and the purchaser entered into possession. It was held that the land was not in the possession of a *bonâ fide* incumbrancer prior to the mortgage within this exception, and that the mortgagee could not recover more than six years' arrears of interest.

Disabilities.

It will be observed that the 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled



to recover six years' interest. It has been observed by Lord *St. Leonards*, "that even as to legacies charged upon real estates, there is no saving as to arrears of interest for infancy, or the like. In the case of younger children's portions, although by way of legacy, the interest is often allowed to remain in arrear for several years, for the accommodation of the head of the family; and the statute will, unless it be modified, often bar a just claim unnecessarily, and ultimately injure the person whom it was intended to benefit; and whether a legacy be payable out of real or personal estate, of course interest upon it, where it carries interest, ought not to be barred during the infancy of the legatee." (Sugd. V. & P. 638, 11th ed.)

3 & 4 Will. 4,  
c. 27, s. 42.

A suit for the recovery of mesne rents and profits in equity, is not a suit for the recovery of arrears of rent within sect. 42. (*Per Turner*, L. J., *Hicks v. Sallitt*, 3 D., M. & G. 816.) On the question how far the account is to be carried back in such suits, the following distinctions have been laid down. In cases of express trusts, the Statutes of Limitation afford no defence, and an account will be directed from the accruer of the plaintiff's title. (*Sturgis v. Morse*, 3 De G. & J. 1; *Wright v. Chard*, 4 Drew. 673; *Mathew v. Brise*, 14 Beav. 341.) Where there is no express trust, but the person in possession has had notice of the plaintiff's title, it was formerly held, that as at law more than six years' mesne profits could not be recovered, so in equity the account would not be carried back beyond six years from the filing of the bill (*Reade v. Reade*, 5 Ves. 744; *Harmood v. Oglander*, 6 Ves. 215); and in *Hicks v. Sallitt* (3 D., M. & G. 782), where the defendant was a purchaser for value, with notice of the plaintiff's title, *Turner*, L. J., thought that the statute 21 Jac. 1, c. 16, might be applicable, by analogy to the action of account at law. But, "where there is no trust, no fraud, no infancy, no suppression, where, in short, there is a mere *bonâ fide* adverse possession, it is not according to the course of the court to carry back the account of rents beyond the filing of the bill." (*Per Turner*, L. J., *Hicks v. Sallitt*, 3 D., M. & G. 782, where Lord *Cranworth* refers to the older cases): and *Wood*, V.-C., laid down in *Thomas v. Thomas* (2 K. & J. 79), that in an adverse suit in the nature of an ejectment suit, the account is directed only from the filing of the bill. (See also *Penny v. Allen*, 7 D., M. & G. 409; *Morgan v. Morgan*, L. R., 10 Eq. 99.)

ACCOUNT OF  
RENTS IN EQUITY.

1. From accruer  
of plaintiff's title.

2. For six years.

3. From filing of  
bill.

Where the plaintiff has been under the disability of infancy during the possession of the defendant, the latter is regarded as a bailiff for the former, and an account will be directed during the period of infancy. (*Blomfield v. Eyre*, 8 Beav. 250; *Nanney v. Williams*, 22 Beav. 452; *Schroder v. Schroder*, Kay, 591; *Pascoe v. Swan*, 27 Beav. 508; *Pelly v. Bascombe*, 4 Giff. 390.) But the bill must be filed within six years after the plaintiff comes of age. (*Lockey v. Lockey*, 1 Eq. Ca. Abr. 304, pl. 10.) It has been laid down in Ireland, that a person entering on the estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position towards the defendant, (1) when he is the infant's natural guardian; (2) when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice, the infant's rights; (3) when he takes possession with knowledge or express notice of the infant's rights. (*Quinton v. Frith*, I. R., 2 Eq. 396.)

Infancy of plain-  
tiff.

Where the plaintiff has been guilty of laches an account will only be directed from the filing of the bill. (*Dormer v. Fortescue*, 3 Atk. 130; *Pettinard v. Prescott*, 7 Ves. 541; *Pickett v. Logan*, 14 Ves. 215; *Schroder v. Schroder*, Kay, 591.) The right to an account, even in the case of mines, may be lost by laches. (*Parrott v. Palmer*, 3 Myl. & K. 632.) A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power. (*Denys v. Shuckburgh*, 4 Y. & Coll. 42).

Laches.

There is no fixed limit of time in directing an account against the trustee of a charity. The result of the authorities is, that in each case the court is bound by the particular circumstances. (*Att.-Gen. v. The Mayor of Exeter*, Jac. 448.) An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the

In case of chari-  
ties.



3 & 4 Will. 4,  
c. 27, s. 42.

information, nor to six years before that time. (*Att.-Gen. v. Brewers' Company*, 1 Mer. 495; *Att.-Gen. v. Corporation of Stafford*, 1 Russ. 547.) And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount. (*Att.-Gen. v. Mayor of Exeter*, Jac. 443; 2 Russ. 362; 3 Russ. 395; *Att.-Gen. v. Caius College*, 2 Keen, 110; *Att.-Gen. v. Pretymann*, 4 Beav. 462.) When the Court of Chancery limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the Statute of Limitations. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it. (*Att.-Gen. v. Mayor of Exeter*, 2 Russ. 367). If there be a fair and honest intention on the part of those who have the management of a charity, it is not the practice of the court, though that rule should be founded in mistake, to hold trustees responsible for acts so done, or to call back money which they have so paid. (*Att.-Gen. v. The Dean and Canons of Christchurch*, 2 Russ. 324.) The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *Att.-Gen. v. Mayor, &c. of Newbury*, 3 Myl. & Keen, 647. (See Shelford on Mortmain and Charities, pp. 455—467, and *Att.-Gen. v. Davis*, 18 W. R. 1132.)

**INTEREST ON  
DEBTS GENERALLY.**

Interest on debts  
at common law.

3 & 4 Will. 4, c. 42,  
ss. 28—30.

At common law it was the general rule that interest was not payable on any debts, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances, or unless the debt were secured by a bill of exchange or promissory note. (*Higgins v. Sargent*, 2 B. & Cr. 348; Chitty on Contracts, 8th ed., p. 595; and see *Rhodes v. Rhodes*, Johns. 653.) Now, however, by 3 & 4 Will. 4, c. 42, it is enacted (sect. 28), that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that the interest shall be payable in all cases in which it is now payable by law. (See Ram on Assets, 560—576.) Sect. 29. The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions of policies of assurance made after the passing (14th August, 1833) of this act. Sect. 30. If any person shall sue out any writ of error upon any judgment whatsoever given in any court in any action personal, and the court of error shall give judgment for the defendant thereon, then interest shall be allowed by the court of error for such time as execution has been delayed by such writ of error for the delaying thereof. (3 & 4 Vict. c. 105, sects. 53—55, Ireland.)

Cases at law on  
sect. 28.

Interest cannot properly be allowed under 3 & 4 Will. 4, c. 42, s. 28, where the sums are not payable by virtue of any written instrument at a certain time, nor when a demand of payment in writing within the meaning of the act has not been made. (*Harper v. Williams*, 4 Q. B. 219.) As to this section, see also *Attwood v. Taylor*, 1 M. & Gr. 279; *Beaumont v. Greathead*, 2 C. B. 494. An attorney may give notice that he will claim interest on his bill of costs delivered to his client from the date of the notice. (*Berrington v. Phillips*, 1 M. & W. 48.) Before action the plaintiff by letter to the defendant demanded re-payment of the whole of the deposits which he had paid on shares in a company which afterwards proved an abortive undertaking, adding that he should expect to be paid 5l. per cent. interest from a time specified which was prior to the date of

the letter. Held, a sufficient demand of payment within this section. (*Lord Lonsborough v. Monatt*, 4 El. & Bl. 1.) A written application for a loan till a fixed day is not an instrument by virtue of which money is payable within this section, although the loan is made on the terms of the application. (*Taylor v. Holt*, 3 H. & C. 452; 13 W. R. 78). And see the cases in equity, *post*.

3 & 4 Will. 4,  
c. 27, s. 42.

As to the allowance of interest in proceedings in error, see *Garland v. Carlisle*, 5 Cl. & F. 355; *Langridge v. Levy*, 4 M. & W. 337; *Hooper v. Lane*, 6 H. L. 443; *Tyne Improvement Commissioners v. General Steam Navigation Co.*, 15 W. R. 875; *Rodger v. The Comptoir D'Escompte de Paris*, L. R., 3 P. C. 465; Reg. Gen., Q. B., C. P., and Ex., T. T., 16 Vict. r. 26, and T. T. 1867.

Cases on sect. 30.

In equity, interest was more frequently allowed. (See the earlier cases collected, C. P. Coop. 209—250, n.) The stat. 3 & 4 Will. 4, c. 42, being a remedial act, a court of equity will adopt many of its provisions, changing its formal language, and adapting it to the practice of the court. (*Hyde v. Price*, 8 Sim. 578.) It has since been held, that the act 3 & 4 Will. 4, c. 42, s. 28, giving power to juries to allow interest if they think fit, has not altered the rules by which the discretion of the Court of Chancery is guided. (*Re Powell's Trust*, 10 Hare, 134. See *Booth v. Leicester*, 3 My. & Cr. 459; *Martyn v. Blake*, 3 Dru. & War. 125; *Earl of Mansfield v. Ogle*, 4 De G. & J. 38; *Spartali v. Constantinidi*, 20 W. R. 823.)

Interest on debts  
in equity.

3 & 4 Will. 4,  
c. 42, s. 28.

Interest at 4l. per cent. will be allowed on the amount of a demand for work and labour in an administration suit from the time when the demand for interest was made, under 3 & 4 Will. 4, c. 42, s. 28. (*Mildmay v. Methuen*, 3 Drew. 91.) Where notice had been given by the plaintiffs to the defendants, that interest would be claimed under this section, and the defendants had prevented the plaintiffs from recovering the interest at law by paying the money into court: it was held, under the circumstances of the case, that the court had jurisdiction to order payment of interest. (*Hull and Selby R. Co. v. N. E. R. Co.*, 5 D., M. & G. 872.)

Cases in equity on  
sect. 28.

Interest is payable under 3 & 4 Will. 4, c. 42, s. 28, where a sum being payable at a certain time, a dispute which is settled by the court arises as to the amount payable. (*Mackintosh v. G. W. R. Co.*, 4 Giff. 683.) A notice of a call on a contributory under a voluntary winding-up under the supervision of the court, which stated that if the call was not paid at the time appointed, interest would be charged thereon at the rate of 5l. per cent., was held to be sufficient within this section so as to charge interest. (*Re Overend, Gurney & Co., Ex parte Lintott*, L. R., 4 Eq. 184; *Barrow's case*, L. R., 3 Ch. 784. See also *Stocken's case*, L. R., 3 Ch. 412.) As to the interest which will be allowed on debts proved in a winding-up, see *Re Herefordshire Banking Co.*, L. R., 4 Eq. 250; *Re East of England Banking Co.*, L. R., 4 Ch. 14; *Warrant Finance Co.'s case*, *ib.* 643; *Hughes' Claim*, L. R., 13 Eq. 633.

Interest on calls.

On debts proved  
in a winding-up.

As to the computation of interest between banker and customer, see *Crosskill v. Bower*, 32 Beav. 86; *Williamson v. Williamson*, L. R., 7 Eq. 542; between trustee and *cestui que trust* (*Jones v. Foxall*, 15 Beav. 392; *Penny v. Avison*, 3 Jur., N. S. 62); and between principal and agent (*Turner v. Burkinshaw*, L. R., 2 Ch. 488; *Burdick v. Garrick*, L. R., 5 Ch. 233). There is no general rule as to the rate of interest the court will allow on repayment of money expressed to be the consideration for an absolute assignment, which is treated only as a security for such consideration money (*Re Unsworth's Trust*, 2 Dr. & Sm. 337), where 5l. per cent. was allowed. Interest at the rate of 4l. per cent. was allowed on a simple contract debt secured by deposit of title deeds, where there had been no stipulation as to interest. (*Re Kerr's Policy*, L. R., 8 Eq. 381.) As to interest on charges, see *Lippard v. Ricketts*, L. R., 14 Eq. 291; and on mortgages, *Thompson v. Drew*, 20 Beav. 49; *Ashwell v. Staunton*, 30 Beav. 52. Where unconscionable bargains have been entered into with money lenders, the court will only allow the sums actually advanced to be recovered together with interest at 5l. per cent. (*Miller v. Cook*, L. R., 10 Eq. 641; *Tyler v. Yates*, L. R., 6 Ch. 665; *Aylesford v. Morris*, 21 W. R. 188.)

Between banker  
and customer ;  
trustee and *cestui  
que trust*;  
principal and  
agent.  
On securities.

Where an annuity is in arrear "the established rule of the court (which,

Arrears of an-  
nuity.

3 & 4 Will. 4,  
c. 27, s. 42.

On money due  
under covenant.

Not allowed be-  
yond penalty of  
bond.

Computation of in-  
terest in adminis-  
tration suits.

however, is only general and not inflexible) is, that interest cannot be recovered on the arrears." (*Per Sugden, C.*, in *Martyn v. Blake*, 3 Dru. & War. 125, adopted by *Turner, L. J.*, in *Earl of Mansfield v. Ogle*, 4 De G. & J. 41; and Lord *Chelmsford* in *Blogg v. Johnson*, L. R., 2 Ch. 228.) See the cases collected, Daniell, Ch. Pr. 1105. As to interest on arrears of salary, see *Rishton v. Grissell*, L. R., 10 Eq. 393. Interest was allowed at 5*l.* per cent. where default had been made in the performance of a covenant to pay money. (*Knapp v. Burnaby*, 9 W. R. 765.) It is the general rule both at law (*Brangwin v. Parrot*, 2 W. Bl. 1190; *White v. Sealey*, 1 Dougl. 49), and in equity, to consider the penalty of the bond as the limit of the debt or damages which can be recovered. But there are exceptions to this rule. See the earlier cases collected in C. P. Coop. 209—230; and see *Clarke v. Lord Abingdon*, 17 Ves. 106; *Hughes v. Wynne*, 1 Myl. & K. 20; *Walter v. Meredith*, 3 Y. & Coll. 264; and *Mathews v. Keble*, L. R., 3 Ch. 691, where the interest allowed, together with the principal, exceeded the penalty.

As to deducting income tax on payments in respect of interest, see *Crane v. Kilpin*, L. R., 6 Eq. 38. And as to calculation of interest and apportionment in questions between a tenant for life and remainderman, see *Re Grabowski's Settlement*, L. R., 6 Eq. 12; *Cox v. Cox*, L. R., 8 Eq. 343; *Maclaren v. Stainton*, L. R., 11 Eq. 382.

Where a decree or order is made directing an account of the debts of a deceased person, unless otherwise ordered, interest shall be computed on such debts, as to such of them as carry interest, after the rate they respectively carry, and as to all others after the rate of 4*l.* per cent. from the date of the decree or order. (Cons. Ord. XLII., rule 9.) A creditor, whose debt does not carry interest, who comes in and establishes the same before the judge in chambers under a decree or order of the court or of the judge in chambers, shall be entitled to interest upon his debt at the rate of 4*l.* per cent. from the date of the decree or order, out of any assets which may remain after satisfying the costs of the suit, the debts established and the interest of such debts as by law carry interest. (Cons. Ord. XLII., rule 10. See the cases quoted in Morgan, 612; Daniell, Ch. Pr. 1103—1106.) On the subject of interest generally, see Fisher's Digest, tit. Interest of Money; 2 Stark. on Ev. 575—579, 3rd ed.

3 & 4 Will. 4,  
c. 42, s. 3.

Limitation of  
action of debt on  
specialties, &c.

### III. OF THE LIMITATION OF ACTIONS ON SPECIALTIES, 3 & 4 WILL. 4, C. 42, SS. 3—7.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *fieri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon any indenture of demise, or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after;

and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. (As to Ireland see 16 & 17 Vict. c. 113, s. 20.) (a).

3 & 4 Will. 4,  
c. 42, s. 3.

(a) To an action of covenant six years is not a good plea of limitation. (*Hartshorn v. Watson*, 4 Bing. N. C. 178.) Where D. by deed sold to H. certain seams of coal, H. covenanting to pay the purchase-money by promissory notes of even date: held, that this was a covenant to pay the purchase-money by means of the notes, that D. had a remedy upon the covenant to pay the purchase-money, and that it was a bad plea that the causes of action did not accrue within six years before action. (*Dixon v. Holroyd*, 7 Ell. & Bl. 703.) In 1831, an obligee of a bond brought an action against the obligor, and after notice of trial the action abated by the death of the obligor in 1835. The obligor left a will which was proved by the executor therein named: and in May, 1857, administration of the goods and effects of the obligor with the will annexed was granted to the defendant. In 1852, the obligee petitioned the Insolvent Debtors' Court, and his effects vested in the provisional assignee who commenced an action on the bond against the defendant on the 17th May, 1858. Held, that the second action was not barred by this section, for the first action had been commenced within the proper time, and had abated without default of the plaintiff, and the second action had been commenced within a reasonable time after the granting of letters of administration. (*Sturgis v. Darell*, 6 H. & N. 120; 8 W. R. 653.)

Cases within this section.

An action for calls by a company under 8 & 9 Vict. c. 16, is an action on a specialty, and is therefore within this section, and not 21 Jac. 1, c. 16. (*Cork and Bandon R. Co. v. Goode*, 13 C. B. 827; see *Shepperd v. Hills*, 11 Exch. 55.) In the winding-up of a banking company which had been established by a deed of settlement, it was held, that the liability of a shareholder was a liability by way of specialty within this section. (*Re Portsmouth Banking Co.*, L. R., 2 Eq. 167.) By 25 & 26 Vict. c. 89, s. 75, the liability to contribute under a winding-up order, creates a specialty debt, even though the company was not registered under that act (*Muggeridge v. Sharp*, L. R., 10 Eq. 443); and the specialty is one which binds the heirs of the contributory. (*Buck v. Robson*, L. R., 10 Eq. 629.) In the case of companies formed and registered under that act, liability on the part of a member ceases twelve months after the date of his retirement. (25 & 26 Vict. c. 89, s. 38.) A call made under the old Joint Stock Companies Winding-up Acts did not create a specialty debt. (*Robinson's Executors' case*, 6 De G., M. & G. 572.)

An action of covenant for rent in arrear may be brought within the time limited by 3 & 4 Will. 4, c. 42, s. 3, and is not limited to six years by the 42nd section of 3 & 4 Will. 4, c. 27. In *Paget v. Foley* (2 Bing. N. C. 679), *Tindal*, C. J., said, "If the 42nd section of 3 & 4 Will. 4, c. 27, is a general enactment, the subsequent declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former: we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception; therefore, without affecting the clause in the first statute further than is necessary to give effect to the second, we decide that the plea of six years' limitation of the cause of action is bad." (See *Paddon v. Bartlett*; 3 Ad. & Ell. 895; 5 Nev. & M. 883; *Wilson v. Jackson*, 2 Ir. L. R. 1.) An action of debt upon a covenant in an indenture granting an annuity or rent-charge to issue out of land, may be brought within the period of twenty years limited by 3 & 4 Will. 4, c. 42, s. 3, and is not barred by 3 & 4 Will. 4, c. 27, s. 42, which limits the recovery of arrears of interest within six years. (*Strachan v. Thomas*, 4 P. & D. 229; 12 Ad. & Ell. 558.) See further *Hunter v. Nockolds*,

Cases within this section and also within 3 & 4 Will. 4, c. 27.

3 & 4 Will. 4,  
c. 42, s. 3.

Cases in equity.

When time begins  
to run under this  
section.

1 Mac. & Gor. 640; and the cases quoted under 3 & 4 Will. 4, c. 27, s. 42, *ante*, p. 252. The limitation prescribed by 3 & 4 Will. 4, c. 27, does not apply to an action on a collateral covenant for payment of rent charged on land, and the covenantee may recover damages for the breach of that covenant, notwithstanding his right to recover the rent-charge is barred by that statute. (*Manning v. Phelps*, 10 Exch. 59.)

It has been already stated that a court of equity will adopt many of the provisions of this statute. (*Hyde v. Price*, 8 Sim. 578.) It has been held in administration suits that specialty debts are barred by lapse of time under this statute. (*Spickernell v. Hotham*, Kay, 669.) But where a settlor had constituted himself a trustee of a covenant, time was held to be no bar. (*Stone v. Stone*, L. R., 5 Ch. 74.) See note as to the doctrines of equity with reference to the statutes of limitation, p. 288, *post*.

In the case of *post obit* bonds, time does not begin to run until the death. Thus where to an action of debt on a bond, dated more than twenty years before the commencement of the action, the defendant pleaded that the debt and cause of action in the declaration mentioned did not accrue at any time within twenty years next before the commencement of the suit; the plaintiff replied that the debt and cause of action did so accrue. At the trial the bond was produced, and appeared to be a *post obit* bond, and it was proved that the party upon whose death the sum secured was made payable died within twenty years: it was held, that the plaintiff was entitled to the verdict. (*Tuckey v. Hankins*, 4 C. B. 655. See *Barber v. Shore*, 1 Jebb & S. 610.)

On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run against each as it becomes due; (*Amott v. Holden*, 18 Q. B. 593;) where Lord Campbell, C. J., said (p. 603): "It is admitted that, since *Sanders v. Coward* (15 Mees. & W. 48), and *Blair v. Ormond* (17 Q. B. 423), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that. The obligee, therefore, is not prevented by the statute from suing in respect of breaches committed more than twenty years after the first breach, if he has chosen to waive the previous breaches."

In giving judgment in *Sanders v. Coward* (15 M. & W. 56), Parke, B., said, "In construing the 3rd section of the 3 & 4 Will. 4, c. 42, it seems to us that the limitation in an action on bond, of 'twenty years from the cause of action or suit,' is not to be confined to twenty years from the first breach of a condition to do various things, any more than it would be confined to that period from the first breach of a covenant to do various things, in an action of covenant. Although, on the first breach of the condition of a bond, the obligee may sue the obligor, and have judgment under the statute of 8 & 9 Will. 3, c. 11, as a security of a higher nature for future breaches, he is not bound to pursue that course. He may waive the right of action on the bond in respect of the first breach, or any number of breaches, and be contented with the specialty security only for future breaches, and sue afterwards on a subsequent forfeiture, and assign that for a breach. If it were not so the inconvenience would be considerable, and the value of a security by bond diminished; and it is to be observed, that the limitation in the statute is not from the cause of action first accrued on the bond, but generally from the cause of action; and this construction leaves the obligee much in the same situation as before the act, except that the statute gives to the lapse of time the effect of an absolute bar to the remedy, instead of its being used as evidence of payment or performance of the condition, as it would have been before. If before the statute there had been a bond for the payment of twenty annual instalments, the lapse of twenty years from the time fixed for the payment of each instalment would have been good evidence to raise a presumption of the due payment of each instalment, but the right to recover the instalments due within twenty years would be unaffected." (See *Higgs v. Mortimer*, 1 Exch. 711.) If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve



years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year. (*Per Bramwell*, B., 7 L. T., N. S. 792.) Where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues. (*Maddock v. Mallet*, 12 Ir. Ch. R. 193.)

3 & 4 Will. 4,  
c. 42, s. 3.

A deed of settlement establishing a banking company contained a clause exonerating the transferor of shares from all liabilities in respect of his shares subsequently to the transfer, with a proviso that nothing contained in that clause should extend to release the transferor from his proportion of losses sustained by the company up to the time of transfer. In the winding-up of the company time was held to run from the date of the transfer, and not from the date of the winding-up order. (*Re Portsmouth Banking Co.*, L. R., 2 Eq. 167.)

4. That if any person or persons that is or are or shall be entitled to any such action or suit, or to such *scire facias*, is, are or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, discover, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is or are or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas (b).

Remedy for in-  
fants, *femes covert*,  
&c.

Absence of defen-  
dants beyond seas  
provided for.

(b) This provision as to disabilities has been altered by 19 & 20 Vict. c. 97, s. 10 (p. 293, *post*), which enacts that the absence beyond seas of the person entitled to the action shall be no disability. As to the meaning of "beyond seas," see sect. 7 of this statute (p. 264, *post*). See further the cases quoted under 21 Jac. 1, c. 16, s. 7 (p. 273, *post*), the law as to disabilities under both these sections being now the same.

Disabilities.

5. That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent (c), or by part payment or part satisfaction on account of any principal or interest being then due thereon (d), it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may, by way of replication, state such

Proviso in case of  
acknowledgment  
in writing, or by  
part payment.



3 & 4 Will. 4,  
c. 42, s. 5.

Acknowledgment  
by writing.

acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute. (See 16 & 17 Vict. c. 113, s. 23, as to Ireland.)

(c) In an action of covenant on an indenture of mortgage of certain houses, executed in 1824 by the defendant in favour of the plaintiff's testator, to secure payment of 400*l.* and interest, the plaintiff, in order to take the case out of the stat. 3 & 4 Will. 4, c. 42, gave in evidence a deed executed by the defendant within twenty years before action brought, but to which deed the plaintiff's testator was no party. The deed, after reciting that the defendant had executed a mortgage of the house in question to the plaintiff's testator for securing to him a sum of 320*l.* and interest, stated that he conveyed that and other properties to trustees on trust to sell, and out of the proceeds of the sale to pay off all the mortgages and other incumbrances affecting the property, and then to pay the creditors, with an ultimate trust as to the surplus. It was held, that this was not an acknowledgment of the debt within the 5th section of the statute, so as to take the case out of the operation of the 3rd section. It was not necessary for the court to decide the point which was raised in this case as to how far the principle of the cases which have decided that an acknowledgment to third persons is not sufficient in actions on simple contracts to take a debt out of the 21 Jac. 1, c. 16, is applicable to the 3 & 4 Will. 4, c. 42, as to debts by specialty. (*Howcutt v. Bonner*, 8 Exch. R. 491; and see *Forsyth v. Bristowe*, 8 Exch. 716.) It has, however, since been decided that the acknowledgment under this section need not be made to the person entitled, or amount to a promise to pay; and, therefore, the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, was held to be sufficient to take the bond debt out of the operation of this statute. (*Moodie v. Bannister*, 4 Drew. 433; 28 L. J., Ch. 881.) To a declaration in covenant for non-payment of money, the defendant pleaded that the cause of action did not accrue within twenty years. Replication, that it did accrue within, &c. It was held, under stat. 3 & 4 Will. 4, c. 42, ss. 3, 5, that the plaintiff could not, in support of this issue, give evidence of an acknowledgment by letter within the twenty years. (*Kempe v. Gibbon*, 9 Q. B. 609.) See further the cases as to acknowledgments by payment under this section.

The case of disability at the time of the acknowledgment existing on the part of the person entitled to the action, or on the part of the person making the acknowledgment is provided for at the end of this section. See the joint effect of this provision and 19 & 20 Vict. c. 97, s. 19, explained Darb. & Bos. Stat. Lim. 111—113.

Acknowledgment  
by payment.

(d) The 5th section does not specify by whom the part payment is to be made; but Lord *Cranworth*, C., expressed an opinion that there can be no doubt but it must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger. (*Roddam v. Morley*, 1 De G. & J. 18.) The payment of interest to a mortgagee by the assignee of the equity of redemption, was held to be payment by the agent of the mortgagor within the meaning of this section. (*Forsyth v. Bristowe*, 8 Exch. 716.) Payments made by a receiver in a suit, but which were not authorized by the order appointing him, were held not to take the case out of this statute. (*Whitley v. Lowe*, 25 Beav. 421; 2 De G. & J. 704.)

Where several  
liable.

Payment by a devisee on a specialty of his testator's, in which the heirs were bound, is an acknowledgment within the 5th section, and sufficient to preserve the right of action, not only against the party making the payment, but also against all other parties liable on the specialty. (*Roddam v. Morley*, 1 De G. & J. 1; 2 K. & J. 336.) "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or pay-

ment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty." (*Per Lord Cranworth, L. C., Ib.*) 3 & 4 Will. 4,  
c. 42, s. 5.

Where a person indebted on a specialty dies having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially; it was said by *Kindersley, V.-C.*, "There are three parties, each of whom is liable to the claims of a specialty creditor—the executor in respect of the personalty, the trustees in respect of the real estate devised for payment of debts, and the beneficial devisee in respect of the real estate beneficially devised. . . . If any one of these parties makes the payment or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty." (*Coope v. Cresswell, L. R., 2 Eq. 117*); in which case it was held, that payment of interest on a specialty debt of a testator by his personal representatives who were also trustees of real estate devised for payment of debts, took the debt out of the statute as against a beneficial devisee. This decision was reversed on appeal by Lord *Chelmsford (L. R., 2 Ch. 112)*, who said that he was unable to concur in the reasoning which led to the ultimate decision in *Roddam v. Morley (ubi sup.)*.

C. H. mortgaged freeholds and leaseholds in 1822. He devised and bequeathed his residuary estate upon trust for the payment of his debts, including mortgage debts, and afterwards upon trust for J. H. A. H., who was beneficial tenant for life under the will of C. H., in a moiety of the freeholds not comprised in the mortgage, and was also interested in the residue under the will of J. H., paid interest on the mortgage down to her death in 1859. Held, that such payment prevented the Statutes of Limitation being a bar to the mortgagee's proceeding, either against the property comprised in the mortgage, or on the covenant for repayment against the estate of C. H. (*Pears v. Laing, L. R., 12 Eq. 41.*) It was said by *Bacon, V.-C.*, that he conceived that *Roddam v. Morley* (notwithstanding what was said of it in *Coope v. Cresswell*, and elsewhere) was of unquestionable authority. (*Ib.*)

As regards acknowledgments by payment of principal or interest in the case of several parties being liable, it has now been provided by 19 & 20 Vict. c. 97, s. 14, that payments by one co-debtor shall not prevent time running under this statute in favour of another co-debtor. (*See post.*)

By a marriage settlement, dated in 1828, A. covenanted to transfer a sum of stock belonging to him to trustees upon trust to pay the dividends to himself for life, and then upon trusts for the benefit of the intended wife and the issue of the marriage. The stock was not transferred: it was held, that this constituted a debt from him, and that notwithstanding his life interest time began to run against this debt from the execution of the settlement; for in this case the sum of stock which ought to have been brought into existence as a trust fund never had any existence, and it could not be assumed that a person had been paying himself the interest of a non-existing fund. (*Spickernell v. Hotham, Kay, 669.* See also *Stone v. Stone, L. R., 5 Ch. 74.*) But where part of the funds comprised in a marriage settlement (under which the husband took the first life interest) consisted of a bond to secure a sum of money lent by the lady to her intended husband, conditioned for repayment by him with interest in six months if he should be called upon to do so, it was held that time did not begin to run until the death of the husband, he being the person who was both bound to pay the interest on the bond, and entitled to receive the interest under the settlement. (*Mills v. Borthwick, 35 L. J., Ch. 31; 13 W. R. 707.*) Under the terms of a marriage settlement the owner was entitled until bankruptcy or insolvency to receive the interest of a fund. This fund was lent to him and he executed a bond to secure repayment, and judgment was entered on the bond. Held, that as regards the judgment, time did not begin to run until the insolvency. (*Re Keay's Estate, I. R., 8 Eq. 659.*)

What amounts to payment.

In the year 1883, the plaintiffs, who were trustees of a marriage settlement, lent to the husband at interest some of the money settled to the separate use of the wife, on the security of the joint bond of the husband and the

3 & 4 Will. 4,  
c. 42, s. 5.

defendant. No interest was paid; but on the 31st October, 1847, it was arranged between the plaintiffs and the husband and wife that she should give to the plaintiffs her receipt for the interest up to that date, which she did accordingly. She afterwards gave from time to time receipts for each half-year's interest up to November, 1860. No money ever passed: it was held, that the transaction amounted to a payment or satisfaction of the interest, within 3 & 4 Will. 4, c. 42, s. 5. (*Amos v. Smith*, 1 H. & Colt. 238; 10 W. R. 759.)

A payment made within twenty years upon one of separate judgments obtained upon foot of one joint and several bond will prevent recovery upon another of such judgments from being barred by this statute. (*Re Earl of Kingston's Estate*, 1 R., 3 Eq. 485.)

A bond conditioned for the replacing a precise amount of stock on a fixed day, not for the payment of any given sum of money on that day, nor even for the payment of such a sum of money as would purchase the given amount of stock, but for replacing the stock itself, is not such an instrument as comes within the 5th section of 3 & 4 Will. 4, c. 42. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee is not payment of interest, neither is any sum of money thereby acknowledged to be due. Lord Campbell, C. J., said, "The argument that, as the bond in question is plainly within the 3rd section, it must necessarily be within the 5th, is quite untenable, for it is obvious that a bond conditioned to perform the covenants of a lease in respect of repairs or any other matter sounding purely in damages, would be within the 3rd section, and yet it would be impossible by any ingenuity of construction to bring it within the 5th." (*Blair v. Ormond*, 17 Q. B. 436, 437.)

As to the proof of payment by indorsements on a bond see 1 Taylor Ev. 614—620, 5th ed.

The limitation  
after judgment of  
outlawry reversed.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, then in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after. (16 & 17 Vict. c. 113, s. 21, Ireland) (e).

(e) See *Tynte v. The Queen*, 7 Q. B. 216.

No part of the  
United Kingdom,  
&c. to be deemed  
beyond the seas  
within the mean-  
ing of this act.

7. That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law" (f).

(f) The act 4 Anne, c. 16, s. 19, was omitted from this section, and the consequence was to make Ireland a place beyond the seas within the meaning of 4 Anne, c. 16, s. 19, notwithstanding the Act of Union. (*Lane v. Bennett*, 1 M. & W. 70; *Battersby v. Kirk*, 2 Bing. N. C. 603.) But see now 19 & 20 Vict. c. 97, s. 12.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, st. 2, c. 6. (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3.)

3 & 4 Will. 4,  
c. 42, s. 7.

Beyond the seas,  
within the Irish  
acts.

Old rule as to the  
presumption of  
payment of bonds.

Before 3 & 4 Will. 4, c. 42, it had been long held that satisfaction of money secured on bonds would be presumed after twenty years. (3 P. Wma. 396; 2 Atk. 144.) In *Morley v. Morley* (5 De G., M. & G. 610), bonds more than twenty years old were presumed to be satisfied. But such presumption of payment might, like every other mere presumption, have been encountered by evidence to repel it, as if the interest were proved to have been paid within the time conceived to furnish the presumption; (8 Mod. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118;) or if the obligor had had no opportunity nor means of paying; (*Fladong v. Winter*, 19 Ves. 196;) or had been abroad ever since he acknowledged by letter the debt to be due. (*Newman v. Newman*, 1 Stark. N. P. C. 101.) See further as to the presumption of payment of bonds, and the grounds upon which the presumption could be rebutted, *Barrington v. Searle*, 3 Br. P. C. 535; *Glyn v. Bank of England*, 2 Ves. sen. 43; *Oswald v. Legh*, 1 T. R. 271; *Colsell v. Budd*, 1 Camp. 27; *Middleton v. Melton*, 10 B. & C. 317; *Gleadon v. Atkin*, 1 Cr. & M. 410; *Sanders v. Meredith*, 3 Man. & Ryl. 116; 1 Phil. Ev., 7th ed. 255.

#### IV. OF THE LIMITATION OF ACTIONS ON SIMPLE CONTRACT DEBTS, 21 JAC. 1, c. 16; 9 GEO. 4, c. 14.

21 Jac. 1, c. 16,  
s. 3.

3. That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say,) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of parliament or within two years next after the words spoken, and not after (a).

Limitation of cer-  
tain personal  
actions.

(a) An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the great seal, is not an action of debt grounded upon a contract without specialty within this section, and there-

Cases within this  
section.

21 Jac. 1, c. 16,  
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fore a plea of the Statute of Limitations under this statute is a good plea, and bars the recovery of the penalty, unless the action be commenced within six years after it is incurred. (*Tobacco-pipe Makers v. Loder*, 16 Q. B. 765; 20 L. J., Q. B. 414.) An action for calls by a company under the Companies Clauses Consolidation Act, 1845, is an action on a specialty, and is therefore not barred by this act, although not brought within six years. (*Cork and Bandon R. Co. v. Goode*, 13 C. B. 827; 22 L. J., C. P. 198.) The liability of an equitable assignee of leaseholds is that of simple contract, and the Statute of Limitations limits its liability to six years after the cause of suit. (*Saunders v. Benson*, 4 Beav. 351. See *Moore v. Greg*, 2 Phill. C. C. 717.)

Set-off.

The statute 21 Jac. 1, c. 16, s. 3, extends to defences of set-off, &c., as well as actions; therefore a debt barred by the statute cannot be set off, and if such debt be pleaded in bar to the action the plaintiff may reply the above statute. (*Remington v. Stevens*, 2 Str. 1271; Bull. N. P. 180; and see 9 Geo. 4, c. 14, s. 4, p. 275, *post*.) But the statute must be replied specially and cannot be relied on under a replication taking issue. (*Chapple v. Durston*, 1 C. & J. 1.) The set-off must have been barred before the commencement of the suit in order to support a replication of the statute. (*Walker v. Clement*, 15 Q. B. 1046.) As to replying the statute to part of the claim of set-off see *Mead v. Bashford*, 5 Ex. 336. See also *Fairthorne v. Donald*, 13 M. & W. 424.

Banker and  
customer.

Money deposited with a banker by his customer in the ordinary way, is money lent to the banker with a superadded obligation that it is to be paid when called for by cheque; and consequently, if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the Statute of Limitations is a bar to its recovery—*dubitante Pollock*, C. B. (*Pott v. Clegg*, 16 Mees. & W. 324.) The relation between a banker and his customer is that of debtor and creditor, and not trustee and *cestui que trust*. (*Foley v. Hill*, 1 Phil. 399; 2 H. L. Ca. 28; and see *Moxon v. Bright*, L. R., 4 Ch. 294.) But, where a fund was standing to the account of two trustees in the books of some bankers who had notice that it was a trust fund, and they by the direction of the tenant for life transferred it to the account of the tenant for life, and thereby obtained payment of a debt due from him to them; it was held, that the trustees had a right in equity to compel the bankers to replace the trust fund, and that the Statute of Limitations was inapplicable. (*Bridgman v. Gill*, 24 Beav. 302.) As to the parties to actions against bankers, and the practice of the common law courts in allowing amendments to avoid the effect of the statute, see *Cramford v. Cocks*, 20 L. J., Ex. 169; *Corne v. Malins*, *ib.* 434.

Solicitor and  
client.

The Statute of Limitations, in the absence of fraud, applies to an action or suit brought by a client against his solicitor, to recover money received by the solicitor as his agent. (*Re Hindmarsh*, 1 Dr. & Sm. 129.) But where a solicitor in London held a power of attorney from a client in America to sell property and invest the proceeds in the client's name, and the solicitor received money under the power, and paid it into his own bankers to the general account of his firm, it was held that the solicitor held the money in trust for the client, and that the statute was no bar. (*Burdick v. Garrick*, L. R., 5 Ch. 233; see *Gray v. Bateman*, 21 W. R. 137.) Where a railway company deposited sums of money with C., their solicitor and agent, in a question on the Statute of Limitations which arose in the administration of C.'s estate, it was held by the Court of Appeal in Ireland, reversing the decision of the Master of the Rolls (L. R., 1 Eq. 436), that C. was not a trustee of these deposits. (*Cramford v. Cramford*, 16 W. R. 411.) See also *Smith v. Pococke*, 2 Drew. 197.

Account.

It was formerly held, that in the case of open accounts between persons other than merchants, the statute did not begin to run so long as the account was continued. (See *Foster v. Hodgson*, 19 Ves. 185.) The effect of 9 Geo. 4, c. 14, in the case of actions of debt or assumpsit was, that although there might be a mutual open running account, the existence of items not barred was not sufficient to take items which were barred out of the statute. (*Williams v. Griffiths*, 2 Cr. M. & R. 45; *Cottam v. Partridge*, 4 Man. &



Gr. 271; see *Jackson v. Ogg*, Johns. 397.) Merchants' accounts were excepted from the statute 21 Jac. 1, c. 16 (see as to the exception, *Robinson v. Alexander*, 2 Cl. & Fin. 717); but this exception has been repealed by 19 & 20 Vict. c. 97, s. 9 (*post*), and merchants' accounts now stand upon the same footing as other accounts.

21 Jac. 1, c. 16,  
s. 3.

Merchants'  
accounts.

Partnership  
accounts.

It seems that this statute applies to partnership accounts, and is a bar to a suit in equity for an account extending to a period more remote than six years before the filing of the bill, unless there be payment or acknowledgment, or unless the partnership articles are under seal, or unless it be a case of trust or fraud. (2 Lindley, 979, 2nd ed.) Where a partner died in 1854, having bequeathed a moiety of his share to his executor, and the surviving partner continued the business, and in 1859 got in outstanding assets; it was held, on a bill filed by the executor in 1864, that the right to an account was barred. (*Know v. Gye*, 15 W. R. 628.) It has since been laid down that where a partnership is dissolved by the death of one of the partners, the statute will not in general run against the representatives of the deceased partner or against the surviving partner, so long as there are any outstanding assets to be got in or liabilities to be discharged: but it was said that the statute might possibly run in case six years elapsed without any assets being got in at all. (*Millington v. Holland*, 18 W. R. 184.) Where a bill was filed to dissolve a partnership which had been discontinued more than six years, and to take accounts, the court directed the accounts to be taken, although the defendants insisted on the statute. (*Miller v. Miller*, L. R., 8 Eq. 499.)

A person injured by a devastavit is but a simple contract creditor of the executor (*Charlton v. Low*, 3 P. W. 331), and his claim is barred by this statute after the lapse of six years. (*Thorne v. Kerr*, 2 K. & J. 54.) A claim arising from a breach of trust is, generally speaking, considered as a simple contract debt. (*Holland v. Holland*, L. R., 4 Ch. 449, and cases there cited.) It was at one time laid down in Ireland, that where it was sought to enforce against a trustee's assets a claim arising from a breach of trust, the claim was barred in six years. (*Dunne v. Doran*, 18 Ir. Eq. R. 545; *Brereton v. Hutchinson*, 3 Ir. Ch. R. 361.) It has since been decided in England (in accordance with previous dicta; *Story v. Gape*, 2 Jur., N. S. 706; *Obee v. Bishop*, 1 De G., F. & J. 187), that the analogy of this statute cannot be set up by an executor in answer to a claim founded on a breach of trust by his testator (*Brittlebank v. Goodwin*, L. R., 5 Eq. 545. See *Cresswell v. Dewell*, 4 Giff. 460; *Woodhouse v. Woodhouse*, L. R., 8 Eq. 514), and this appears to be now accepted as law in Ireland. (*Smith v. Cork and Bandon R. Co.*, I. R., 5 Eq. 65; *Carroll v. Hargrave*, *ib.* 548.)

Devastavit.

Claim arising  
from breach of  
trust enforced  
against assets of  
deceased trustee.

Prior to 1859 this statute extended to India. (*Ruckmaboye v. Mottichund*, 8 Moore, P. C. 4; but see now *Re Peat's Trusts*, L. R., 7 Eq. 302.) In the construction of a contract, the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law where the contract is sought to be enforced. (*Per Mellish*, L. J., *Ex parte Melbourn*, L. R., 6 Ch. 69.) Therefore a debt contracted abroad can only be enforced in England within the time limited by the English statutes. (*Huber v. Steiner*, 2 Bing. N. C. 202; conf. *Harris v. Quine*, L. R., 4 Q. B. 653.)

India.

Foreign contracts.

On the principle that the statute does not extinguish the debt, but merely bars the remedy by action or suit, it has been held that a creditor whose action or suit is barred may avail himself of any other means of recovering his debt he may possess. Thus a solicitor has been allowed to recover by means of his lien on his client's papers, costs which were barred by the statute. (*Re Murray*, W. N. 1867, p. 190.) And see the cases as to an executor's right of retaining debts barred, quoted p. 289, *post*.

Statute does not  
extinguish debt,  
but merely bars  
remedy.

Solicitor's lien.

In an action on the case for negligence, where the declaration alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the consequential damage accrued. (*Howell v. Young*, 5 B. & C. 259; *Smith v. Fox*, 6 Hare, 386.) But in actions on the case for injury to

WHEN TIME BE-  
GINS TO RUN.

(1) In actions *ex  
delicto*

Case.



21. *Jac.* 1, c. 16,  
s. 3.

real property, where the ground of the action is the consequential damage, time runs from the actual damage, and not from the wrongful act. Thus, in an action by the plaintiff as the owner of the reversion of certain buildings for negligently working mines, it was proved that the plaintiff was the owner of the surface, on which was an ancient house, and that the defendant having worked the mines under the plaintiff's premises leaving proper support, afterwards worked other mines 280 yards from the plaintiff's property in such a way that the surface fell in and caused a thrust, which gradually extended through the intervening workings to those under the plaintiff's premises, causing the surface to subside so as to damage the plaintiff's buildings. The working which caused the thrust was more than six years before action brought, but the actual damage did not commence till within the six years. It was held in the Exch Ch., that no cause of action arose until the actual damage, and, therefore, that the statute was no bar (*Bonomi v. Backhouse*, El., Bl. & El. 662; 28 L. J., Q. B. 378; 7 W. R. 667); and this decision was affirmed by the House of Lords. (9 H. L. C. 508.)

Trover.

In trover time runs from the conversion (*Denys v. Shuckburgh*, 4 Y. & C. 42), even though it be fraudulently concealed from the plaintiff. (*Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; 2 W. R. 527.) A.'s furniture was seized under an execution by the sheriff, who assigned it to the judgment creditor. A.'s friends afterwards purchased it from the judgment creditor, and the sheriff's officers then returned and left the goods in A.'s possession, who remained in undisturbed enjoyment for more than six years. After his death the furniture was claimed by his friends who had purchased it, and adversely by his administratrix: it was held, that the rights of the former were not barred by the Statute of Limitations, which could only apply from six years from a conversion. (*Edwards v. Clay*, 28 Beav. 145.)

Detinue.

In an action for the detention of title deeds, time does not begin to run so long as the deeds are in the possession of the persons in the enjoyment of the lands, although such enjoyment be wrongful. (*Plant v. Cottrell*, 5 H. & N. 430; 29 L. J., Ex. 198; 8 W. R. 281.) Goods having been bailed by the plaintiffs to the defendant for safe custody, the defendant wrongfully sold them, and the plaintiffs, more than six years after the sale, of which they were ignorant, demanded the return of the goods which the defendant refused. It was held, in an action of detinue, that time ran from the date of the demand and refusal, and not from that of the sale; inasmuch as the plaintiffs, although if they had discovered the sale they would have been entitled to sue immediately for conversion, were also entitled to elect to sue upon the breach of the bailee's duty by the refusal to deliver up on request. But it was said, that where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue, either for the wrong or for the breach of the original terms of deposit, time would run from the period at which the property was first wrongfully dealt with. (*Wilkinson v. Verity*, L. R., 6 C. P. 206.)

False imprisonment.

As to when time runs in the case of an action for false imprisonment, see *Violett v. Simpson*, 8 El. & Bl. 344; 6 W. R. 12.

(2) In actions *ex contractu*.

In general, the day on which the cause of action accrued is to be included. (Hob. 109; 4 Moore, 465.) It may be laid down as a general rule, that the time limited by the statute does not begin to run until there be a full and complete cause of action. On a sale of goods on credit the statute begins to run from the time when credit has expired. (*Helps v. Winterbottom*, 2 B. & Ad. 431.) In assumpsit the statute begins to run from the breach of the promise, and not from the consequential damage. Therefore in an action against an attorney, in which it was stated as a breach, that the defendant neglected to make a search at the Bank of England, to ascertain whether certain stock was standing in the names of certain persons: it was held, that the omission to search having taken place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years. (*Short v. M'Carthy*, 3 B. & Ald. 626; *Brown v. Howard*, 2 Brod. & B. 73; *Battley v. Faulkner*, 3 B. & Ald. 288.)

Assumpsit.

Where the cause of action does not arise until after request made, the statute will only run from the time of such request. (*Gould v. Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.) If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute therefore, in such case runs only from the time of such demand. (*Topham v. Braddick*, 1 Taunt. 572.) If the contract be to pay money at a future period, or upon the happening of a certain event, as "when J. S. is married," the statute does not begin to run until that specified period has arrived or the event has occurred. (*Fenton v. Imbers*, 1 W. Bl. 354; 3 Burr. 1278.)

21 Jac. 1, c. 16,  
s. 3.

Where money was advanced to a firm to be repaid on demand, with compound interest: it was held, that the Statute of Limitations ran from the date of the advance. (*Jackson v. Ogg*, Johns. 897.) Entries made in the books of the firm, crediting the person who advanced the money with interest from time to time, on the footing of periodical rests, do not bar the statute. (*Ib.*)

Debt payable on demand.

Where the plaintiff, in 1851, advanced 5,000*l.* to the defendant, to assist an undertaking, which was brought to an end in 1856, and it was agreed that the defendant was not to be personally liable, but the plaintiff was to be paid out of the profits, it was held that the advance was not to be considered with reference to the statute as a debt payable on demand, and that the statute did not commence to run until after the plaintiff's first demand. A distinction was drawn between debts payable on demand, and debts recoverable on demand. (*Knox v. Gye*, 15 W. R. 628.)

The defendant, being drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise that, in consideration of the plaintiff having agreed not to proceed against him, the defendant thereby debarred himself of all future plea of the Statute of Limitations in case of his being sued, and thereby promised to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." In an action of special assumpsit on this agreement, it was held, that under stat. 21 Jac. 1, c. 16, s. 3, the limitation of action ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had not been informed by the defendant, or otherwise had knowledge of such ability. (*Waters v. The Earl of Thanet*, 2 Q. B. 757. See *Hammond v. Smith*, 33 Beav. 452.)

A promissory note being given by A. and a surety to a banker, and a contemporaneous memorandum of an agreement showing the note to be given as a security for the banking account to be kept by A. with the bank: it was held, that the Statute of Limitations did not run from the time when A. became indebted to the bank, but from the time when the balance was struck. (*Hartland v. Jukes*, 9 Jur., N. S. 180; 32 L. J., Exch. 162.)

The statute runs from the time the plaintiff might have brought his action, unless he be subject to any of the disabilities specified in the statute, *post*, p. 273. The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of any default, to have judgment and execution for the whole, as if all the periods for payment had expired. It was held, that in an action of assumpsit on the implied promise to pay according to the terms of the defeasance, the defendant might show, under a plea of the Statute of Limitations, that the first default was made more than six years before action; and that this was a complete defence, not only as to instalments due more than six years ago, but also as to those due within that period. (*Hemp v. Garland*, 4 Q. B. 519.)

If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money in an action for money had and received for failure of consideration. In such a case the Statute of Limitations runs from the time when the security is set aside, it not appearing that the consideration has failed before that time; and the statute does not attach if the security was set aside within six years, though six years have elapsed since the annuity was last paid. (*Huggins v. Coutes*, 5 Q. B. 432; *Comper v. Godmond*, 9 Bing. 748.)

Action for purchase-money of annuity.

A note payable on demand is payable immediately, and the statute begins to operate from the date; (*Christie v. Fonsick*, 1 Selw. N. P. 301, 13th ed.;)

Bills and notes.

21 Jac. 1, c. 16,  
s. 3.

but where it is payable twenty-four months after demand, the cause of action does not accrue, and the statute does not begin to run until after twenty-four months after demand made. (*Thorpe v. Boothe*, 1 Ry. & Moo. 388.) Payment of interest upon a promissory note payable on demand is sufficient to take the case out of the Statute of Limitations, although there be no independent evidence that any demand of payment of the note has been made. (*Bamfield v. Tupper*, 7 Exch. 27; 21 Law J., Exch. 6.) And so where a note is payable after sight, the statute runs only from the time of presentment. (*Holmes v. Kerrison*, 2 Taunt. 323. And see *Savage v. Aldred*, 2 Stark. 232.) By 34 & 35 Vict. c. 74, s. 2, it is enacted, that every bill of exchange or promissory note drawn after 14th August, 1871, and purporting to be payable at sight or on presentation, shall bear the same stamp, and shall for all purposes whatsoever be deemed to be a bill of exchange or promissory note payable on demand, any law or custom to the contrary notwithstanding. Where a bill of exchange is drawn, payable at a future period, for the amount of a sum of money lent by the payee to the drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the money was to be repaid, namely, when the bill became due, and not from the time of the loan. (*Wintersheim v. Countess of Carlisle*, 1 H. Bl. 631.) Where a debtor draws a bill of exchange, to be applied in part payment of the debt, and the bill is paid when due, by the drawee to the creditor, it operates as a part payment to defeat the Statute of Limitations, only from the time of the delivery of the bill by the debtor, not from the time of its payment. (*Irving v. Veitch*, 3 Mees. & W. 90.) The defendant, in 1840, gave S. for value his acceptance in blank on a 5s. stamp. S., in 1852, and as the jury found not within a reasonable time, filled in his own name as drawer for 200*l.* at five months. The defendant being sued on the bill by an innocent indorsee for value, pleaded the Statute of Limitations: it was held, that the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank, and that the plaintiff was entitled to recover. (*Montague v. Perkins*, 17 Jur. 557; 22 L. J., C. P. 187.) Where the plaintiff having agreed to lend the defendant money gave him a cheque for the amount which the defendant paid into his bankers, receiving credit for it, but the cheque was not paid by the plaintiff's bankers till some days later, it was held that time ran from the payment of the cheque. (*Garden v. Bruce*, L. R., 3 C. P. 300.)

The holder of a bill of exchange on *nonacceptance*, and protest and notice thereon, has an immediate right of action against the drawer, and does not acquire a fresh right of action on the *nonpayment* of the bill when due. The Statute of Limitations, therefore, runs against him from the former, and not the latter period. (*Whitehead v. Walker*, 9 Mees. & W. 506.) "It is a general rule that where there has once been a complete cause of action arising out of contract or tort, the statute begins to run; and that subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action, are disregarded. As, for instance, in the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment." (*Per Willes, J., Wilkinson v. Verity*, L. R., 6 C. P. 209.) K. being indebted to the plaintiff and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills. (*Webster v. Kirk*, 17 Q. B. 954; 21 L. J., Q. B. 159.)

Concealment of  
right.

It is no answer at law to a plea of the Statute of Limitations, that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired. (*Imperial Gas*

*Co. v. London Gas Co.*, 10 Exch. 39; 23 L. J., Exch. 303; 2 W. R. 527.) 21 Jac. 1, c. 16, s. 3.  
*Secus* in equity. (*Blair v. Bromley*, 5 Ha. 542; 2 Phil. 354.) In an action for the value of coal wrongfully taken out of the plaintiff's mine, a replication to a plea of the Statute of Limitations, that the wrongful taking was fraudulently concealed from the plaintiff until within six years before action, was disallowed to be pleaded, on the ground that a court of equity would not restrain the defendant from setting up the defence; and that if there was any right to equitable relief it could only be by a bill for an account in equity, in which the amount allowed would be different from the amount recoverable at law. (*Hunter v. Gibbons*, 2 Jur., N. S. 1249; 26 L. J., Exch. 1.)

As a general rule, an attorney or solicitor retained to conduct a suit is under the obligation to carry it on to its termination, and he cannot sue for his bill of costs until that period has arrived. He may, however, give a reasonable notice to his client to supply him with adequate funds, and in case of refusal he may sue him for his costs. The retainer is also determined by the death of the client. A solicitor was retained in a chancery suit in which his client was a defendant, and an order was made by the court, that a supplemental bill should be filed to make certain persons next of kin parties to the suit; no decree was ever made, nor was there any further step taken in the suit. Upwards of ten years after this order had been made the solicitor's client died: it was held, in an action by the solicitor against the representative of the client for his bill of costs up to the time when the order was made, that the debt was not barred by the Statute of Limitations. (*Whitehead v. Lord*, 7 Exch. 691; 21 Law J., Exch. 239; see *Stokes v. Trumper*, 2 Kay & J. 232.) From the time when an attorney might decline proceeding further with his client's business until his bill is paid, the Statute of Limitations will begin to run. (*Rothery v. Munnings*, 1 B. & Ad. 15; *Harris v. Osbourn*, 2 Cr. & Mees. 629; 4 Tyrw. 445; *Nicholls v. Wilson*, 11 Mees. & W. 106.) The defendant employed the plaintiff, an attorney, in several transactions, and, among others, in procuring him money to pay off a mortgage. In an action against the defendant on the plaintiff's bill of costs, it appeared by items in the bill, that he had made applications in several quarters for this purpose, but without success, after which he wrote to the plaintiff, informing him what had been done, and requesting to know his wishes. This item bore date more than six years before action brought. The next, dated within six years, was, "Paid the postage of your answer." By subsequent items, it appeared that further endeavours were made by the plaintiff to raise the money. Ultimately it was obtained: it was held, that the transaction was not one in which the attorney's employment was continuous, and that the latter items did not draw after them the previous ones, so as to take them out of the Statute of Limitations. (*Phillips v. Broadley*, 9 Q. B. 744.) Where a bill of costs contained items of a date both more and less than six years before the action, but it was considered that, under the circumstances, there had been a continuous employment of the plaintiffs, it was held that none of the items were barred by the statute. (*Harris v. Quine*, L. R., 4 Q. B. 653; *Baile v. Baile*, L. R., 13 Eq. 497.)

Costs, charges and expenses incurred by solicitors in prosecuting a commission in lunacy, and subsequently as the solicitors of the committee, were considered as a simple contract debt due by the lunatic for necessaries; and it was held, that the lapse of six years during the lunatic's life does not bar a debt of this description, for the Court of Chancery will take judicial notice in a suit to obtain payment out of the lunatic's assets, that any action against the lunatic for the recovery of the claim would have been restrained by the Lord Chancellor on petition in lunacy. (*Stedman v. Hart*, Kay, 607.)

In May, 1849, an order was made to wind up a company, and in the ensuing October the solicitors who had acted for the company carried in a claim against them for costs. In November, 1850, the solicitors, on the application of the official manager, delivered to him the company's books and papers, on which they had a lien for their costs, upon the official manager at the same time undertaking in writing to pay them the amount

Actions for costs.

Costs in lunacy.

Costs incurred by a company which is afterwards wound up.

21 *Jac.* 1, c. 16,  
s. 3.

of their bill out of the first funds which might come into his hands. That undertaking received the sanction of the Master. In 1859, the official manager recovered a sum of money, and the solicitors subsequently thereto sent in to him a larger bill of costs against the company : it was held, that, having regard to the undertaking of the official manager of November, 1850, the solicitors' claim was not barred by the Statute of Limitations, and an order was made to tax their bill of costs, without prejudice to the question whether they were entitled to have a call made to pay the same when taxed. (*Re Gloucester, &c., R. Co.*, 29 L. J., Chanc. 383 ; 2 Giff. 47.) As to the right of an official liquidator to have bills of costs taxed, see *Ex parte Evans*, L. R., 11 Eq. 151. Where a solicitor's bill had been taxed, and ordered to be paid out of the first funds of the company which should come to the hands of the official liquidator, and the solicitor took no steps to obtain payment for more than six years, and in the meantime the affairs of the company were settled by compromise : it was held, that the solicitor was not entitled to have a call made for his payment. (*Ex parte A'Beckett*, 2 Jur., N. S. 684.)

Effect of winding-up order on the running of time.

It was decided, under the Winding-up Acts of 1848-49, that an order to wind up a company did not stop time from running against a creditor whose right of action had accrued previously to the winding-up order. (*Ex parte Forest*, 2 Giff. 42.) But the carrying in a claim under the winding up did stop the running of time. (*Wryghte's Case*, 5 De G. & Sm. 244.) Under the Companies Act, 1862, a winding-up order stops the running of time. (*Re General Rolling Stock Co.*, L. R., 7 Ch. 646.)

Continuous running of time.

It was formerly laid down that when once time had begun to run, no subsequent disability or inability to sue would stop it. (*Rhodes v. Smethurst*, 4 M. & W. 42.) But it has since been held, that where a debtor takes out administration to his creditor, the running of time will be suspended during the administration. (*Seagram v. Knight*, L. R., 2 Ch. 628.) And where an action brought in time abated by the death of the defendant, and a second action was subsequently commenced : it was held, that the running of time had been suspended. (*Sturgis v. Darell*, 6 H. & N. 120 ; 8 W. R. 653.)

A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute. (*Fuller v. Redman*, 26 Beav. 614.) But a covenant not to sue for a certain period will prevent time running until the expiration of that period. (*Iven v. Elwes*, 3 Drew. 25.)

Where a cause of action accrues to a person in his lifetime, his executor cannot bring an action after the time limited by the statute has expired. (*Penny v. Brice*, 18 C. B., N. S. 393 ; 13 W. R. 342.) But if the statute has not begun to run during the lifetime of an intestate, then it does not begin to run against the right of his administrator to bring the action until letters of administration have been taken out. (*Burdick v. Garriok*, L. R., 5 Ch. 241 ; and see 2 Wms. Exors. 1735—1741.) If time has once begun to run against a debt in the debtor's life, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted. (*Freaks v. Cranefeldt*, 3 M. & Cr. 499. See 2 Wms. Exors. 1797—1802.)

In an action by an administrator against the acceptor upon a bill of exchange, payable to the testator, but accepted after his death, it was held, that the Statute of Limitations began to run from the time of granting the letters of administration, and not from the time the bill became due, there being no cause of action until there was a party capable of suing. (*Murray v. The East India Co.*, 5 Barn. & Ald. 204 ; and see *Pratt v. Swaine*, 8 Barn. & C. 285 ; *Perry v. Jenkins*, 1 M. & Cr. 118 ; *Hyde v. Price*, 1 C. P. Coop. 196 ; *Freaks v. Cranefeldt*, 3 M. & Cr. 499 ; *Howlitt v. Lambert*, 1 Ir. Eq. R. 263 ; 1 Wms. Exors. 596.) The Statute of Limitations is not a good plea where an executor has not proved ; because no laches can be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action. (Coop. Eq. Pl. 233 ; 2 Vern. 694 ; 1 Eq. Cas. Abr. 305.) But where the defendant had possessed the personal estate and might have been sued as executor *de son tort*, his plea of the Statute of Limitations was allowed, although he had not



taken out probate until some years after the testator's death: (*Webster v. Webster*, 10 Ves. 93.) 21 Jac. 1, c. 16, s. 4.

By 21 Jac. 1, c. 16, s. 4, if judgment is given for the plaintiff and reversed by error or arrested, or if the defendant is outlawed and the outlawry reversed, a new action may from time to time be commenced within a year afterwards by the plaintiff, his heirs, executors or administrators. Within the equity of this section the courts permitted an executor or administrator, within a year, or within a reasonable time after the death of the testator or intestate, to renew a suit commenced by the testator or intestate, and *vice versa*. (*Curlewis v. Lord Mornington*, 7 E. & B. 283; 5 W. R. 266.) See now 15 & 16 Vict. c. 76, ss. 135—138; 1 Sel. N. P. 176, 18th ed.

Limitation after judgment or outlawry reversed.

7. Provided nevertheless, and be it further enacted, that if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action sur trover, replevin, actions of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done (*b*).

Infants, femes coverts, &c. excepted.

(*b*) Neither the imprisonment of the plaintiff nor his absence beyond the seas now constitute a disability. (19 & 20 Vict. c. 97, s. 10.) The absence of a defendant beyond the seas is made a disability by 4 Anne, c. 16, s. 19. (See *Forbes v. Smith*, 11 Ex. 161; 24 L. J., Ex. 299.) As to the meaning of "beyond seas" in these acts, see 3 & 4 Will. 4, c. 42, s. 7 (p. 264, *ante*); and 19 & 20 Vict. c. 97, s. 12 (p. 294, *post*).

DISABILITIES.

The proviso in favour of persons under disabilities, in the 21 Jac. 1, c. 16, s. 7, applies as well to foreigners who have never been in the country as to parties residing abroad at the time of the accruing of the cause of action and returning afterwards to England. (*Lafond v. Ruddock*, 13 C. B. 813.) It was said by Lord Chancellor *Hardwicke*, that if a man both of non-sane memory and out of the kingdom came into the kingdom and then went out again, his non-sane memory continuing, his privilege as to being out of the kingdom was gone, and his privilege as to non-sane memory would cease from the time he returned to his senses. (2 Atk. 610—614.) If a party at the time the cause of action accrues is abroad, the statute does not begin to run until he comes to England; and if he never comes, he has always a right of action while he lives abroad, and so have his executors or administrators after his death. (*Strithorst v. Græme*, 3 Wils. 145.) In this case the plaintiff was a foreigner, and the court held that, being a foreigner, he had six years for bringing his action after his first coming to this country. (See *Lafond v. Ruddock*, 13 C. B. 818.) If a plaintiff be beyond seas at the time of the action accruing, he may sue under the stat. 21 Jac. 1, c. 16, s. 7, at any time before his return, as well as within the time limited after his return. (*Le Vaux v. Berkeley*, 5 Q. B. 836; *Turnsend v. Deacon*, 13 Jur. 866; 3 Exch. R. 708.) If a plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom, and going beyond the seas, will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time. (*Smith v. Hill*, 1 Wils. 184. See Lord *Kenyon's* observations, 4 T. R. 311; *Denys v. Shuckburgh*, 4 Y. & Coll. 47.)

Under the stat. 4 Ann. c. 16, s. 19, if a right of action accrued against several persons, one of whom was beyond seas, the Statute of Limitations

One of several under disability.



21 Jac. 1, c. 16,  
s. 7.

Representatives of  
persons dying  
under disability.

did not run till his return, though the others had never been absent from the kingdom. (*Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 C. B. 123; 24 L. J., C. P. 89; 3 W. R. 178.) If one of several intended co-plaintiffs was within seas, the statute did run, because one plaintiff could act for the others and use their names in an action. (*Perry v. Jackson*, 4 T. R. 516. See 19 & 20 Vict. c. 97, ss. 10, 11, *post*.)

Where a person dies abroad, to whom a right of action has accrued during his residence there, and he never returned to this country, his executors may sue for it, although more than six years have elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years; *Parke*, B., inclining to the opinion that the executor was under no restraint; but *Rolfe*, B., thinking it would be more reasonable to consider the right of action as accruing to the executor at the death of the testator, and to limit the right of action to six years. (*Townsend v. Deacon*, 3 Exch. R. 706.) A person, in satisfaction of a previous debt due from him, gave his creditor a bill of exchange, and before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved by his executors in England, and within six years after his death a creditor's bill was filed against the executors: it was held, that the plaintiff was not barred by the Statute of Limitations. (*Story v. Fry*, 1 Y. & Coll. C. C. 603; see *Williams v. Jones*, 13 East, 439; and *Flood v. Patterson*, 29 Beav. 295.)

EXPRESS ACKNOWLEDGMENTS.

From an early period, although the time limited by the stat. 21 Jac. 1, c. 16, had elapsed, the plaintiff was permitted to prove an acknowledgment of, or promise to pay, the debt within six years, which was sufficient to entitle him to recover. (3 Y. & Jerv. 522.) To provide a remedy against the vague and loose verbal promises which had been allowed to take cases out of the statute, 9 Geo. 4, c. 14 (Lord Tenterden's Act) was passed. (6 Bing. 264.)

9 Geo. 4, c. 14.

The stat. 9 Geo. 4, c. 14, recites the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts (sect. 1), "That in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever (see 16 & 17 Vict. c. 113, s. 24, as to Ireland): provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise, that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

S. 1. In actions of debt or upon the case no acknowledgment shall be deemed sufficient, unless it be in writing or by part payment.

Proviso for case of joint contractors.

The 2nd section makes provision as to pleas in abatement.

The 3rd section enacts, "That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes." (16 & 17 Vict. c. 113, s. 25, Ir. See p. 285, *post*.)

9 Geo. 4, c. 14.

S. 3. Indorsements of payments.

The 4th section enacts, "That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice or otherwise." (See 16 & 17 Vict. c. 113, s. 26, Ir.)

S. 4. Simple contract debts alleged by way of set-off.

The intention of the stat. 9 Geo. 4, c. 14, was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but merely to require a different mode of proof, substituting the certain evidence of writing, signed by the party chargeable, instead of the insecure and precarious testimony to be derived from the memory of witnesses. The inquiry, therefore, in a given case, whether the written document amounts to an acknowledgment or a promise, is no other than whether the same words, if proved before the statute to have been spoken by the defendant, would have had a similar effect. (*Haydon v. Williams*, 7 Bing. 163. See *Courtenay v. Williams*, 8 Ha. 549; and *Moodie v. Bannister*, 4 Drew. 440.)

Construction of Lord Tenterden's Act.

Previously to the act 19 & 20 Vict. c. 97, it was held, under this section, that an acknowledgment signed by an agent of the debtor would not revive a debt barred by 21 Jac. 1, c. 16, but that it must have been signed by the debtor himself. (*Hyde v. Johnson*, 2 Bing. N. C. 776; *Clark v. Alexander*, 8 Scott, N. R. 165.) But an acknowledgment signed by an agent is now sufficient. (See 19 & 20 Vict. c. 97, s. 13.) Where a debt due from a company to L. was barred, and the board of directors, of whom L. was one, passed a resolution in reference to the debt, it was said by *Wood, V.-C.*, that even if the resolution had been a sufficient acknowledgment, it would not have bound the company. (*Londres v. The Garnett, &c. Co.*, 33 L. J., Ch. 418; 12 W. R. 573.)

Acknowledgments by agent.

It was ruled by Lord Tenterden, in *Tulloch v. Dunn* (1 Ry. & M. 416), that one executor cannot be bound by the express promise of another, even if he binds himself in his character as executor. "It seems to have been the opinion of the court, in the case of *Atkins v. Tredgold* (2 B. & C. 23), that if an express promise is made by an executor in his representative character, it binds the remaining executors in their representative characters. So, also, in *M'Culloch v. Daves* (9 D. & R. 40), the court appear to have thought that if one promised in his executive character, it would bind the others. The point, however, is not decided in those cases, but it has been decided in *Tulloch v. Dunn*. It appears to me that that case is founded in justice and good sense, and ought to be followed." (*Scholey v. Walton*, 12 M. & W. 514, *per Parke, B.*)

By one of several executors.

The effect of an acknowledgment by one of several joint contractors is determined by the last part of 9 Geo. 4, c. 14, s. 1. In the case of an acknowledgment by one of several partners, it must be considered whether, in making the acknowledgment, he has acted as the agent of the firm. It appears to be open to question whether a partner, as such, can bind his firm at all by an acknowledgment. (See 1 Lindley on Partnership, 465, 2nd ed.)

By one of several joint contractors.

A written acknowledgment of a debt is an answer to a plea of the Statute of Limitations, though made by an infant, if the debt was for necessities supplied to him. (*Willins or Williams v. Smith*, 4 Ell. & Bl. 180; 1 Jur., N. S. 163; 24 L. J., Q. B. 62.) No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith. (9 Geo. 4, c. 14, s. 5.) In an action of debt for goods sold and delivered; plea, infancy; replication, that the defendant ratified the contract in writing, signed by him after coming of age. Issue thereon. The plaintiff produced the following paper, signed

By infants.

Confirmation of promises made by infants.

9 Geo. 4, c. 14, s. 5.

- 9 Geo. 4, c. 14. by the defendant: I am sorry to give you so much trouble in calling: but I am not prepared for you, but will, without neglect, remit you in a short time." The paper had no address or date, and specified no sum; but it was proved orally that the defendant delivered it to the plaintiff's agent on being pressed for the debt, the amount of which was also proved by oral evidence. This was held sufficient to satisfy the stat. 9 Geo. 4, c. 14, s. 5. No evidence was given to show whether the defendant was of age or not when he delivered the paper: it was held, that the plaintiff must recover; the defendant, if he relied on his infancy at the time, being bound to prove it. (*Hartley v. Wharton*, 11 Ad. & Ell. 934. As to the second point, see *Borthwick v. Carruthers*, 1 T. R. 648; *Bates v. Wells*, 1 Stark. Ev. 463, 2nd ed.) Any written instrument signed by the party, which, in the case of adults would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification of a promise or simple contract debt. (*Harris v. Wall*, 1 Ex. 122. See, however, *Mawson v. Blane*, 10 Ex. 212.) As to the adoption in equity of a contract made during infancy, see *Cornwall v. Hawkins*, 20 W. R. 653.
- Acknowledgment to a third party.** It has been held, that an answer and inventory in the Ecclesiastical Court made on the citation of the next of kin, stating the debts due from the estate of the deceased, and signed by the administrator, was sufficient to take such debts out of the statute. (*Smith v. Poole*, 12 Sim. 17; *Spollan v. Magan*, 1 Ir. Com. L. R. 691.) But it seems that now an acknowledgment made to a third party would not take the case out of the statute. (*Moodie v. Bannister*, 4 Drew. 439; *Fuller v. Redman*, 26 Beav. 619.) But an acknowledgment to the agent of the creditor will be sufficient. (*Edmonds v. Goater*, 15 Beav. 415.)
- To an agent.** An acknowledgment made within six years before action brought is sufficient, although it be made more than six years after the original cause of action. (*Spickernell v. Hotham*, Kay, 669.) An acknowledgment made after action brought cannot be used to take a case out of the statute. (*Bateman v. Pinder*, 3 Q. B. 574.)
- When acknowledgment must be made.** In *Philips v. Philips* (3 Hare, 281, 299), *Wigram, V.-C.*, laid down the following principle, which was recently quoted by *Williams, J.*, as the true one (10 C. B., N. S. 749, 750):—"The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." On this principle a mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute. (*Francis v. Hawkesley*, 1 Ell. & Ell. 1052; 5 Jur., N. S. 1391; 28 L. J., Q. B. 370; 7 W. R. 599.)
- Effect of an acknowledgment.** The construction of an acknowledgment is a question for the court, not the jury, except where the document is connected with other evidence affecting the construction. (*Morrell v. Frith*, 3 Mees. & W. 402; *Bird v. Gammon*, 3 Bing. N. C. 883; *Power v. Barham*, 4 Ad. & Ell. 473.) The later cases have decided that the effect of a document set up as an acknowledgment is entirely a question for the court, unless extrinsic evidence is necessary to qualify or explain it. (*Per Parke, B.*, *Smith v. Thorne*, 18 Q. B. 140.)
- Construction of an acknowledgment.** To prevent the right to have an account from being barred by the Statute of Limitations, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party. (*Prance v. Sympton*, Kay, 678.)
- Acknowledgment of pending account.** If, since the stat. 9 Geo. 4, c. 14, a defendant, by a letter, admits a *balance to be due*, without stating the amount, this will take the case
- Amount need not be stated.**

out of the Statute of Limitations, so as to entitle the plaintiff to nominal damages. (*Dickenson v. Hatfield*, 5 Car. & Payne, 46.) An acknowledgment of a debt without mentioning the amount will not entitle the plaintiff to recover nominal damages on a count upon an account stated. (*Lane v. Hill*, 18 Q. B. 252.) A general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient to take the case out of the operation of the Statute of Limitations. These words in a letter were held a sufficient acknowledgment to revive a debt barred by the Statute of Limitations:—"I wish I could comply with your request, for I am very wretched on account of your account not being paid; there is a prospect of an abundant harvest, which must turn into a goodly sum, and considerably reduce your account; if it does not, the concern must be broken up to meet it; my hope is, that out of the present harvest you will be paid." (*Bird v. Gammon*, 3 Bing. N. C. 833; 5 Scott, 213.) In another case the defendant had a claim against his attorney the plaintiff, the amount of which was not ascertained; at the foot of his bill, the plaintiff acknowledged the debt thus:—"By Mr. Lacy's bill," leaving a blank for the sum: it was held, that this was a sufficient acknowledgment to take the defendant's claim out of the Statute of Limitations. (*Waller v. Lacy*, 1 Scott, N. R. 186.) Where a deed executed by A. and B. recited that A. was indebted to B. in various sums, the amount of which was not yet ascertained, and a balance not yet struck; and that A. was willing to pay B. the amount which might appear to be due to B. in respect of such sums, such amount to be ascertained and paid as thereafter mentioned, and the deed afterwards provided for taking the accounts by the arbitration of two persons named in the deed: it was held, that, notwithstanding the clause as to arbitration, the recitals amounted to an absolute promise to pay the amount when ascertained; and that, when coupled with extrinsic parol evidence as to the amount, they were sufficient, consistently with stat. 9 Geo. 4, c. 14, to take the debt out of the Statute of Limitations. (*Cheslyn v. Dalby*, 4 You. & C. 238.) In assumpsit on a bill of exchange, a letter was produced to take the case out of the Statute of Limitations, from the defendant to the plaintiff, stating that the plaintiff should be informed, immediately it was settled, how the defendant's affairs should be arranged; adding, "Your account is quite correct, and, oh! that I were now going to inclose the amount." No amount of debt was stated, and no proof was given, from the letter or otherwise, to what account the letter referred, nor whether the letter applied to the bill. It being left to the jury to say whether this was an unconditional acknowledgment of the debt, and they having found that it was, it was held that there was no ground for a nonsuit; for that the acknowledgment was unconditional; and that the jury, if it was a question for them, had decided it rightly. (*Dodson v. Mackey*, 8 Ad. & El. 225, n.) But it seems that when a written acknowledgment does not state the amount due, there can only be nominal damages; (*Ib.*; see *Lechmere v. Fletcher*, 1 Cr. & M. 623; 3 Tyr. 450; *Dabbs v. Humphries*, 10 Bing. 446;) unless there be proof *aliunde* of the amount due. (*Dickenson v. Hatfield*, 5 Carr. & P. 46.) A promise in writing, signed by the party chargeable thereby, to pay his proportion of a joint debt of more than six years' standing, was held sufficient, within the stat. 9 Geo. 4, c. 14, s. 1, to take the case out of the Statute of Limitations, though no amount was stated, and to entitle the plaintiff to recover the whole of such proportion proved by extrinsic evidence. (*Lechmere v. Fletcher*, 1 Cr. & Mees. 623; *Waller v. Lacy*, 1 Scott, N. R. 186.)

Where a written promise to pay a debt barred by the Statute of Limitations has been lost, parol evidence of the contents of the writing is admissible. (*Hayden v. Williams*, 7 Bing. 163; 4 M. & P. 811.) But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence. (*Edmunds v. Downes*, 4 Tyrw. 173; 2 Cr. & M. 459.)

An admission by a bankrupt in his balance sheet will not take a debt out of the Statute of Limitations as against his assignees. An admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of

Parol evidence.

Bankrupt's balance sheet.

9 Geo. 4, c. 14.

Advertisement.

Acknowledgment  
exempted from  
stamp duty.

9 Geo. 4, c. 14, s. 8.

What a sufficient  
acknowledgment.

There must be  
acknowledgment,  
or unconditional  
promise, or condi-  
tional promise and  
evidence of fulfil-  
ment of condition.

Instances of suffi-  
cient acknowledg-  
ments.

the bankrupt estate, will not take a debt of the bankrupt out of the Statute of Limitations. (*Pott v. Clegg*, 16 Mees. & W. 821. See *Everett v. Robertson*, 1 Ell. & Ell. 16, and *Ex parte Topping*, 13 W. R. 1025.)

An advertisement to creditors to bring in their claims will not take a debt out of the statute. (*Scott v. Jones*, 4 Cl. & Fin. 382.)

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps. 9 Geo. 4, c. 14, s. 8; (16 & 17 Vict. c. 113, s. 27, Ir.) Under this section the following memorandum:—"I acknowledge to owe to M. 36l., which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the Statute of Limitations, the debt itself being proved by other evidence. (*Morris v. Dixon*, 4 Ad. & Ell. 845.) When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the Statute of Limitations under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp. (*Jones v. Ryder*, 4 M. & W. 32. See also *Parmiter v. Parmiter*, 8 De G., F. & J. 461.)

A mere acknowledgment is not sufficient to take a case out of the Statute of Limitations, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise. (*Tanner v. Smart*, 6 B. & C. 602.) There must either be an unconditional acknowledgment from which a promise can be inferred, or a promise. But if the promise be conditional and the condition be unperformed, that is not an absolute promise until the condition be performed. In *Smith v. Thorne* (18 Q. B. 134, 139), *Parke*, B., said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled." (Cited by *Hill*, J., *Everett v. Robertson*, 1 Ell. & Ell. 20.) "There must be, in order to take the case out of the statute, one of the three following things: either there must be an acknowledgment of the debt from which a promise to pay it must be implied: or, secondly, there must be an unconditional promise to pay the debt: or thirdly, there must be a conditional promise to pay the debt in writing, and evidence that that condition has been performed." (*Per Mellish*, L. J., *Re River Steamer Co., Mitchell's Claim*, L. R., 6 Ch. 828.)

Upon an application for payment of 450l. due upon two bills of exchange, dated 25th of March, 1836, upon which interest had been paid up to the 25th of March, 1841, a letter was written by the debtor on the 13th of January, 1846, stating:—"I hope to be in H. very soon, when I trust every thing will be arranged with Mrs. W. agreeable to her wishes." It was held a promise to pay which would take the debt out of the statute, and exceptions to the master's report, allowing the debt, were overruled. (*Edmonds v. Goater*, 15 Beav. 415. See *Fuller v. Redman*, 26 Beav. 620.)

The following letter is an acknowledgment from which a promise to pay might be implied so as to rebut the statute:—"In reply to your statement of account received, I am ashamed the account has stood so long. I must beg to trespass on your kindness a short time longer till a turn in trade takes place, as for some time things have been very flat. Yours, J. J." (*Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J., Ex. 228; 8 W. R. 8.) The plaintiff having applied to the defendant for payment of a debt, the defendant wrote in answer:—"I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right. The works I have been appointed to, but they are not yet worked with the full complement of labour; this term will decide the matter." This was held a sufficient acknowledgment. (*Collis v. Stack*, 1 H. & N. 605; 26 L. J., Ex. 138.) The question in these cases is, whether the statement as to the time of pay-



ment is merely an excuse, or the condition on which payment is to be made. (*Ib.*) 9 Geo. 4, c. 14.

In 1847, the plaintiffs, who were solicitors, lent to the defendant 100*l.* on a mortgage, 40*l.* on a promissory note, and they had also a claim against him for costs. In 1857, the defendant wrote to the plaintiffs as follows:—"September 26. I wish to inform you that I received yours this morning. I am going to leave my situation on the 1st of November, and when the policy is paid on the 29th October, I hope that you will have the whole of your account ready for me as I hope to be with you on that day." "October 25. Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*; of course this includes the 100*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B.; of course you are aware that you have paid 25*l.* to my credit, that Mr. Y. paid over when he could not complete the purchase of the property in the High-street." This was held a sufficient acknowledgment of the debt to take the case out of the Statute of Limitations. (*Godwin v. Culley*, 4 H. & N. 373.)

Instances of  
sufficient acknow-  
ledgments.

S. borrowed of J. 200*l.* upon promissory notes, and a year afterwards remitted to J. 10*l.* on account of the interest due, and sent him a bill of 17*l.* for goods. J., by note, acknowledged the 10*l.* and the bill and stated that he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the 17*l.*, it was held, that the above letter took the case out of the statute. (*Evans v. Simon*, 9 Exch. 282.) So where the plaintiff having repaired some cottages for the defendant sent him his bill and in answer, the defendant wrote thus:—"I have received your bill, it does not, I think, specify sufficiently to which cottages the work is done. I shall feel obliged if you will more particularly explain, and take your agreements to Mrs. H. (the defendant's agent). It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct." It was held that the letter was a sufficient acknowledgment of a debt to take the case out of the statute. (*Sidwell v. Mason*, 26 L. J., Ex. 407; 2 H. & N. 306.)

A. gave B. a promissory note, dated October, 1834, for 837*l.* 1*s.* 6*d.*, payable on demand. In December, 1834, demand was made, and A. then promised to pay interest and signed an unstamped memorandum, dated the 2nd of December, 1834, as follows:—"I promise to pay to B. 837*l.*, with 4*l.* per cent. interest thereon, A." Neither principal nor interest was paid, but in January, 1848, A. wrote to B. a letter referring to a promissory note for a debt which he acknowledged and promised thereby to pay. It was held, that the memorandum of December, 1834, and a letter accompanying it, showed that interest was running, and that though in form a promissory note and unstamped, it could be looked at to see to what debt this interest was to be referred; and that as no other debt was proved to exist, the 837*l.* there mentioned was to be assumed to be part of the 837*l.* 1*s.* 6*d.* secured by the former promissory note. It was held, also, that in the absence of proof of the existence of any other promissory note to which it could relate, the letter of 1848 must be taken to refer to the promissory note of October, 1834, and thus to take it out of the Statute of Limitations. (*Spickernell v. Hotham*, Kay, 699.)

A debtor wrote to his creditor "I will pay you as soon as I get it in my power: before I cannot"—held, that the statute did not commence to run until the debtor became of ability to pay. (*Hammond v. Smith*, 33 Beav. 452). And where a debtor wrote to his creditor, "I will try to pay you a little at a time if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week:" it was held a sufficient acknowledgment. (*Lee v. Wilmot*, L. R., 1 Ex. 364.) An indorsement by the maker of a promissory note of his name together with the date upon the note, was held a sufficient acknowledgment. (*Bourdin v. Greenwood*, L. R., 13 Eq. 281.) See also *Archer v. Leonard*, 15 Ir. Ch. R. 267; *Leland v. Murphy*, 16 Ir. Ch. R. 500; *Burrows v. Baker*, L. R., 3 Eq. 596; *Fiske v. Mitchell*, 19 W. R. 798.

9 Geo. 4, c. 14.

Instances of insufficient acknowledgments.

The acknowledgment in writing to take a case out of the Statute of Limitations must either amount to a distinct promise to pay, or to a distinct acknowledgment that the sum is due. (*Buckett v. Church*, 9 Car. & P. 209.) An acknowledgment, without anything more, may raise an implied promise since the stat. 9 Geo. 4, c. 14, as it did before; but where something else is added, that must be taken into consideration. A debtor having sums due to him, handed the accounts to his creditor, and wrote, "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear," and added his signature. It was held, that this acknowledgment did not imply a promise to pay, and was no answer under the statute, 9 Geo. 4, c. 14, to a plea of the Statute of Limitations. (*Routledge v. Ramsey*, 8 Ad. & Ell. 221.) An acknowledgment, accompanied with what is a contradiction of any promise to pay, is not sufficient. (*Linsell v. Bonsor*, 2 Bing. N. C. 241.) The principle of law applicable to these cases is, that the plaintiff must either show an unqualified acknowledgment of the debt, or, if he show a promise to pay coupled with a condition, he must show performance of the condition. The following letter written by the defendant to the plaintiff's clerk, in answer to an application for a debt contracted above six years before the action brought, was held not sufficient to defeat a plea of the Statute of Limitations:—"I will not fail to meet the plaintiff on fair terms, and have now a hope before perhaps a week from this date I shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance." (*Hart v. Prendergast*, 14 Mees. & W. 745. See *Gardner v. M'Mahon*, 3 Q. B. 561; *Fuller v. Redman*, 26 Beav. 620.) Letters not containing any absolute acknowledgment of a debt or unqualified promise to pay, but only expressing a hope that on the transfer of a mortgage the debtor might be able to clear off the whole that might be standing against him, will not take a case out of the statute. (*Smith v. Thorne*, 18 Q. B. 134.)

A mere acknowledgment, though it may, under circumstances, amount to a new promise, yet if it does not, it is not a sufficient answer to the Statute of Limitations. (*Fearn v. Lewis*, 6 Bing. 349; *Scales v. Jacob*, 3 Bing. 638; *Ayton v. Bolt*, 4 Bing. 105.) And therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability on the defendant's part to make the payment, was held not to raise an implication of a promise to pay. (*Brigstock v. Smith*, 1 Cr. & Mees. 483.)

The renewal of former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts, where all that can be inferred from giving fresh notes is that the party intended to give a fresh security limited to the liability on the new notes, without any intention on his part to renew his liability on the original demand. (*Foster v. Damber*, 6 Exch. 839; 20 L. J., Exch. 385.) A deed of composition, by which, after reciting that the defendant was indebted to the plaintiff and others, the former assigned his property to the plaintiff, in trust to sell and to pay all such creditors as should sign the schedule of debts annexed, but which was neither signed by the plaintiff nor specified the amount of his debt, and had become void under a proviso, was held not to be evidence of a promise, nor an acknowledgment in writing within the stat. 9 Geo. 4, c. 14, for the acknowledgment was only of some debt, but what, remained to be made out by parol evidence. (*Kennett v. Milbank*, 8 Bing. 38.) The Statute of Limitations is not barred by a letter in which the defendant states "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information;" for by the stat. 9 Geo. 4, c. 14, s. 1, the acknowledgment in writing, to bar the statute, must be signed by the party chargeable thereby, and such letter does not charge the defendant. (*Whippy v. Hillary*, 3 B. & Ad. 399.)

In order to take a case out of the Statute of Limitations, a letter from the defendant to the plaintiff was put in, containing the following words:—"I shall be most happy to pay you both interest and principal *as soon as convenient*;" and in a subsequent part, "I shall pay no more interest till we have a fair settling." Other letters of the defendant acknowledged a debt, but spoke of a settling between him and the plaintiff. It was held that, in order to enable the plaintiff to recover, some evidence must be given that a time had arrived when it was convenient to the defendant to pay; and, as it seems, that the settlement alluded to had taken place between the parties. (*Edmunds v. Downes*, 4 Tyrw. 173; 2 C. & M. 459.)

9 Geo. 4, c. 14.

Instances of insufficient acknowledgments.

A party being written to by the plaintiff's attorney for payment of an alleged debt due for more than six years, wrote an answer, in which he stated that he was "in almost daily expectation of being enabled to give a satisfactory reply" to the application, and that he would call on the plaintiff's attorney "on the matter:" it was held, that this was not sufficient to take the case out of the Statute of Limitations. (*Morrell v. Frith*, 8 Carr. & P. 246.)

Where a local turnpike act provided that all orders of the trustees should be entered in a book kept for that purpose, an order by them to pay a bill is not an act done so as to take a debt out of the Statute of Limitations under 9 Geo. 4, c. 14, unless it be so entered in writing; the only act capable of taking a case out of the statute being the payment of principal or interest. (*Emery v. Day*, 1 C., M. & R. 245; 4 Tyr. 695.) Commissioners under a town improvement act being in debt appointed a finance committee, who made a report to which was appended a schedule of liabilities, including arrears of salary due to the clerk of the commissioners more than six years. The commissioners made an entry in their minute book that they accepted the report. Held, no sufficient acknowledgment of the debt. (*Bush v. Martin*, 2 H. & C. 311; 11 W. R. 1078. See also *Lowndes v. The Garnett, & Co. Company*, 33 L. J., Ch. 418; 12 W. R. 578; *ante*, p. 275.)

In *Williams v. Griffith* (3 Exch. 335), letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the Statute of Limitations.

The following letter, addressed by the defendant to the plaintiff within six years, respecting a debt otherwise barred by the Statute of Limitations, was held (on appeal) not a sufficient acknowledgment to take the case out of the statute:—"I am surprised at receiving a letter from H. (the plaintiff's attorney) this morning for the recovery of your debt. I must candidly tell you once for all, I never shall be able to pay you in cash, but you may have any of the goods we have at the Pantechnicon by paying the expenses incurred thereon, without which they cannot be taken out, as before agreed when Mr. F. (one of the plaintiffs) was in town." (*Cawley v. Furnell*, 12 C. B. 291; 15 Jur. 908; 20 Law J., C. P. 197.)

The following letter, written by the debtor in answer to an application for payment of a debt, was held to be insufficient:—"I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. My situation as a clerk does not afford me the means of laying by a shilling; but in time I may reap the benefit of my services in an augmentation of salary, that may enable me to propose some satisfactory arrangement. I am much obliged to you for your forbearance." (*Rackham v. Marriott*, 2 H. & N. 196; 3 Jur., N. S. 495; 26 L. J., Exch. 315.)

P., being indebted to the executors of C. in 1,100*l.*, to which A. was beneficially entitled, sent a letter to A., as follows:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed in this letter was a promissory note on receipt stamp for 1,100*l.*, and 4*l.* per cent. interest. At the time of this letter and note being sent the debt was barred by the statute: it was held, that there was no sufficient acknowledgment by P. without referring to the note to see what was the promise made, and that this could not be done for want of a proper stamp. (*Parmiter v. Parmiter*, 30 L. J., Ch. 508; 3 De G., F. & J. 461.)

9 Geo. 4, c. 14.

Instances of insufficient acknowledgments.

An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment of the debt to prevent the operation of the Statute of Limitations, though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe. (*Goate v. Goate*, 1 H. & N. 29.)

A letter, the fair effect of which is that the writer is not certain whether the debt is owing, and will have the matter examined into, is not a sufficient acknowledgment in writing to take the case out of the statute, notwithstanding that it contains expressions of regret that the debt should have been so long unpaid. (*Collinson v. Margesson*, 27 L. J., Exch. 305.)

Where there was an open account between R. and H., which extended from 1834 to within a short time of H.'s death in 1847, and in 1845, H. signed a memorandum as follows: "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for 174*l.*, being for bricks delivered to the trustees of Y. P. chapel in 1834:" it was held, reversing the decision of Sir J. Stuart, V.-C., that this was not such an acknowledgment as to take the general account out of the Statute of Limitations, and that the delivery of the bricks could not be treated as a part payment, so as to have that effect. (*Hughes v. Paramore*, 7 D., M. & G. 229; 24 L. J., Ch. 681.)

A letter in these terms was held not to contain an acknowledgment from which a promise to pay could be inferred:—"I have received a letter from Messrs. P. & L., solicitors, requesting me to pay you an account of 40*l.* 9*s.* 6*d.* I have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10*l.* per annum, until it is liquidated. Should this proposal meet with your approbation, we can make arrangements accordingly." (*Buckmaster v. Russell*, 10 C. B., N. S. 745; 8 Jur., N. S. 155, Exch. Cham.)

In answer to a plea of the Statute of Limitations in an action for a debt, the creditor proved that within six years of action brought the debtor had presented a petition for arrangement with his creditors under 7 & 8 Vict. c. 70, and had inserted the debt upon which the action was brought in the account of his debts, and his proposal was, that "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate and effects to trustees: it was held, not to be sufficient to take the case out of the statute, as not showing that from which the court could infer an unconditional promise, or a promise upon a condition fulfilled. (*Everett v. Robertson*, 1 Ell. & Ell. 16.)

An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included is not such an acknowledgment as will take the case out of the operation of the Statute of Limitations. The circumstance of there being no ascertained or adjusted debt till within six years will not delay the operation of the statute. (*Nash v. Hill*, 1 F. & F. 198.)

The drawer of a bill of exchange wrote to the holder "If in funds I would immediately pay the money and take the bill out of your hands." Held an insufficient acknowledgment. (*Richardson v. Barry*, 29 Beav. 22.)

In 1853, H. as principal and the defendant as surety gave to the plaintiff their joint and several note for payment of 200*l.* on demand. In 1861, H. assigned all his property for the benefit of his creditors, and the defendant signed and gave to the plaintiff the following letter: "I hereby consent to your receiving the dividend under H.'s assignment and agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff received the dividend, and in 1862 sued the defendant for the balance of the note. Held, that the letter was not a sufficient acknowledgment to take the debt out of the statute. (*Cockrill v. Sparke*, 1 H. & C. 699; 11 W. R. 428.) In *Cassidy v. Firman* (1 R., 1 C. L. 8) and *Cranford v. Cranford* (1 R., 2 Eq. 166) acknowledgments were held to be insufficient. See further Darb. & Bos. Stat. Lim. 46—53; Fisher's Digest, 5512—5528.

Since Lord *Tenterden's* Act, after the six years have elapsed, nothing will revive the debt, except an acknowledgment in writing, from which a promise to pay can be inferred, or a part payment of principal or interest. Now, there have been several cases in which it has been considered after much discussion, and adopted by all the courts, that the payment must appear, either by the declaration or acts of the party making it, or by the appropriation of the party in whose favour it is made, to be made in part payment of the debt in question; if it stands ambiguous whether it be part payment of an existing debt or payment generally, without the admission of any greater debt as due to the party; if it may have been made by the party paying in reduction of an account due to himself, or intended to satisfy the whole of the demand against him, then it is not sufficient to bar the Statute of Limitations. (*Per Lord Abinger, C. B., Waugh v. Cope*, 6 Mees. & W. 829.) Part payment to come within the statute must be a payment accompanied by an acknowledgment from which a promise may be inferred to pay the remainder. (*Foster v. Damber*, 6 Exch. 839.) See *Sims v. Brutten* (5 Exch. 802), where it was said that to take a case out of the statute there must be a payment *quâ* interest, or a part payment of principal, thereby acknowledging more to be due. In that case, although interest had been paid, it was not paid as interest on the debt sought to be recovered.

9 Geo. 4, c. 14.

ACKNOWLEDGMENT  
BY PAYMENT.

In order to take a case out of the Statute of Limitations by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and thirdly, that the payment was made of part of a greater debt, because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at time of the payment. (*Tippets v. Heane*, 1 Cr., M. & R. 252. See *Wainman v. Kynman*, 1 Exch. R. 118.) One of three joint makers of a promissory note became insolvent and inserted the note and the holder's name in his schedule, and a dividend was afterwards paid to the holder by order of the Insolvent Court; it was held in an action upon the note, that such was not sufficient to take the case out of the Statute of Limitations, either as against the other makers of the note or as against the insolvent himself. (*Davies v. Edwards*, 7 Exch. 22; 21 Law J., Exch. 4.) Payment into court will not keep a debt alive. (*Long v. Greville*, 3 B. & C. 10.) The meaning of *part payment* of the principal is not the naked fact of payment of a sum of money, but payment of a smaller *on account of a greater sum* due from the person making the payment to him to whom it is made, which part payment implies an admission of such greater sum being then due, and a promise to pay it: and the reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment *by words*, but it is coupled with a fact. (*Waters v. Tompkins*, 2 Cr., M. & R. 726. See *Morgan v. Rowlands*, L. R., 7 Q. B. 493.)

Part payment of  
principal.

Since the statute 9 Geo. 4, c. 14, the payment within six years of interest which had become due upon a note, beyond that period, has been held sufficient to take the case out of the Statute of Limitations, where the note remained in the hands of the payee. (*Beally v. Greenslade*, 2 C. & J. 61.) So also was payment of interest within six years by one of the several makers of a joint and several promissory note. (*Wyatt v. Hodson*, 1 M. & Scott, 442; 8 Bing. 309.) Payment of interest upon a promissory note payable on demand will take a case out of the statute, although there be no independent evidence of any demand of payment of the note having been made. (*Bamfield v. Tupper*, 7 Exch. 27.)

Payment of in-  
terest.

In an action for money lent the defendant pleaded the Statute of Limitations, and at the trial the plaintiff proved the transmission of the money to the defendant, and the payment by him of a half-yearly sum for interest up to a certain time, and produced an answer to a bill of chancery, in which the defendant admitted having paid the same half-yearly sum within six years, but asserted that it was paid by way of annuity, and not of interest. Assuming that an acknowledgment of a payment must be in writing, and signed, under the 9 Geo. 4, c. 14, s. 1, in order to bar the operation of the Statute of Limitations: it was held, that the evidence for the plaintiff was



9 Geo. 4, c. 14. sufficient to go to the jury; that the construction of the admission in the answer was for the court; and that the whole of it should have been left to the jury, but that they might believe the fact of the payments having been made half-yearly, but reject the residue, and infer from the other evidence that the payments were really made in respect of interest. (*Baildon v. Walton*, 1 Ex. 617; 17 L. J., Ex. 357.) Words used at the time of making a payment qualify it, but it is for the jury to judge of the truth of a statement accompanying the admission of a previous payment. (*Ib.* See *Trentham v. Deterill*, 3 Bing. N. C. 397.) Payment of interest under compulsion of law will not take a debt out of the statute. (*Morgan v. Rowlands*, L. R., 7 Q. B. 493.)

**Appropriation.**

A. owed B. three sums on three promissory notes, dated respectively in 1839, 1840, and 1841. In 1846 B. applied for interest, and A. paid 5*l.* on account of interest generally, and a few days afterwards B., without the knowledge or concurrence of A., made a memorandum on the note 1841, that the payment had been made on account of interest thereon. At the time of this payment two of the notes were barred by the statute: it was held, upon appeal reversing the order of the court below, that the payment of the interest generally could not be referred exclusively to the two notes which were barred, but must be referred either to the three notes or to the one not barred, and in either view the effect of the payment was to take the note of 1841 out of the statute. It seems that the appropriation by the creditor, without the knowledge or consent of the debtor, will not *per se* furnish sufficient ground for raising against the debtor a new promise to pay. Where a payment is made by a debtor on account generally, the court will not refer it to a debt barred by the statute if it can be attributed to any debt not so barred. (*Nash v. Hodson*, Kay, 650; 6 De G., M. & G. 474. See *Mills v. Furnes*, 5 Bing. N. S. 455.)

The application by a trustee of the income of trust property received by him to the partial liquidation of a debt due to him from his *cestui qui trust*, will, if made with the authority of the latter, prevent the residue of the debt from being affected by the statute, in respect of the lapse of time preceding the last such application. (*Stewart v. Connick*, I. R., 5 C. L. 562.)

A creditor who had more than six years before the action supplied ship's stores on seven separate occasions to the debtor amounting in the aggregate to more than 300*l.* within six years, asked his debtor for money. The debtor answered that he had not looked into his accounts, but supposed the balance to be between 90*l.* and 100*l.*, but he had not cash. Being pressed, he accepted a draft at four months for 60*l.*, which he did, taking an acknowledgment that he had given the acceptance on account. It was proved by other evidence that the amount unpaid for the ship's stores was 95*l.*, but the different accounts were never balanced or ascertained between the creditor and debtor: it was held, that the evidence of the giving of the acceptance under these circumstances was evidence to go to the jury of a payment on account of all the debts, so as to be evidence of a fresh promise to pay what was due sufficient to take the whole out of the statute. (*Walker v. Butler*, 6 El. & Bl. 506; 2 Jur., N. S. 687; 25 L. J., Q. B. 377.)

Between Midsummer, 1845, and Lady-day, 1854, the guardians of the Wycombe Union made payments by way of relief to non-settled paupers of the Eton Union. The only authority for these payments were letters written in 1847, 1849, and 1850, in which the guardians of the Eton Union requested the guardians of the Wycombe Union to make weekly payments to certain paupers. One of these letters stated that the money would be repaid quarterly, and another stated that if they would furnish an account at the end of each quarter they would be repaid. In July, 1850, the guardians of the Wycombe Union sent to the guardians of the Eton Union an account in which they claimed a balance (after giving credit for a payment made in November, 1849) for relief on non-settled paupers of the Eton Union from Lady-day, 1845, to Lady-day, 1847, and from Lady-day, 1849, to Lady-day, 1850. No previous account had been sent in or claim made in respect thereof: it was held, that the payment not being generally on account did not take the case out of the Statute of Limitations. (*Wycombe Union (Guardians) v. Eton Union (Guardians)*, 1 H. & N. 687; 26 L. J., M. C. 97.)

In an action upon a promissory note, to which the Statute of Limitations was pleaded, the plaintiff gave evidence that the defendant had paid 5s. on account of the note. He then offered to prove that the defendant, on a subsequent occasion, admitted orally that he had made such payment on the above account. It was held that the latter evidence was not excluded by stat. 9 Geo. 4, c. 14, s. 1. (*Bevan v. Gething*, 3 Q. B. 740.) A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment on the part of the defendant was in his own handwriting, but said he could not recollect the fact of payment: it was held, nevertheless, that there was sufficient evidence to go to the jury, as to the fact of payment to take the case out of the Statute of Limitations. (*Trentham v. Deterill*, 3 Bing. N. C. 397.)

9 Geo. 4, c. 14.

Proof of payment  
by parol evidence.

It was once decided that a verbal acknowledgment of the payment of part of a debt within six years was not sufficient within the stat. 9 Geo. 4, c. 14, to take the case out of the Statute of Limitations; as the previous enactment must be engrafted upon the proviso as to part payment, and the whole must be taken together and the payment proved, not by a verbal acknowledgment, but by evidence of the actual payment, or by writing such as the act requires; and being so proved it will have the same effect as it had before the passing of the act. (*Willis v. Newnham*, 3 Y. & J. 518.) But that decision is now overruled, and part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute. (*Cleave v. Jones*, 6 Exch. 573, Exch. Cham.; 15 Jur. 515; 20 L. J., Exch. 238.)

Evidence of verbal admissions in 1850 by A., since deceased, that he owed a debt of 2,330*l.* to B.'s estate, the interest of which he had arranged to discharge, and was discharging, by paying two annuities bequeathed by B.'s will, together with a statement in an affidavit made by B.'s executor in 1850, which was inserted in the draft affidavit from the dictation of A. to the effect that B.'s executor had received in August, 1850, from A. a half-year's interest on 2,300*l.*, and had paid the same annuities the same half-year, was held sufficient to take the debt of 2,300*l.* out of the statute. (*Edwards v. Janes*, 1 K. & J. 534.)

A letter not in itself sufficient as a written acknowledgment to bar the statute, may be left, with other evidence, to the jury upon the question whether there have been payments or deliveries of goods in part satisfaction of the debt within the six years. It will be a question for the jury whether the payments or deliveries of goods were made and received on account of the particular debt sued for. (*Collinson v. Margesson*, 27 L. J., Ex. 305.)

In assumpsit on a promissory note bearing interest, proof that the defendant being sent to by the plaintiff for money, paid 1*l.*, and said, "this puts us straight for the last year's interest, all but 18*s.*: some day next week I will bring that up," is sufficient answer to a plea of the Statute of Limitations no evidence being given of any other debt due from the defendant to the plaintiff. (*Evans v. Davies*, 4 Ad. & Ell. 840; 3 Dowl. P. C. 786; 1 Gale, 150.)

Before the passing of 9 Geo. 4, c. 14, indorsements of the payment of interest made upon bills or notes before the statute had run by the holder, were received in evidence, upon the principle that they operated against the interest of the party by whom they were made; but where it appeared that such an indorsement had been made after the statute had run, it was not received as evidence to exclude the operation of the statute. (*Briggs v. Wilson*, 5 D., M. & G. 12; 1 Taylor on Ev. 614, 5th ed.) But now it is enacted by 9 Geo. 4, c. 14, s. 3, that no indorsement or memorandum of any payment written or made after the 1st Jan. 1829, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the statute. In an action by an executor of the payee of a promissory note against the maker upon a promissory note more than six years overdue, the plaintiff, in order to take the case out of the Statute of Limitations, produced a book in which he had in 1844 and 1847 respectively, at the request of the testatrix, entered

By indorsements  
on bills and notes.

9 Geo. 4, c. 14, s. 3.

9 Geo. 4, c. 14. two payments as for interest due upon the note, which she told him she had received from the defendant: the evidence was held not to be excluded by this section, which applies where there is nothing but an indorsement. (*Bradley v. James*, 13 C. B. 822.)

Modes in which  
payment can be  
made.

Since 9 Geo. 4, c. 14, there must be part payment in cash, or what is equivalent to it, to take a case out of the Statute of Limitations. A. occupied a house and land under B. at the rent of 16*l.* a year, and A., at B.'s request, entered into his employment as a farming bailiff, and to perform other services, in the place of another person, who had been employed by B. and had been paid 12*s.* a week. A. continued in B.'s service for more than twelve years, but there was no payment of rent on the one hand, or of wages on the other. In an action brought by A. to recover wages for twelve years, deducting the rent: it was held, that this was not such an open account as would take the case out of the Statute of Limitations since the 9 Geo. 4, c. 14, but that there must be a part payment in cash, or what is equivalent to it, to have that effect. (*Williams v. Griffiths*, 2 Cr., M. & R. 45.)

A. gave B., then being a feme sole, a promissory note; B. died, having married C., who thereupon arranged with A. that the interest on the note should go towards the maintenance of B.'s child, then under the care of A. In 1839, A. and C. settled their accounts; and A. indorsed a memorandum on the note, that all the interest up to that date was paid, but no money passed. In 1848, the child died, no payments on either side having been made in the meantime. In 1853, C. took out letters of administration to B., and brought an action against A. to recover the amount of the note, alleging a promise to himself as administrator after the death of B. It was held (dubitante *Parke*, B.) that the agreement between the plaintiff and the defendant, and the continued acting thereon up to the time of the child's death, constituted a payment of interest within this section. (*Bodger v. Arch*, 10 Exch. 333; 24 L. J., Exch. 19.)

Not essential that  
money should  
pass.

It has been held, that to constitute a payment of interest sufficient to take a debt out of the statute it is not essential that money should pass between the parties. Where a debt due to the plaintiff from his son was barred, an interview between the plaintiff, his son and his son's wife took place, at which the interest due was calculated, and the son offered to pay. The plaintiff stopped him, and writing a receipt for the interest gave it to the son's wife, saying that he would make her a present of the money: no money passed. Held, that this was a sufficient payment to take the debt out of the statute. (*Maber v. Maber*, L. R., 2 Ex. 153.)

Payment by de-  
livery of goods.

If an equitable mortgagee enters into the receipt of the rents of the mortgaged estate, such receipt is *prima facie* a payment within the meaning of the proviso in the stat. 9 Geo. 4, c. 14, s. 1. (*Brookhurst v. Jessop*, 7 Sim. 438.) Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the Statute of Limitations. (*Hooper v. Stephens*, 4 Ad. & Ell. 71; 7 C. & P. 260; *Hart v. Nash*, 2 Cr. M. & R. 337.) If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is part payment so as to prevent the operation of the Statute of Limitations. (*Hart v. Nash*, 2 Cr. M. & R. 337.) In order to make a delivery of goods within six years operative in taking a case out of the statute, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment. (*Cottam v. Partridge*, 4 Scott, N. R. 819.) The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments*. (*Ashby v. James*, 11 Mees. & W. 342, recognized in *Worthington v. Grimsditch*, 7 Q. B. 484; *Clark v. Alexander*, 8 Scott, N. R. 165; *Bodger v. Arch*, 10 Exch. 333; *Amos v. Smith*, 1 H. & Colt. 238.) See *Hughes v. Paramore*, 7 D., M. & G. 229, and also *Scholey v. Walton*, 12 M. & W. 510, where the setting-off a sum of money in an account stated and settled was held to be a payment within the statute. The going through an account where there are items on one side only does not alter the situation of the parties at all or constitute a new consideration. (*Smith v. Forty*, 4 Car. & P. 126;

By settlement of  
accounts.

*Jones v. Rider*, 4 Mees. & W. 32; *Mills v. Furkes*, 5 Bing. N. C. 455; 9 Geo. 4, c. 14, s. 1. 7 Scott, 444.)

The defendant was indebted to the plaintiffs in a balance of 2,245*l.*, for which they held his overdue promissory note. In 1827, the plaintiffs and the defendant agreed that the defendant should pay the balance as follows: 245*l.* in cash, and the remainder by annual payments of 300*l.* a-year out of his salary as a consul abroad, and by the proceeds of certain wines consigned by him to India; and that the plaintiffs should hold his promissory note as a security for the payment of the amount. The 245*l.* was paid, and the 300*l.* was also duly paid in 1828 and 1829, but the defendant made default in payment of it in September, 1830: it was held, that the plaintiffs were entitled, at any time within six years from September, 1830, to sue the defendant on the promissory note, or for the balance remaining due, on a count upon an account stated. (*Irving v. Veitch*, 3 Mees. & W. 90.) Where a bill of exchange has been so delivered in payment on account of a debt as to raise an implication of a promise to pay the balance, the Statute of Limitations is answered, as from the time of such delivery, whatever afterwards becomes of the bill, the promise implied from such delivery not being within the meaning of stat. 9 Geo. 4, c. 14, s. 1, "an acknowledgment or promise by words *only*," and the word "payment" in the proviso in that section being used in the popular sense, so as to include a giving and taking of a negotiable instrument on account of a debt as well as a giving and taking of it in satisfaction of the debt. (*Turney v. Dodwell*, 3 Ell. & Bl. 136; 18 Jur. 187; 28 L. J., Q. B. 137.) A testator died in 1829, part of his assets consisted of a promissory note for 100*l.* of five persons. All interest on it was paid down to 1837, but by whom did not appear. In 1837, the executor took the note of one of the five for the 100*l.*, and interest was paid until 1842. Subsequently nothing was done, and the debt became barred by the statute: it was held, that the second note must be treated as a new security given for payment of the old debt, and the executor was charged with the 100*l.* (*Sparkes v. Restall*, 22 Beav. 587.)

By giving note or bill.

Payment may be made to an agent of the creditor. (*Evans v. Davies*, 4 Ad. & El. 840.) The payment of interest to a *cestui que trust*, was held to keep alive the right of the trustee to maintain an action on a promissory note. (*Meggison v. Harper*, 2 C. & M. 822; 4 Tyr. 94.) Payment of interest, within six years of action brought, on a promissory note given to a woman before marriage to her husband in her lifetime, was held an answer to the plea of the Statute of Limitations in an action by her administrator, such payment being considered as made to the husband in the character of agent to his wife, and not to have reduced the *chose in action* into possession. (*Hart v. Stephens*, 6 Q. B. 937.)

Payment to an agent.

In an action against a husband and his wife upon a joint and several promissory note made by the wife before coverture, and one J. A., a promise was alleged to have been made by the wife *dum sola*. The defendant pleaded the Statute of Limitations. The declaration was amended after issue by inserting an allegation of a subsequent promise by the husband. The plaintiffs proved a payment of interest within six years made by the wife after marriage with money sent by J. A., but without the privity or subsequent ratification of the husband: it was held, that such payment raised no promise, either by the husband or the wife, so as to take the case out of the Statute of Limitations, inasmuch as the wife being incapable of making any promise in law, express or implied payment by her, or the other joint maker of the note, could create no promise on her part, and as such payment was not made by the husband, or for any consideration affecting him or with his sanction, it raised no implied promise on his part. (*Neve v. Hollands*, 18 Q. B. 262.) If the payment had been made by the husband, or with his sanction, the declaration, as amended, would have been bad in arrest of judgment, as the wife would then have been improperly joined in the action. (*Ib.*, per Lord Campbell, C. J.) (See now 33 & 34 Vict. c. 93, s. 12, *post*.)

Payment by a wife on a debt incurred by her before marriage.

The words of the act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger,

Payment by an agent.

9 Geo. 4, c. 14. and without authority, but payment made by the principal debtor or any one acting by his authority. (*Linsell v. Bonsor*, 2 Bing. N. C. 245; *Homan v. Andrews*, 1 Ir. Ch. R. 106.)

A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by the plaintiff upon the security of a promissory note payable to him or bearer on demand with interest, and signed by the defendant thus: "I. H., churchwarden, J. E., overseer, or *others for the time being*." The interest had been regularly paid by the overseer for the time being up to 1847, but the defendants had never paid the interest, or in express terms authorized the parish officers to pay it for them. The defendants having pleaded the Statute of Limitations to an action on the note: it was held, that it was a question for the jury, whether by the form of the note the defendants had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute. (*Jones v. Hughes*, 5 Exch. 104. See *Rew v. Pettet*, 1 Ad. & E. 196.)

Payment by one of several joint contractors or one of several executors.

Payment by executor, effect as against beneficial devisees.

The effect of a payment by one of several joint contractors, or by one of several executors or administrators, now depends on 19 & 20 Vict. c. 97, s. 14, *post*, where see note.

It was held under 47 Geo. 3, c. 74, that a payment by the executrix of a trader would not take a debt out of the statute, so as to enable the creditor to claim payment out of the real estate in the hands of a devisee. (*Putnam v. Bates*, 3 Russ. 188; *conf. Wilson v. Leonard*, 3 Beav. 373, where a devisee was held not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party.) And it has since been held under 3 & 4 Will. 4, c. 104, that the payment of interest on a debt of the testator by his executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons, they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it. (*Fordham v. Wallis*, 10 Hare, 217; 17 Jur. 228; 22 L. J., Ch. 548.) And it was also held, that the demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the Statute of Limitations, was not kept alive so as to preclude the operation of the statute by the effect of any right which might exist or might have existed among the parties to have the assets of the testator marshalled. (*Ib.* See Darb. & Bos. Stat. Lim. 87—90.)

Where executor is beneficial devisee.

Where executor is trustee.

Effect in keeping alive right to make legatees refund.

It was said that such a payment made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect. (*Fordham v. Wallis*, 10 Hare, 217.) Payments having been made to some residuary legatees by the executors, it was held that such payments whilst the debts of the testator remained unpaid were a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the monies they had received on account of the estate. (*Ib.*) See further, as to the acknowledgment of a simple contract debt by payment, *Whitcomb v. Whiting*, 1 Smith, L. C. 574, 6th ed., and see the cases quoted under 3 & 4 Will. 4, c. 27, s. 40 (*ante*, p. 244), and 3 & 4 Will. 4, c. 42, s. 5 (*ante*, p. 262).

Principles on which courts of equity act with reference to the statutes of limitation in the case of specialty and simple contract debts.

The statutes which prescribe the periods of limitation for the recovery of specialty and simple contract debts, do not apply in terms to courts of equity; but those courts in the case of legal demands act in obedience to the statutes. (*Foley v. Hill*, 1 Phill. 399; and see the cases quoted as to the period during which an account of rents will be decreed in equity, *ante*, p. 255, and the cases as to partnership accounts, *ante*, p. 267.)



In administration suits legal demands are decided entirely on legal grounds. (See *per* Lord Romilly, M. R., in *Fuller v. Redman*, 26 Beav. 619.) Executors in administration suits are not bound to plead the statute. (*Ex parte Dendney*, 15 Ves. 498; *Norton v. Frecker*, 1 Atk. 526; *Castleton v. Fanshawe*, Prec. Ch. 100.) If a decree has been obtained, the statute may be set up in the proceedings under the decree by one creditor against another (*Fuller v. Redman*, 26 Beav. 614), and by a residuary legatee or other party interested in the estate against a creditor (*Moodie v. Bannister*, 4 Drew. 432; *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Beeching v. Morphem*, 8 Hare, 129); but the statute cannot be set up against the plaintiff whose debt is the foundation of the decree. (*Adams v. Waller*, 14 W. R. 789.) As to this question in the administration of real estate, see *Briggs v. Wilson*, 5 D., M. & G. 21. It seems the court is not bound to set up the statute on behalf of absent parties. (*Alston v. Trollope*, L. R., 2 Eq. 205.) A residuary legatee has been held to be precluded by his own acts from setting up the statute as against a pecuniary legatee. (*Prowse v. Spurgin*, L. R., 5 Eq. 99.)

After a decree in an administration suit, an acknowledgment by an executor will not revive a debt barred by the statute. (*Phillips v. Beale*, 32 Beav. 26.) Where a judgment has been recovered against executors for a debt due from their testator, which they paid, the executors are entitled to be allowed such payment, although the Statute of Limitations might have been set up against the creditor who recovered the judgment. (*Hunter v. Baxter*, 3 Giff. 214.) An executor may pay a debt justly due to a stranger, although barred in testator's lifetime (*Stahlschmidt v. Lett*, 1 Sm. & Giff. 415), and may retain his own debt under same circumstances. (*Hill v. Walker*, 4 K. & J. 166. See *Coombs v. Coombs*, L. R., 1 P. & M. 288; *Morley v. Saunders*, L. R., 8 Eq. 599.) He may also set off a legacy against a debt owing by the legatee to the testator, though such debt is barred by the statute. (*Coates v. Coates*, 33 Beav. 249; *Courtney v. Williams*, 3 Hare, 589.)

Where one of several executors owed the testator 300*l.* on a promissory note, and the other executors proved at once, but the debtor did not prove for more than six years, it was held that he could not then set up the statute, that the act of proving had relation to the testator's death, and he was considered as having 300*l.* in his hands as assets. (*Ingle v. Richards*, 28 Beav. 366.) Where a testator bequeathed property to his children subject to a condition that any debts appearing in his ledger as due from them should be deducted from their shares, it was held, that a debt appearing in the ledger though barred ought to be deducted. (*Rose v. Gould*, 15 Beav. 189.) A testator gave property to his wife for life, and after her death equally between his children, with a proviso that his trustees should deduct from the share of his daughter M. 200*l.* which he had advanced to her, and add it to his personal estate; and that if at the period of distribution M. should be indebted to any of her brothers or sisters in respect of advances made to her, the trustees should be empowered to deduct such debts or advances from her share, and pay the same to the brother or sister to whom the same might be owing. Held, that the trustees were authorized to deduct from M.'s share all such debts though barred by the statute, but that (the intention of the testator being to put advances by brothers and sisters on the same footing as advances by himself) no interest ought to be deducted. (*Poole v. Poole*, L. R., 7 Ch. 17.)

Lapse of time will not of itself bar an executor of an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party. (*Smith v. O'Grady*, L. R., 3 P. C. 311.)

In the case of direct trusts, the expiration of the statutory periods will not bar the rights of the *cestui que trust* in a court of equity. The case of constructive trusts, however, is different. (*Beckford v. Wade*, 17 Ves. 97; *Townsend v. Townsend*, 1 Bro. C. C. 550.) Between *cestui que trust* and trustee no lapse of time will preclude the account from the commencement of the trust, in a case in which the relation of trustee and *cestui que trust*

9 Geo. 4, c. 14.

Administration suits.

Who may set up statute.

Executor may pay and retain debts barred.

Right of executor of executor to account of estate of original testator.

Time no bar in case of direct trusts.

9 Geo. 4, c. 14. continues, the transactions between them are not closed, and the delay of the claim is attributable to the trustee not having given to the *cestui que trust* that information to which he was entitled, and accounted with him in such manner as he ought. (*Wedderburn v. Wedderburn*, 4 M. & Cr. 41; 2 Keen, 722.) But time may be a bar where there has been a direct and independent dealing between the trustee and the *cestui que trust* after the relation has terminated. (2 Keen, 749.)

Where a trustee lends out trust money in breach of the trust, and the borrower with notice of the trust applies the money to his own use, he cannot be permitted to separate the loan from the trust, and insist that the loan being barred by the statute the trust is barred also. (*Ernest v. Croysdill*, 2 De G., F. & J. 198. See *Butler v. Carter*, L. R., 5 Eq. 276; *Coxwell v. Franklinski*, 12 W. R. 1072.) Where a settlor had constituted himself a trustee of a covenant, the specialty debt was held not to be barred by lapse of time. (*Stone v. Stone*, L. R., 5 Ch. 74.) Where an obligor, by a voluntary settlement executed in 1813, gave certain funds to trustees in trust to pay the principal and interest due on the bond as and when the obligor should be required to pay the same, and the obligees did not claim on the bond until 1870, being up to that time ignorant of their title, it was held that no trust had been created, and that the claim of the obligees was barred. (*Henriquez v. Bensusan*, 20 W. R. 350.)

No lapse of time will bar the right to obtain an account of moneys received by a person standing in a fiduciary relation. (*Teed v. Beere*, 7 W. R. 394; *James v. Holmes*, 10 W. R. 634; and see the cases as to solicitor and client quoted *ante*, p. 266.) And where a breach of trust has been committed by a deceased trustee, his executor cannot set up the statutes in answer to a claim arising from such breach of trust. (*Brittlebank v. Goodwin*, L. R., 5 Eq. 545; and see further p. 267, *ante*.)

Where a creditor proceeds against the separate estate of a married woman as a trust fund, it has been held that the Statutes of Limitation do not apply. (*Vaughan v. Walker*, 8 Ir. Ch. R. 458. See *Hartford v. Power*, 16 W. R. 822).

Devise in trust to pay debts.

A devise of real estates in trust for payment of the testator's debts will not revive a debt barred by the statute at the time of the testator's death. (*Burke v. Jones*, 2 Ves. & B. 275.) But as to such debts as are not barred, time will cease to run at the death of the testator. (*Hughes v. Wynne*, T. & R. 307. See note to 3 & 4 Will. 4, c. 27, s. 25, *ante*, p. 203.) A direction for the payment of debts in a will of personal estate will not stop the running of the Statute of Limitations. (*Scott v. Jones*, 4 Cl. & F. 382; *Cadbury v. Smith*, L. R., 9 Eq. 42.) But a testator may, by express directions in his will, revive debts which have been barred. (*Williamson v. Naylor*, 3 Y. & Coll., Exch. 208; *Philips v. Philips*, 3 Hare, 281.) When a man makes a provision for his debts, he makes a provision for those debts which are not barred by the Statute of Limitations, that is to say, for those which can be deemed, and in law are deemed, debts, because he has the benefit which the legislature has given to him as a protection against stale demands. They are not debts which are recoverable, therefore they are not debts. The law has barred them. But if a man chooses voluntarily to make a provision for his father's debts to which he was not liable, this statute has no operation with respect to such debts. (*O'Connor v. Haslam*, 5 H. L. C. 170; see p. 181.)

Mistake.

Trustees had by mistake paid to one of the *cestui que trusts* a portion of the trust funds, to which he was not entitled. In a suit by another party interested against the *cestui que trust* to make him refund, it was held, that the Statute of Limitations was inapplicable: that he was bound to repay, though more than six years had elapsed, and that all his interest in the trust fund was liable to make good the amount. (*Harris v. Harris*, 29 Beav. 110.) Where a trust fund had been paid by mistake to one who was not a *cestui que trust*, it was held that the trustees could compel him to refund at any time within six years after the discovery of the mistake. (*Brooks-bank v. Smith*, 2 Y. & C., Ex. 58.) Where property has been long enjoyed by a family in certain shares under a mistake, it is said that the court will

presume a grant or family arrangement. (*Re Peat's Trusts*, L. R., 7 Eq. 9 Geo. 4, c. 14. 302.)

In cases of fraud, courts of equity grant relief notwithstanding the lapse of the statutory period. Thus, accounts were opened on the ground of fraud, notwithstanding the lapse of seventeen years. (*Allfrey v. Allfrey*, 1 Hall & T. 179; 1 Mac. & G. 87.) A. and B., having for many years been partners in business as solicitors, dissolved their partnership in 1834, and the business continued to be carried on by A. alone until 1841, when he became bankrupt; and it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their bankers in 1829, for the purpose of investment, and which A. had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money, it was held, that in equity the effect of the misrepresentation, so far as regarded the Statute of Limitations, was the same as if it had been made on the day the fraud was discovered, notwithstanding the partnership had been dissolved more than six years before. (*Blair v. Bromley*, 2 Ph. C. C. 354; 11 Jur. 617; 16 Law J., Ch. 495.) Where a bill was filed for an account of coal abstracted from plaintiff's mine, it was said that the account would not have been limited to six years, if the coal had been abstracted intentionally, and steps had been taken to conceal the fact and prevent discovery. (*Dean v. Thwaite*, 21 Beav. 621.) As to relief in the case of a fraudulent conversion of a trust fund, see *Rolfe v. Gregory*, 13 W. R. 355.

Independently of the statutes, time in equity will bar stale demands in cases of acquiescence. (*Harcourt v. White*, 28 Beav. 303; *Smallcombe's Case*, L. R., 3 Eq. 769.) As to acquiescence in breaches of trust, see *Lewin on Trusts*, 661, 5th ed.; *Butler v. Carter*, L. R., 5 Eq. 276; *Sleoman v. Wilson*, L. R., 13 Eq. 36; see also *Archbold v. Scully*, 9 H. L. C. 883, where Lord *Wensleydale* distinguishes between laches and acquiescence.

Even where the Statutes of Limitations do not apply, the court will not entertain a suit by a *cestui que trust* instituted for the purpose of challenging the accounts settled by his trustees, when the accounts and matters had been investigated twenty years before, and he had every opportunity of going into them. Lapse of time alone will be sufficient bar to such a suit. (*Bright v. Legerton*, 2 De G., F. & J. 606.)

Though the rule as to limitation by time does not apply in cases of express trust, yet as to them in equity the general rule is that stale demands are not to be encouraged. (*M'Donnell v. White*, 11 H. L. C. 570.)

Where, according to the terms of a deed of trust, no proceedings are to be taken by creditors for the recovery of the debt otherwise than out of appropriated property, the debtor or his representatives cannot, under such circumstances, afterwards set up such abstinence of suit in pursuance of the contract as a bar to the claim of the creditor. (*O'Brien v. Osborne*, 10 Hare, 92; 16 Jur. 960.)

The stat. 5 & 6 Vict. c. 97, after reciting that divers acts, commonly called public, local and personal, or local and personal acts, and divers other acts of a local and personal nature, contain clauses limiting the time within which actions may be brought for any thing done in pursuance of the said acts respectively, and that the periods of such limitations vary very much, and it is expedient that there should be one period of limitation only, enacts, "That from and after the 10th August, 1842, the period within which any action may be brought for any thing done under the authority or in pursuance of any such act or acts shall be two years; or in case of continuing damage, then within one year after such damage shall have ceased; and that so much of any clause, provision or enactment by which any other time or period of limitation is appointed or enacted, shall be, and the same is hereby repealed." But this act does not extend to actions brought before the passing of it. (See *Moore v. Shepherd*, 10 Exch. 424, as to the Ramsgate Harbour Act.) On the 8th May, 1801, there was a resolution of the House

Fraud.

Acquiescence and laches.

General limitation of actions under local and personal acts.

9 Geo. 4, c. 14. of Commons, agreed to by the House of Lords, that the general statutes, and the "public, local and personal," in each session should be classed in separate volumes. (*Richards v. Easto*, 15 Mees. & W. 251.) The Metropolitan Police Acts, 10 Geo. 4, c. 44, 2 & 3 Vict. c. 47, and 3 & 4 Vict. c. 84, are not local and personal within the meaning of the stat. 5 & 6 Vict. c. 97; and therefore the times limited by the former statutes respectively for the bringing of actions against justices of a metropolitan district are not altered by the last act. (*Barnett v. Cox*, 9 Q. B. 617.) See further Darb. & Boa. Stat. Lim. 464—470.

## MERCANTILE LAW AMENDMENT ACT.

19 & 20 VICTORIA, CAP. 97.

*An Act to amend the Laws of England and Ireland affecting  
Commerce.* [29th July, 1856.]

### *Limitation of Actions and Suits.*

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

19 & 20 Vict.  
c. 97, s. 9.

Limitation of  
actions for "mer-  
chants' accounts."

(*a*) *Ante*, pp. 265, 267.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of twenty-first year of the reign of King James the First, chapter sixteen, section three (*b*), or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five (*c*), or by the acts of third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (*d*), and chapter forty-two, section three (*e*), or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*f*), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

Absence beyond  
seas or imprison-  
ment of a creditor  
not to be a dis-  
ability.

(*b*) *Ante*, p. 265.

(*c*) *Ante*, p. 250.

(*d*) *Ante*, pp. 236, 249.

(*e*) *Ante*, p. 258.

(*f*) *Ante*, p. 259.



19 & 20 Vict.  
c. 97, s. 10.

This section, as to the imprisonment of the creditor, applies to cases where the cause of action accrued before that act came into operation, and no action is commenced till after that time. (*Cornill v. Hudson*, 8 El. & Bl. 429; 8 Jur., N. S. 1257; 27 Law J., Q. B. 8.) This section is retrospective, and therefore even where the cause of action has accrued before the statute was passed, no person is entitled to any time within which to commence an action beyond the time fixed by the Statutes of Limitation, by reason of such person being beyond the seas when the cause of action accrued. (*Pardo v. Bingham*, L. R., 4 Ch. 755.)

Period of limitation to run as to joint debtors in the kingdom, though some are beyond seas.

Judgment recovered against joint debtors in the kingdom to be no bar to proceeding against others beyond seas after their return.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas, and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid (g).

(g) *Ante*, p. 273.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act (h).

(h) See 3 & 4 Will. 4, c. 27, s. 19, *ante*, p. 193; 3 & 4 Will. 4, c. 42, s. 7, *ante*, p. 264. This section of the act is not retrospective. (*Flood v. Patterson*, 29 Beav. 295.) A testator resided in Jersey, and died, having appointed his widow, who also lived there, the executrix of his will. She proved his will in Jersey, but not in England, and, though she had been three weeks in England shortly after the testator's death, she did not act as executrix in England: it was held, that she was not a person whom a creditor of the testator could sue in this country, and that the Statute of Limitations did not therefore run in favour of her testator's estate. (1b.)

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

13. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (i), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (k), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the

same effect as if such writing had been signed by such party himself.

19 & 20 Vict.  
c. 97, s. 13.

(i) *Ante*, pp. 274, 278.  
(k) *Ante*, pp. 274, 278.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (l), and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (m), and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (n), when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

Part payment by one contractor, &c. not to prevent bar by certain statutes of limitations in favour of another contractor, &c.

(l) *Ante*, p. 265.  
(m) *Ante*, p. 258.  
(n) *Ante*, p. 259.

This section is not retrospective, and therefore a payment by one co-debtor made before this act takes the case out of the Statute of Limitations as against the other. (*Jackson v. Woolley*, 8 El. & Bl. 784; 27 L. J., Q. B. 448; 6 W. R. 686; overruling on this point *Thompson v. Waithman*, 3 Drew. 628.) But this section applies to notes made before the act, where the payment or acknowledgment has been made after the act. In 1853, H. as principal, and the defendant as surety, gave a joint and several promissory note to the plaintiff, payable on demand. In 1861, H. made an assignment for the benefit of his creditors, and the defendant signed and gave the following letter to the plaintiff:—"I consent to your receiving the dividend under H.'s assignment, and do agree that your so doing shall not prejudice your claim upon me for the same debt." The plaintiff accordingly received a dividend on the note, and afterwards brought an action on it against the defendant for the balance, to which the defendant pleaded the Statute of Limitations. It was held that the payment of the dividend, coupled with the letter, did not amount to more than "a payment only" by one co-debtor, under this section; and that, therefore, the defendant, the other co-debtor, was entitled to the benefit of the statute. (*Cookrill v. Sparke*, 32 L. J., Ex. 118; 1 H. & C. 699; 11 W. R. 428.)

This section not retrospective.

Before 19 & 20 Vict. c. 97, it was held that payment of interest by one of the makers of a joint and several promissory note was sufficient to take the case out of the Statute of Limitations as against the other maker, although such payment was made after the statute had run. (*Channell v. Ditchburn*, 5 M. & Wels. 494; *Goddard v. Ingram*, 3 Q. B. 839. See *Atkins v. Tredgold*, 2 B. & C. 23; 3 Dowl. & R. 200; *Slater v. Lawson*, 1 B. & Ad. 396; *Burleigh v. Stott*, 8 B. & C. 86; 2 M. & Ry. 93; *Whitcomb v. Whiting*, Dougl. 652; *Munderston v. Robertson*, 4 Man. & R. 140. See cases cited 5 M. & W. 498, n.) The correctness of the above decision in *Channell v. Ditchburn* was questioned in Story on Partnership, 324, n. If a debtor, A., gave as security a note of himself and another, B., a payment on behalf of B., after the statute has begun to run, was held to revive the debt as against A. (*Ex parte Woodman*, 3 Mont. & A. 609. See *Ib.* 618.) Where the joint contractors are partners, it seems, even since 19 & 20 Vict. c. 97, open to question whether a payment by one partner must not be considered to be made by him as agent of the firm, and therefore to bind the other partners. (See 1 Lindley on Partnership, 465, 2nd ed.)

Old law as to payments by one of several joint contractors.

Payments by one partner.

19 & 20 Vict.  
c. 97, s. 14.

Payments after  
death of one of  
several joint  
contractors;

after death of  
one of several  
partners.

Payments by one  
of several execu-  
tors.

Short title.

Extent of act.

It had been decided before 19 & 20 Vict. c. 97, where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representatives of the other to take the debt out of the statute as against the survivor; as where, after the death of one maker of a joint and several promissory note, signed by two, a payment upon it by the executor of the deceased party will not take the debt out of the Statute of Limitations as against the survivor. (*Slater v. Lawson*, 1 B. & Ad. 396; 2 B. & C. 25; 8 B. & C. 36.) On this point the law has not been altered.

In the case of the death of one partner, it was said by Lord *Cottenham*, in *Winter v. Innes* (4 M. & Cr. 111), that it was questionable whether the deceased's representatives could set up the statute so long as the survivor continued liable to the payment of the debt, and the deceased's estate was consequently liable to be called upon by the survivor for contribution. (See *Braithwaite v. Britain*, 1 Keen, 206, 221.) But it has been since held that payments of interest on a partnership debt by surviving partners have not the effect of taking the debt out of the statute as against the real or personal estate of a deceased partner. (*Way v. Bassett*, 5 Hare, 55; *Brown v. Gordon*, 16 Beav. 302.) Even where payments are made by a surviving partner, who is also executor of the deceased partner, the presumption seems to be that the payments are made in the character of surviving partner, and not as executor. (*Thompson v. Waithman*, 3 Drew. 628.)

For the effect before this act of a payment by one of several executors as regards his co-executors, see *Atkins v. Tredgold*, 2 B. & Cr. 23, and *Scholey v. Walton*, 12 M. & W. 510.

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856."

17. Nothing in this act shall extend to Scotland.

## ABOLITION OF FINES AND RECOVERIES.

3 & 4 WILLIAM IV. CAP. 74.

*An Act for the Abolition of Fines and Recoveries (a), and for the Substitution of more simple Modes of Assurance.\**  
[28th August, 1833.]

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- I. *Interpretation clause, s. 1.*
  - II. *Fines and recoveries abolished, ss. 2, 3.*
  - III. *The tenure of ancient demesne, ss. 4—6.*
  - IV. *The amendment of fines and recoveries, and the rendering them valid in certain cases, ss. 7—12.*
  - V. *The custody of the records of fines and recoveries, s. 13.*
  - VI. *Estates tail not barrable by warranty, s. 14.*
  - VII. *Disposition of lands entailed, ss. 15—21.*
  - VIII. *Definition of the protector, ss. 22—33.*
  - IX. *Powers of the protector, ss. 34—37.*
  - X. *Confirmation of voidable estates created by tenant in tail, s. 38.*
  - XI. *Enlargement of base fees, s. 39.*
  - XII. *Modes in which dispositions of land under this act by tenants in tail are to be effected, ss. 40—49.*
  - XIII. *Estates tail in copyholds, ss. 50—54.*
  - XIV. *Bankrupts' estates tail, ss. 55—69.*
  - XV. *Money to be laid out in lands to be entailed, ss. 70—72.*
  - XVI. *The inrolment of deeds, &c., ss. 73—76.*
  - XVII. *Alienation by married women, ss. 77—91.*
  - XVIII. *Ireland, s. 92.*
- 

### I. INTERPRETATION CLAUSE.

1. Be it enacted, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided

Meaning of certain words and expressions.  
"Lands."

\* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, entitled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance in Ireland." This act corresponds in most particulars with the English statute. The general period fixed for the Irish act to come into operation was the 31st October, 1834, instead of 31st December, 1833.

3 & 4 Will. 4,  
c. 74, s. 1.

"Estate."

"Base fee."

"Estate tail."

"Actual tenant  
in tail."

"Tenant in tail."

"Tenant in tail  
entitled to a base  
fee."

"Money."

"Person."

Number and  
gender.

Settlement.

share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands (b); and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (c); and the expression "estate tail," in addition to its usual meaning, shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (d); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (e); and where any such settlement is or shall be made by will, the time of the



death of the testator shall be considered the time when such settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is any thing in the subject or context repugnant to such construction.

8 & 4 Will. 4,  
c. 74, s. 1.

(a) The principal objects of this statute are,—

The principal  
objects of this  
act.

1st. To abolish fines and recoveries, and to make warranties by a tenant in tail no longer effectual for barring entails.

2nd. To enable a tenant in tail to make an effectual alienation by any deed to be inrolled, by which a tenant in fee can convey.

3rd. To make the beneficial owner of an estate for years determinable on life, or of any greater estate prior to an estate tail under a settlement, the protector of the settlement for the purpose of consenting to a disposition by a tenant in tail in remainder.

4th. To repeal the statute 11 Hen. 7, c. 20, restraining the alienation by married women tenants in tail of lands of the gift of their husbands, except as to settlements made before the passing of this act.

5th. To provide new methods by which estates tail and interests expectant thereon may be barred, as well as to freeholds as copyholds.

6th. To repeal the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, as far as relates to estates tail, and to give to the commissioners of bankrupts other powers of disposing of the estates tail of bankrupts.

7th. To repeal the statutes 39 & 40 Geo. 3, c. 56, and 7 Geo. 4, c. 45; and to extend the substitute for fines and recoveries to the case where money is directed to be laid out in the purchase of lands to be settled, so that any person, if the land were purchased, would have an estate tail therein.

8th. To enable married women, with the concurrence of their husbands, to dispose of lands and money subject to be invested in lands, and to release or extinguish any interest or powers as if sole by deeds to be acknowledged by them before judges or commissioners.

By the common law, before the stat. Westm. 2, commonly called the statute *De Donis* (13 Edw. 1, c. 1), there were two kinds of estates of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body. (See *Willion v. Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354.)

The origin of  
estates tail.

The estate of a tenant in tail grew out of the ancient conveyances to a man, and to the heirs of his body. Under such a conveyance, it was held at common law, that, until issue born, the grantee had not the absolute property in the estate, it being limited by the grant, not to his general heir, but to the heirs of his body; but that the moment issue was born, the condition being performed, the estate became absolutely his property for some purposes (2 Bl. Comm. 111), and he could dispose of it in the same manner as if he had held it in fee simple. The legislature, however, thought fit to interfere; and by the statute *De Donis* it was declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate. (3 Madd. 531, 532.)

Two things are essential to an entail within the statute *De Donis*. One requisite is, that the subject be land or some other thing of a *real* nature. The other requisite is, that the estate in it be an *inheritance*. Therefore neither estates *pur autre vie* in lands, though limited to the grantee and his heirs during the life of the *cestui que vie*, nor *terms for years*, are entailable any more than personal chattels; because as the latter, not being either interests in things *real* or of *inheritance*, want *both* requisites; so the two former, though interests in things *real*, yet not being also of *inheritance*, are deficient in *one* requisite. However, estates *pur autre vie*, terms for years, and personal chattels, may be so settled as to answer the purposes of

What may be  
entailed.

3 & 4 Will. 4,  
c. 74, s. 1.

an entailed estate, and be rendered inalienable almost for as long a time as if they were entailable in the strict sense of the word. (Harg. Co. Litt. 20 a, n. (5). See Fearn, 495—501, 7th ed.)

Words conferring an estate tail in real, give an absolute interest in personal estate. (*Leventhorpe v. Ashbie*, Tudor's Leading Cases, Conv. 763, 2nd ed.) As to chattels settled by reference to limitations of real estate in strict settlement, see *Lord Glenorchy v. Bosville*, 1 White & Tudor, L. C., Eq. 1.

Lands in ancient demesne were held according to the custom, which was that each tenant should hold to him and the heirs of his body with reversion to the lord, but that every tenant might by deed alien to any person to hold to him and the heirs of his body with remainder to the lord, on first obtaining the lord's licence, which by custom was also always granted on payment of a year's rent. It was held that such lands were not within the operation of the statute *De Donis*. (*Cresswell v. Hawkins*, 3 Jur., N. S. 407.) Copyholds cannot be entailed, except by custom. (3 Rep. 8; 2 Bl. Comm. 118.) As to evidence of such a custom, see *Goold v. White*, Kay, 683. (See *post*, note to section 50.) And if an annuity be granted out of personal estate to a man and the *heirs of his body*, it is a fee conditional at common law, and there can be no remainder or further limitation of it; and when the grantee has issue, he has the full power of alienation, and of barring the possibility of its reverting to the grantor by the failure of the issue of the grantee. (2 Ves. sen. 170; 1 Br. C. C. 325.)

Quasi entails of  
estates *pur autre*  
*vie*.

A *quasi* estate tail in lands held *pur autre vie* may be barred by deed, surrender or even by articles (*Guy v. Mannock*, 2 Eden, 339; see 16 Ves. 313; Coop. C. C. 178; 1 Mer. 665; see *Lynch v. Nelson*, 1 R., 5 Eq. 192); but not by will (*Hopkins v. Ramadge*, Batty, 365; 1 Sch. & Lef. 281; 1 Ball & B. 77; but see 6 T. R. 292, *contra*). So by the surrender and renewal of a lease for lives by the first *quasi* tenant in tail of it, even without the concurrence of the trustees, he may acquire the absolute ownership of the lease. (*Blake v. Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox. See Coop. C. C. 184, 185.) But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person with remainder over, could not by his own act, by fine or otherwise, in the lifetime of the tenant for life and without his concurrence, bar the remainders over. (*Slade v. Pattison*, 5 Law J. (N. S.) Chan. 51, affirmed on appeal to the Lords Commissioners, July, 1835. See *Wastneys v. Chappell*, 3 Br. P. C. 50; *Edwards v. Champion*, 3 D., M. & G. 202.) So where an estate *pur autre vie* is limited to one for life with remainder over, there the first taker cannot bar the remainder, unless the remainderman in tail joins. (*Low v. Barron*, 3 P. Wms. 262; *Osbreys v. Bury*, 1 Ball & B. 53.)

The statute 3 & 4 Will. 4, c. 74, has not altered the law with respect to *quasi* entails in estates *pur autre vie*, or in mere chattels. (See Shelford on Wills, pp. 89, 90.) A person cannot by will bar a *quasi* entail and the remainders over. (*Campbell v. Sandys*, 1 Sch. & L. 281; *Cresswell v. Hawkins*, 3 Jur., N. S. 408. See *Doc d. Lake v. Luxton*, 6 T. R. 292.) A *quasi* tenant in tail in possession of such an estate has full power over, and may, by any act *inter vivos*, deal with the estate precisely as if there never had been any settlement; but a *quasi* tenant in tail in remainder cannot, without the concurrence of the tenant for life, defeat the subsequent remainders. But if he alien with the consent of the tenant for life, or obtain a renewal with his concurrence, or if the tenant for life procures a renewal, and then conveys to the *quasi* tenant in tail, this will be sufficient to bar the *quasi* entail. If a *quasi* tenant in tail in remainder executes a conveyance for valuable consideration, but without the concurrence of the tenant for life, and, surviving the tenant for life, lives until a period at which he was clearly capable of barring the entail, it was questioned whether such alienation shall operate to bar the remainders over. (*Allen v. Allen*, 2 Dru. & War. 307; 1 Con. & L. 427; 1 Cl. & Fin. 427. See *Pickersgill v. Grey*, 31 L. J., Ch. 394.) A father, tenant for life and his son, *quasi* tenant in tail in remainder of a renewable freehold, joined in executing a deed whereby the father granted the lands for a term of one hundred years by way of mortgage, and conferred upon the mortgagee a power of sale of the whole *quasi*

fee, and also of obtaining renewals to himself. Held that the *quasi* entail was barred by the deed. (*Walsh v. Studdert*, I. R., 5 C. L. 478.) A fee farm grant under the Renewable Leasehold Conversion Act (Ireland), 12 & 13 Vict. c. 105, executed to a *quasi* tenant in tail in possession of a renewable freehold bars the *quasi* entail and the remainders over. (*Morris v. Morris*, I. R., 6 C. L. 73.)

3 & 4 Will. 4,  
c. 74, s. 1.

Entailed estates were made by the statute *De Donis* inalienable, and neither the issue nor the remaindermen could be barred; that consequence was soon found by experience productive of great inconveniences, by preventing forfeitures of estates, and taking away the power of raising money upon them for the purposes of trade and commerce, or as a provision for the younger children of families. And soon after the passing of that statute, which it was found impracticable to repeal, means were devised for breaking through it, by common recoveries, which were first established by a judicial determination in *Taltarum's case*. (12 Edw. 4, 19; Hardr. 209; Willes, Rep. 452; Tudor's L. C. Conv. 605, 2nd ed.) Common recoveries were considered only as common assurances, and not at all as real transactions, being conveyances on record borrowed from the ecclesiastics (who invented them to evade the statutes of mortmain) in order to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (Willes, Rep. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n. See Shelford on Mortmain and Charities, pp. 12, 18.) As a common recovery pursued the forms of a real action, it was absolutely necessary that the vouchee against whom the judgment was obtained should have been living on the day when such judgment was given by the court, for otherwise the judgment was erroneous. (*Broome v. Swan*, 3 Burr. 1595; S. C., 1 Bl. Rep. 496, 526; 6 Br. P. C. 333; 2 Saund. 42.) The necessary information on this subject will be found in Cruise's Dig. vol. 5; 1 Preston's Convey.; Coventry's Treatise on Common Recoveries; Sheppard's Touchst., by Preston; *Doe d. Lumley v. Earl of Scarborough*, 3 Ad. & Ell. 1.)

Alienation of  
entailed estates.

The law respecting fines and recoveries is every day becoming of less practical application; but some knowledge upon that subject is still required in the investigation of titles, and will lead to the better understanding of this statute. The general objects of fines and recoveries being clearly explained in the first report of the commissioners of real property, some extracts, with some variations and references, are added in the following note:—

Report of real  
property commis-  
sioners.

"A fine in its origin was an amicable composition, by leave of the king or his justices, of any actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of fines, which, before this statute, subject to certain modifications made from time to time by statutes, had been in use for centuries. The bar by non-claim after a year and a day on fines at common law was taken away by the statute 34 Edw. 3, c. 16. The statutes 1 Rich. 3, c. 7, and 4 Hen. 7, c. 24, have declared that a fine proclaimed in four successive terms, the first proclamation being made in the term in which the fine is engrossed, shall operate as a bar by non-claim at the end of five years after the last proclamation, but with a certain limited extension of time in the cases of infancy, coverture, lunacy, and absence beyond seas; and by the latter statute, and the statute 32 Hen. 8, c. 36, the further effect of barring estates tail was given to fines levied with proclamations. The two last statutes gave rise to a distinction between the fines levied with proclamations and fines levied without proclamations, the latter being fines at common law, and having those effects only which fines had immediately after the passing of the statute 34 Edw. 3, c. 16.

Definition of a  
fine and its origin.

"There were four sorts of fines, viz., 1st, a fine '*Sur conuzance de droit come ceo, &c.*;' 2ndly, a fine '*Sur conuzance de droit tantum*;' 3rdly, a fine '*Sur concessit*;' and 4thly, a fine '*Sur done grant et render*.' The first and third were those in general use; the second was sometimes used, but the same purposes could not be attained either by the first or third. The fourth

Different sorts  
of fines.

3 & 4 Will. 4,  
c. 74, s. 1.

Operation of  
fines.

had become obsolete. The first was always levied with proclamations, and so it seems was the fourth fine. But the second and third were usually levied without proclamations.

"The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee determinable on the failure of the issue in tail (see stat. 32 Hen. 8, c. 36), to gain a title by non-claim (see *ante*, pp. 147, 148; *Davies*, dem., *Lowndes*, ten., 7 Scott, N. R. 141), and to pass the estates and bar the rights of married women. The interest of a married woman in copyhold estates would not pass by a fine. (*Life Association of Scotland v. Siddall*, 3 D., F. & J. 74. See note to section 91, *post*.) For the first two objects the first fine was usually resorted to. The last object was often accomplished by the first fine, sometimes by the second, but more frequently by the third, which was usually resorted to for conveying the life estates and interests of married women, and for creating terms of years to bind, by way of estoppel, their contingent or executory or other estates and interests." (See Co. Litt. 121 a, n.)

By marriage settlement, dated in 1815, renewable leaseholds for years were conveyed to trustees upon trust to renew, &c., and then in trust for J. B., the husband, for life; remainder to raise certain sums in certain events, which happened; remainder to the intended wife for life; remainder, in the events which happened, to the wife absolutely. By another indenture of re-settlement, dated in 1823, reciting the settlement and that the leaseholds had been renewed, and were then held for twenty-one years from 1821, and that there was no issue nor probability of issue, the husband and wife covenanted to levy a fine *sur concesserunt* of the leasehold hereditaments, which was to enure to vest them in a new trustee, to extinguish a trust in the original marriage settlement for raising a sum of money, but subject to all the other trusts in the marriage settlement anterior to the trust for the wife; and subject, as aforesaid, to enure to the new trustee "during all the rest, residue and remainder of the said term of twenty-one years from 1821, so lately granted;" nevertheless upon trust for the husband absolutely. The husband died in 1831, the leasehold hereditaments having been again renewed in the interim. The wife survived the year 1842, and died in 1853: it was held, that the leaseholds and all renewals of the said lease were bound and conveyed as against the wife surviving, by the indenture of 1823, and the fine levied in pursuance thereof. (*Dickens v. Unthank*, 1 Jur., N. S. 916; 24 L. J., Chanc. 501; 3 W. R. 504.)

"A fine, according to the sort used, would also produce the following effects: it would operate by estoppel in other cases beside the one above noticed (see note to section 20, *post*); it would operate as a confirmation of all prior defeasible estates or charges made by the party levying it; it would release or extinguish rights, interests and powers (see note to section 34, *post*); it would destroy or extinguish contingent remainders and executory interests; it would create a discontinuance when levied by a tenant in tail in possession (see *ante*, p. 229); it would revoke devises (*Doe d. Dilnot v. Dilnot*, 2 Bos. & P., N. R. 401), and when levied by a tenant for life or in tail after possibility of issue extinct, or by a tenant for years, or by a copyholder, it would produce a forfeiture; and when levied by a tenant in tail, with the immediate remainder or reversion in fee to himself, the base fee acquired by the fine would merge in the remainder or reversion, which would immediately become an estate in possession, and all the estates and charges made on the remainder or reversion, not only by the tenant in tail himself, but also by those who were previously entitled to the remainder or reversion, would, in consequence of the merger, be let into possession, and become immediately available." (See note, section 39, *post*. As to discontinuance, see *ante*, p. 229.)

Fine by tenant in  
tail operating as  
discontinuance.

In order that a fine levied by a tenant in tail might operate as a discontinuance to the reversioner, the tenant in tail must be rightfully in possession by force of his estate tail at the time when the fine was levied. (*Anderson v. Anderson*, 7 Jur., N. S. 1067; 30 Beav. 209.) Therefore a fine levied by a tenant in tail in remainder expectant upon the determination of an estate by the curtesy, during the existence of the previous estate,

and in favour of the tenant by the curtesy, was held not to work a discontinuance. (*Ib.*)

8 & 4 Will. 4,  
c. 74, s. 1.

In ejectment a fine is no evidence of ownership in the conusor; and without proof that he was in possession when it was levied, it is no evidence at all. (*Brassington v. Llenellyn*, 1 F. & F. 27.)

"A common recovery was a judgment in a fictitious suit, in the nature of a real action, brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched, or the person last vouched, if there should be more than one vouchee, making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout, and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude the statutes of mortmain, and were in constant use for that purpose until checked by the statute Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's case*, a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the statute *De Donis Conditionalibus*, by virtue of which the old common law estate of fee simple conditional was abolished, and the modern estate tail was introduced, with such restrictions that the tenant in tail could not alienate the lands entailed, nor make them subject to his debts in the hands of his successors, nor were they liable to forfeiture for felony or treason, the last of which incidents was, in those disturbed times, considered by the crown as a serious evil. In the long interval of nearly two hundred years between the passing of the statute *De Donis* and the application of recoveries to the evading of that statute, there was no contrivance, except that of warranty in a few cases, by which lands entailed could be unfettered. During that interval many attempts were made in parliament to procure the repeal of that statute, but without success, on account of the uniform opposition of the great landed proprietors. Awkward as was the contrivance of a recovery for unfettering lands entailed, yet it was considered a great boon to the public, because it removed the mischiefs which arose from the tendency of the statute *De Donis* to establish perpetuities.

Definition of a  
common recovery  
and its origin.

"The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; but a reversion vested in the crown could not, as it is generally understood, be barred by a recovery. (See section 18, *post*, and note.)

Operation of a  
recovery.

"A recovery would produce other effects, viz., it would operate by estoppel, when suffered without a proper tenant to the *præcipe*, or by persons having contingent, or expectant or other rights or interests, or by expectant heirs, and in some other cases so as to conclude the parties suffering it and all persons claiming under them, except issue in tail; it would operate as a confirmation of all prior estates or charges made by the tenant in tail who suffered it. (See note to section 38, *post*.) It would release or extinguish rights, interests and powers; it would destroy or extinguish contingent remainders and executory interests; it would work a discontinuance to the issue in tail, if not duly suffered by tenant in tail; it would revoke devises. (*Doe d. Lushington v. Bishop of Llandaff*, 2 Bos. & P., N. R. 491.) It would create a forfeiture in many cases, when suffered by a tenant for life, or by persons not having the freehold.

"Although it was not usual to suffer a recovery, except when it was necessary to bar entails and remainders over, yet when resorted to for those purposes, it was not unfrequently made use of at the same time to convey, release, bar or extinguish the estates, rights, powers and interests of married women and others.

"In order to operate as a bar to an estate tail, and the remainders and reversion, it was necessary that a proper writ should be brought, and that there should be a demandant, tenant and vouchee. The writ must have been brought by the demandant, against the person who had the immediate

Necessary parties  
to a recovery for  
barring estates  
tail and remain-  
ders.



8 & 4 Will. 4,  
c. 74, s. 1.

freehold, who was technically called the tenant to the *præcipe*; for all actions to recover the seisin of lands, to be effectual, must be brought against the actual tenant of the freehold. Hence a tenant in tail, who had not himself the immediate freehold, must, in order to bar by a recovery the entail and the remainders and reversion, have procured the concurrence of the person who had the immediate estate of freehold. In consequence of the difficulties which frequently occurred in procuring a conveyance from lessees for lives to make a tenant to the *præcipe*, their concurrence was dispensed with by the stat. 14 Geo. 2, c. 20 (21 Geo. 2, c. 11, Ireland); and by the same statute the person entitled to the first estate for life, or other greater estate in reversion expectant on the leases, was made competent to make the tenant to the *præcipe*, and was for that purpose considered as having the immediate estate of freehold. The common law required that a tenant to the *præcipe* in a recovery should have the freehold before and at the time of judgment given. But the above-mentioned stat. 14 Geo. 2, c. 20, has made a recovery valid, if the freehold is vested in the tenant to the *præcipe* before the end of the term, great session, session or assizes in which it was suffered, notwithstanding the fine or deed for making the tenant to the *præcipe* should be levied or executed after the judgment had been given in such recovery, and the writ of seisin had been awarded. Thus it appears that the legislature had relieved common recoveries from one of the requisites in real adverse suits, and in doing so had encumbered them with a legal fiction. In a recovery by a tenant in tail, it was necessary that he should vouch some person to warranty. If the writ was brought by the demandant against the tenant in tail, and he vouched over another person, the recovery only barred the estate tail, of which the tenant in tail was then seised, and the remainders and reversion. This recovery was called a recovery with single voucher. If the writ was brought by the demandant against another person who had the immediate estate of freehold, and that person vouched the tenant in tail, and he vouched over another person, the recovery barred all estates tail of or to which the tenant in tail was or ever had been seised or entitled, and the remainders and reversion. This recovery was called a recovery with double voucher. If there were two estates tail existing at one time in distinct persons, the one being derived out of the other, a recovery with treble voucher was sometimes suffered, although the necessity of such a recovery was considered doubtful. In this case the writ was brought by the demandant against some person who had the immediate estate of freehold, not being either of the tenants in tail, and that person vouched the tenant of the derivative estate tail, who vouched over the tenant of the original estate tail, and he vouched over another person. The person solely vouched or last vouched, was always some officer of the court where the recovery was suffered, and he was called the common vouchee. It was not usual to suffer a recovery with single voucher. In the case of a recovery with double or treble voucher, the person having the first estate of freehold conveyed it to a stranger to make him tenant to the *præcipe*; the tenant must have appeared in court, either personally or by attorney, and therefore some person in the habit of attending the court where the recovery was suffered was usually made the tenant, in order to save the expense and delay of a commission of *dedimus potestatem*, which must have been incurred if the tenant appeared by attorney. It was not necessary that the demandant should appear in court; but every vouchee must have appeared in court, either in person or by attorney. The demandant had judgment to recover the land against the tenant, and the tenant had judgment to recover of his vouchee land of equal value, in recompense for the land lost by his default; and if there were several successive vouchees, each person vouching had judgment to recover of his vouchee in like manner. The supposed recompense in value to the tenant and vouchee, or each successive vouchee except the last, was usually assigned as the reason why the issue in tail and the remainders and reversion were barred by a recovery.

Mischiefs arising  
from the necessity  
of the freehold  
being in the

"In consequence of its being required that the tenant to the *præcipe* should have the freehold, great difficulties were frequently thrown in the way of barring entails, and occasionally serious mischiefs arose. So long

as the freehold remained in the tenant for life, or, if there should be no tenant for life, in the tenant in tail, who was to suffer the recovery, there was no difficulty. But it often happened that the freehold was in a trustee, or had been alienated by the tenant for life or tenant in tail, and the person in whom it was vested could not be traced, or would refuse to concur in making the tenant; sometimes it was a question of construction whether the freehold was vested in trustees. If, under the impression that they had not the freehold, they were not made to join in the conveyance to the tenant, the recovery may be void. Not unfrequently, from omitting to investigate the title when a recovery was to be suffered, or from some other cause, it was not known that the freehold was in a trustee, or that it had been aliened, and from ignorance of this circumstance the recovery was void. These mischiefs could only be remedied by obtaining the concurrence of the person in whom the freehold was vested, and suffering a new recovery. If a recovery should be void for want of a proper tenant to the *præcipe*, and the defect should not be discovered in the lifetime of the tenant in tail who suffered it, the evil was incurable, and the estate might be lost by the persons claiming under the recovery. (See 1 Prest. on Conv. p. 28.)

3 & 4 Will. 4,  
c. 74, s. 1.

tenant to the  
*præcipe*.

"When a tenant in tail in remainder was desirous of suffering a recovery, he was at the mercy of the person having the freehold, who had it in his power to withhold his assent. There were instances of this power being abused, and of the person having the freehold extorting from the remainderman a consideration for his concurrence. This sometimes occurred when the freehold continued in the first tenant for life, who might or might not be connected with the remainderman; but it more frequently occurred when the freehold was vested in an alienee, who was generally a stranger. There were cases in which great skill and caution must have been used in making the tenant to the *præcipe*, in order to preserve powers, rights and interests, which might otherwise be prejudiced or extinguished, as the following examples will show. If a tenant for life conveyed to a tenant to the *præcipe* to enable a remainderman in tail to suffer a recovery, he would, without caution, have extinguished the powers annexed to his estate for life, and let in upon his own estate the incumbrances of the remainderman. The expedients adopted to prevent this mischief are extremely subtle and artificial. (See note to section 34, *post*.) By similar expedients, a tenant for life with a contingent remainder in tail, either to himself or his children, might assist a remote remainderman in tail in suffering a recovery without destroying the contingent remainder. If a person having either an estate tail or an estate for life, with a contingent remainder to his children (but, as not unfrequently happened, it is doubtful which), was desirous of barring his supposed estate tail by a recovery, but at the same time wishes to prevent the forfeiture of his supposed life estate and the destruction of the contingent remainder, a different contrivance, no less artificial, was resorted to. In recoveries of copyholds, most of these precautions were unnecessary. After the demandant had obtained judgment in a recovery, a writ of seisin was sued out, to be executed by the sheriff of the court where the lands lie, and he returned that he had executed the writ, and delivered seisin of the lands to the demandant. But this was a false return, for the writ was never executed, and seisin was never in fact delivered. So that while the law required that the demandant should recover against the actual tenant of the freehold, when he had recovered the lands, it failed in the final object of the action, namely, that of giving him possession. Thus the suit was to commence with all the formalities of a real action, but to end with dispensing with the only object of those formalities, namely, to give to the demandant the lands sued for." (*First Report of Commissioners of Real Property, ordered by the House of Commons to be printed, 20th May, 1829, pp. 20—25.*)

(b) In the glossary clause of the Irish act, the word "estate" is made to extend to "any interest, charge, *right, title*, lien or incumbrance in, upon or affecting lands, either at law or in equity, *whether present or vested, or future or contingent.*" The additional words, *right and title*, were probably introduced in consequence of some doubts which some, as it is conceived,

Estate.

3 & 4 Will. 4,  
c. 74, s. 1.

Base fee.

Divest.

Relation of ap-  
pointment to deed  
creating a power.

erroneously entertained whether the word estate would comprehend the right or title of dower of a married woman. (See note to section 77, *post.*) As to this definition of estate, see also *Briggs v. Chamberlain*, 11 Hare, 74.

(c) The species of base fee here defined is thus described by Lord Coke: -- Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it. (*Seymour's case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 432.) Thus, suppose A., being tenant in tail general, levied a fine with proclamations, the estate tail was converted into a base or determinable fee, which would subsist as long as there was any issue inheritable under the entail, and on the failure of such issue, the person next in remainder after the estate tail was entitled to enter. It was clearly settled that a release or bargain and sale by a tenant in tail gave a *base fee*, voidable by the issue in tail. (*Machel v. Clark*, 2 Ld. Raym. 779; *S. C.*, Salk. 619; Com. 120; 7 Mod. 18; 11 Mod. 19; *Goodright d. Tyrrell v. Mead*, 3 Burr. 1703; *Seymour's case*, 10 Rep. 95; *Doe d. Neville v. Rivers*, 7 Term Rep. 276.) A conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail. (*Sturgis v. Morse*, 2 De G., F. & J. 231, 282.)

(d) The word *divest* signifies nothing more than a mere deprivation of the possession. (Cow. Dict.) But the words *put to a right* have a more extensive signification, as they mean a deprivation not only of the possession, but also of the right of possession; for when an estate is turned to a right, the owner has only the *jus proprietatis*, or mere right of property, which could not be regained by a possessory, but only by a real action. (See 1 Burr. 107; 1 Taunt. 578, 588; 1 T. R. 738; Butl. Co. Litt. 289 a, n. (1).)

(e) It has been established ever since the time of Lord Coke (*Sir Edward Clere's case*, 6 Rep. 18), that where a power of appointment over real estate is executed, that the appointee takes under him who created the power, and not under him who executes it. The estates limited in default of and until the execution of the power are defeated by an appointment, for the execution of a power is the limitation of a use under and by the effect of the instrument by which the power was reserved. Thus in the ordinary case of a marriage settlement, with a power to the tenants for life of leasing for twenty-one years, when the tenant for life executes the power, the effect is not technically making a lease; but such lessee in fact stands precisely in the same relation to all the persons named in the first settlement, as if that settlement had contained a limitation to his use for twenty-one years antecedent to the life estate and the subsequent limitations. (*Maundrell v. Maundrell*, 10 Ves. 255, 256; see Co. Litt. 216 a, 241 a, notes by Butl.) It has been held, that a right of dower, which had attached before the execution of a power, was defeated by an appointment. (*Ray v. Pung*, 5 B. & Ald. 561; 5 Madd. 310.) So where an estate was limited to such uses as a purchaser should appoint, and subject thereto, to the usual uses to bar dower, an appointment made under the power would, in equity as well as at law, overreach any judgments, which might in the meantime have been entered up against the purchaser, and the circumstance that the appointee took with notice of the judgments would make no difference in this respect. (*Skeeles v. Shearly*, 3 My. & Cr. 112; 8 Sim. 153; *Eaton v. Sanxter*, 6 Sim. 517; *Doe d. Wigan v. Jones*, 10 B. & C. 459; *Tunstall v. Trapps*, 3 Sim. 300.) An important alteration has been effected by the statute 1 & 2 Vict. c. 110, s. 11 (3 & 4 Vict. c. 105, s. 19, Ireland), with respect to defeating judgments by the execution of a power, for that statute authorizes execution against the real estates of the owner, over which, at the time of entering up judgment, or at any time afterwards, he had any disposing power which he might, *without the assent* of any other person, exercise for his own benefit. But in such a case, if the appointee is a purchaser or mortgagee, *without notice* of the judgment, then it may be de-

feated by an appointment, in consequence of the 5th section of the stat. 2 & 3 Vict. c. 11.

3 & 4 Will. 4,  
c. 74, s. 1.

An exception to the above rule, that the appointee takes under the deed creating the power, is, where the person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. (*Snape v. Turton*, Sir W. Jones, 392; *Yelland v. Fielis*, Moore, 788; *Goodright v. Cator*, Dougl. 477.) Thus, where an estate was limited by a marriage settlement to trustees to the use of the settlor *for life*, with remainders over, and with a power to the settlor, with the consent of the trustees, to revoke all the uses in the settlement, and the settlor having granted an estate *for his own life* in the settled estate, a revocation subsequent thereto *of all the uses* by him, with the consent of the trustees, will not affect the estate granted for his life for a valuable consideration. (*Goodright v. Cator and others*, Dougl. 477; see Gilb. on Uses, 142; *Edwards v. Slater*, Hardr. 415; *Reg. v. Ellis*, 4 Exch. 652.)

An appointment has not relation in point of time so as to make the appointee take from the time of the creation of the power; thus, in the case of *The Duke of Marlborough v. Godolphin*, 2 Ves. sen. 61, Lord Sunderland left the interest of 30,000*l.* to his wife for her life, and the principal, after her decease, to such of her children as she should by deed or will appoint. By her will she appointed 2,000*l.* to Mr. Spencer, and 1,500*l.* to Lady Morpeth, who both died in her lifetime. It was contended that the appointment related back to the time of Lord Sunderland's will, which relation would overreach the death of the two parties, who were alive at the time of the death of the testator, Lord Sunderland: and then it would be considered as vesting in them in their lives. But Lord *Hardwicke* said, that nothing vested in them during their lives, and consequently that nothing was transmissible to their representatives; because every person claiming under the execution of a power must claim not only according to the execution of the power, but according to the nature of the instrument by which that power is executed; and therefore a will in execution of such a power being always revocable, it is not complete till the death of the testatrix, although an appointment by deed, even with a power of revocation, would have vested the sums from the time of its execution. (See 1 Ves. sen. 139; 2 Ves. sen. 612; *Lisle v. Lisle*, 1 Br. C. C. 533.) A deed of appointment of lands in a register county was postponed to a mortgage made after it, which was registered both before the deed creating the power and the appointment. (*Scrafton v. Quincey*, 2 Ves. sen. 413.) It is in general clear where a party, having both an authority and an interest, does an act, purporting an intention to pass the interest, he shall be held to intend that, and not to exercise his authority. (10 Ves. 258; see Sugd. on Powers, c. 5, s. 6.)

## II. FINES AND RECOVERIES ABOLISHED.

### Abolition Clause.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery (*f*); and any fine or common recovery, which shall be levied or suffered contrary to this provision, shall be absolutely void.

No fine or recovery to be levied or suffered after the 31st of December, 1833.

(*f*) It will be observed that no time is prescribed for completing the fine or recovery.

3 & 4 Will. 4,  
c. 74, s. 3.

Persons liable after 31st December, 1833, to levy fines or suffer recoveries under covenants to effect the purposes intended by means of this act; but in any case where the purpose of a fine or recovery cannot be so effected, the persons liable to levy fines or suffer recoveries shall execute a deed which shall have the same operation as the fine or recovery.

*Provision as to Covenants to levy Fines, &c.*

3. In case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable, under such covenant or agreement, to make, or to procure to be made, such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect, as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation



and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered. 3 & 4 Will. 4,  
c. 74, s. 8.

### III. THE TENURE OF ANCIENT DEMESNE.

#### *Reversal of Fines, &c.*

4. No fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against, and as binding upon, the conusors thereof and all persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor, upon such writ of deceit as aforesaid, shall still remain as good and valid against, and as binding upon, the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid (g).

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid against the parties thereto, and persons claiming under them, as if not reversed as to the lord.

(g) All those estates which are called in Domesday Book *terræ regis* were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure which has long been known by the appellation of *ancient demesne* (4 Inst. 269, 270), which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Domesday Book. (Dyer, 250; 2 Burr. 1046. See 2 Scriven on Cop. 579—599, 4th ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13.) The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or

Tenure by ancient demesne.

3 & 4 Will. 4, suffered in the Court of Common Pleas. (See the *First Report of the Real Property Commissioners*, pp. 28, 29.)  
c. 74, s. 4.

### *Defect of Jurisdiction.*

Fines and recoveries of lands in ancient demesne levied or suffered in the manor court, after other fines and recoveries in a superior court, shall be as valid as if the tenure had not been changed.

Fines and recoveries shall not be invalid in other cases, though levied or suffered in courts whose jurisdictions may not extend to the lands therein comprised.

5. If at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid and binding as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

### *Tenure of Ancient Demesne restored.*

Tenure of ancient demesne, where suspended or destroyed by fine or recovery in a superior court, restored in cases in which the rights of the lord of the manor shall have been recognized within twenty years.

6. In every case in which at any time, either before or after the passing of this act, the tenure or\* ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not

\* *Lege of.*

by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

3 & 4 Will. 4,  
c. 74, s. 6.

#### IV. THE AMENDMENT OF FINES AND RECOVERIES, AND THE RENDERING THEM VALID IN CERTAIN CASES.

##### *Errors in Fines.*

7. If it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (*h*).

Fines made valid  
without amend-  
ment.

(*h*) An estate stood limited, subject to a life estate, to five persons, as tenants in common in tail, with cross remainders between them in tail. One of these persons, a married woman, concurred with her husband in a deed mortgaging her fifth share, and all other the share and interest to which she might become entitled by the death of any of the other tenants in tail without issue; and the deed contained a covenant to levy a fine of the property expressed to be conveyed by the deed. A fine was levied purporting to extend only to the fifth share. Afterwards one of the other tenants in tail died without issue and without having barred his estate tail: it was held, that there was an error in the fine which was cured by this section, and that the fine was effectual as to one-fourth and not as to one-fifth only. (*Life Association of Scotland v. Siddal; Cooper v. Green*, 3 De G., F. & J. 58.)

The court refused to amend a fine by substituting for the name of one parish mentioned by mistake in the fine the name of another parish in which, according to the deed to lead the uses, the premises were situated; the court observing, that if the application were acceded to, it would be in the same situation as before the act, and be called on to amend upon every conveyancer's doubt, and all the expense would be incurred which the act was passed to prevent. (*Lookington, dem., Shipley and wife, conusors*, 1 Bing. N. C. 355.) Fines of conusor's lands in G. and any other adjoining parish,

Amendment of  
fines.

3 & 4 Will. 4,  
c. 74, s. 7.

were amended by inserting the parish of R., an adjoining parish, in which the consor had land, which had gone according to the deed to lead the uses. (*Totton*, dem., *Vincent*, defor., 5 Bing. N. C. 626.) The court amended a fine levied at the Carmarthen Great Sessions, 1830, by indorsing the first and third proclamations of which there was no entry, it appearing that such proclamations had been made, but the entry of them omitted by the clerk of the court. (*Lloyd*, dem., *Nicholas*, defor., 4 Bing. N. C. 633; 6 Scott, 855.) In another case a similar amendment was made of a fine levied in 1771, at the great sessions for the county of Cardigan, upon the affidavit of the clerk to the deputy-prothonotary of that court to the effect that the proclamations were always duly made according to the practice of the court, but very often not registered, and on the affidavit of the surviving deforciant that the fine was intended between the parties, she (the survivor) now wishing to transmit a good title to a purchaser, and although no affidavit was produced of the fact of the proclamations in this particular case. (*Price v. Watkins*, 6 Jur. 170.) A fine was levied at the autumn great sessions held for the county of Cardigan in 1830; the roll of fines levied at those sessions was then proclaimed, and also at the autumn assizes for that county in 1881; and it appeared that the fine was then upon the proper roll. There was no evidence as to any proclamation having been made at the spring assizes, 1831; and there was no indorsement of any of the proclamations, the officer whose duty it was to indorse them on the roll having omitted to do so. The court allowed the proclamations to be indorsed by the clerk of the peace, into whose hands the records of fines for the county of Cardigan, by the 11 Geo. 4 & 1 Will. 4, c. 70, came on the death of the late deputy-prothonotary, and this after an ejectment brought to recover the premises comprised in the fine. (*Evans*, dem., *Davis*, defor., 3 Jur. 223; 5 Bing. N. C. 229; 7 Dowl. P. C. 259; 6 Scott, 872.)

11 & 12 Vict.  
c. 70.

Fines levied in  
the Court of  
Common Pleas to  
be deemed fines  
with proclama-  
tions.

Pending proceed-  
ings not to be  
affected.

Not to extend to  
fines concerning  
lands, &c. pos-  
sessed under  
adverse titles, &c.

The stat. 11 & 12 Vict. c. 70, recites that notwithstanding all fines levied in the Court of Common Pleas at Westminster previously to the abolition of fines were levied with proclamations, yet unnecessary trouble and expense are occasionally incurred by parties being required to procure evidence of such proclamations having been in fact made, and enacts that all fines heretofore levied in the said Court of Common Pleas shall be conclusively deemed to have been levied with proclamations, and shall have the force and effect of fines and proclamations. Sect. 2. Provided always, and be it enacted, that nothing herein contained shall extend to or affect any proceedings at law or in equity pending at the time of the passing of this act, 31st Aug. 1848. 3. Provided also, and be it enacted, that this act shall not extend to any fine heretofore levied of or concerning any lands, tenements, or hereditaments which at the time of the passing of this act, 31st Aug. 1848, shall be actually possessed or enjoyed by any person or persons under a title adverse to or inconsistent with the operation of such fine if levied with proclamations, but in all such cases it shall be necessary for all parties alleging that such fine was levied with proclamations to prove such allegation in the same manner as if this act had not been made.

### Errors in Recoveries.

Recoveries made  
valid without  
amendment.

8. If it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to

have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission (i). 3 & 4 Will. 4, c. 74, s. 8.

(i) A recovery was amended under this section by inserting the words "*right of free warren*," the right having always gone with the property in question, and the deed to lead the uses conveying all hereditaments. (*In re Twisden's Recovery*, 4 Bing. N. C. 253; 5 Scott, 638.) Amendment of recoveries.

In the exemplification of a recovery, the name of the tenant was inserted in the place of that of the demandant and *vice versa*: it was held, as it was apparent upon the deed how it was intended that the parties should be described, the defect was remedied by this section, and that no amendment was necessary. (*Wickens*, dem., *Windus*, ten., 9 C. B. 711.)

In a recovery the court of C. P. will not allow the christian names of the vouchee (erroneously transposed in the warrant of attorney) to be made right, amendments never being allowed in that instrument. (*Lamont*, vouchee, 3 Scott, 666; 2 Bing. N. C. 297.) Where the deed to lead the uses of a recovery is sufficient to cover all the lands intended to be passed, an application to amend the recovery by inserting the name of the parish is unnecessary. (*Re Watkins*, 9 Dowl. P. C. 58.) The court refused to permit an old recovery to be amended by the insertion of a parish, the words of the deed being large enough to embrace it, and the omission being consequently cured by this section. (*Evans*, vouchee, 2 Scott's N. R. 83.)

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. XXXV. c. 5, XXXVI. c. 6; 2 Wms. Saund. 94.

*Jurisdiction to amend saved.*

9. Provided always, and be it further enacted, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act. Saving jurisdiction in cases not provided for.

*Defect of Tenant to the Præcipe, Non-inrolment of Bargain and Sale.*

10. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled. Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

*Defect of Legal Tenant to Præcipe.*

11. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.



3 & 4 Will. 4,  
c. 74, s. 11.

time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ(*k*); and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved (*l*).

Equitable fines  
and recoveries.

(*k*) Fines and recoveries were levied or suffered of equitable estates, and had, with a few exceptions, the same operation as they would have had if the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *præcipe*. (See *First Real Property Report*, p. 29.)

Requisites to  
make good tenant  
to the *præcipe*.

It had been established that an equitable estate for life and a legal remainder in tail would not unite, so as to make a good recovery; and that in order to make a good tenant to the *præcipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail. (*Shapland v. Smith*, 1 Br. C. C. 75; *Salvin v. Thornton*, 1d. 73, n.; *S. C. Ambl.* 545. See *Iveson v. Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214; *Doc d. Cadogan v. Ewart*, 7 Ad. & Ell. 670.) A recovery suffered by an equitable tenant for life with a legal remainder in tail was void. Thus, where an estate was conveyed to a purchaser and his trustee and their heirs, to the use of the purchaser and trustee and the heirs and assigns of the purchaser for ever, it was held, that a recovery suffered by a devisee in tail under the will of the purchaser after his death, but in the lifetime and without the concurrence of the trustee, in whom the legal estate of freehold for life was vested, was bad, as the tenant in tail had no legal estate in her, except a remainder in tail expectant on the determination of the trustee's life estate and an equitable estate during his life. (3 B. & Cr. 799.) But an equitable remainder in tail might have been barred although the person making the tenant to the *præcipe* had the legal estate. (3 Ves. 125.) Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, and was afterwards desirous of suffering a recovery, the concurrence of his alienee in making a tenant to the *præcipe* was necessary, and the recovery without it would not have been effectual. But this rule was held not applicable by analogy to trust estates, and therefore if equitable tenant in tail with equitable remainder over conveyed his interest to another person and his heirs by way of mortgage, or upon such trusts as left the ultimate beneficial ownership in himself, a recovery suffered of the secondary equitable estate was valid without the concurrence of the mortgagee or trustee in the conveyance making the tenant to the *præcipe*. (*Nonville v. Greenwood*, Turn. & Russ. 26. See *Casborne v. Scarfe*, 1 Atk. 608.)

A testator who was entitled to the equity of redemption in freehold premises, subject to a mortgage in fee, devised the premises to J. P. and another as trustees, on trust, in the first place, out of the rents to pay off the mortgage; and he then gave 10*l.* a year out of the rents in the events which happened to E. P., and the remainder of the rents to J. P. and S. M. P. equally; and, after the death of E. P., he devised certain parts of the premises to J. P. and the heirs of his body. S. M. P. died in the lifetime of E. P.; J. P. then joined in suffering a recovery for the purpose of barring the estate tail; but neither E. P. nor the next of kin of S. M. P. joined in making the tenant to the *præcipe*: it was held that the concurrence of E. P. was not necessary, but that the concurrence of the next of kin of S. M. P. was necessary, and that the recovery was, for want of such concurrence, invalid as to one moiety of the premises. (*Penny v.*

*Allen*, 7 De G., M. & G. 409; 3 Jur., N. S. 278.) The eldest son and heir of S. M. P. was in possession of the rents of all the devised premises, and joined in respect of certain parts of them of which he was himself tenant in tail in making the tenant to the *præcipe*. The court refused, in the absence of any other circumstances tending to prove it, to presume a surrender to him of S. M. P.'s estate *pour autre vie*, or to regard him as having a title to it by general occupancy. (*Ib.*) It was held, that there could be no general occupancy, whether the estate *pour autre vie* was regarded as legal or equitable, and that the person beneficially entitled, and not the executor or administrator of S. M. P., was the proper person to concur in making the tenant to the *præcipe*. (*Ib.*)

3 & 4 Will. 4,  
c. 74, s. 11.

Lands were devised (before stat. 7 Will. 4 & 1 Vict. c. 26) to L. and his heirs in trust to permit and suffer A. to take the rents and profits during A.'s life, "with this proviso, to pay" W. out of the same, an annuity for her life, and if A. died before W., to permit W. to enjoy the lands for her life; and, after the deaths of A. and W. the devisor gave and devised the lands to the heirs male of A., remainder over. A. and W. both survived the devisor. A. survived W., and after W.'s death suffered a common recovery. It was contended that A. took an equitable estate only for his life under the will, with a legal estate tail in remainder under the same instrument, and therefore that the recovery was inoperative to bar the estate tail or remainder over. It was held, that assuming L. to have had a legal estate during W.'s life, A. was legal tenant in tail male after W.'s death, and that the recovery barred the estate tail and remainders. (*Adams v. Adams*, 6 Q. B. 860.)

To make a legal tenant to the *præcipe* it was absolutely necessary that there should be possession by seisin in fact or in law; but the equitable owner never had the legal seisin, often not the actual possession, and very frequently not even the right to call for either. In the one case, if it were shown that the possession was not in the party, and consequently would not pass from him, the purpose of the conveyance was frustrated, no legal freehold being acquired; but in the other case it was not the object, nor could ever be the effect of the conveyance, to transfer the possession, but only to pass the equitable interest; and therefore an equitable recovery was held to be valid though the tenant in tail was not at the time in the actual receipt of the rents, which a trustee had paid over to others under a decree which was afterwards reversed. (*Lord Grenville v. Blyth*, 16 Ves. 224.) The possession and the right to it are presumed to go together till the contrary is shown, and the rightful owner will not be held out of possession unless it be shown that some other person has adversely obtained possession at the time of executing the deed making the tenant to the *præcipe*. (*Pigott v. Waller*, 7 Ves. 122.) Nothing short of a disseisin or intrusion can prevent the freehold in law from remaining in the party entitled to it, and a person not having an estate of freehold cannot suffer a recovery, though in possession. Where a tenant in tail in remainder expectant on an estate for life had obtained possession of the settled estate under a judgment in an action of ejectment, and during the life of the tenant for life made a feoffment with livery of seisin to a third party to make him tenant to the *præcipe*, for suffering a common recovery, in which the tenant in tail was vouched, it was held that the taking possession under the judgment in ejectment did not amount to a disseisin of the freehold, as there was no *tortious ouster* (see Litt. s. 279; Co. Litt. 153); and that the feoffment, without the concurrence of the jointress, did not make a good tenant to the *præcipe*, and that the recovery was void, because there was no disseisin of the jointress, nor *ouster* of her freehold; that the feoffment was made really under an idea of having a right to suffer a recovery, and not with an intention to constitute a disseisin, and that if it were done with that intention, it amounted to a feoffment in *form* only, and was not such a feoffment as was in use of old; no transmutation of the possession passed by it, but its object being secret and collusive, it ought not to work a constructive disseisin. (*Taylor*, dem., *Atkyns v. Horde*, 1 Burr. 60; Cowp. 689; 6 Br. P. C. 633, Toml. ed.; see Butl. Co. Litt. 330 b, n.) It is a general rule that unless the persons entitled to the actual possession of the land concur in a

3 & 4 Will. 4,  
c. 74, s. 11.

feoffment, it will not defeat their interest. (*Doe d. Maddock v. Lyons*, 3 B. & C. 388.)

If a tenant in tail, after having assigned dower, suffered a recovery without the concurrence of the widow, it was void as to the part assigned, for want of a good tenant to the *præcipe*. (*Row v. Power*, 2 Bos. & Pul. 1.) But a dowress who had not entered was not a necessary party to a recovery. (4 Br. C. C. 525. See Gilb. Ten. 26; 5 Cru. Dig. p. 246, pl. 18.) So where tenant in tail conveyed his estate to the use of himself and his *intended* wife for their lives, with remainder to the heirs of their bodies, and after marriage the husband alone suffered a recovery, it was held to bar but a moiety, and to be a severance of the joint estate. (*Moody v. Moody*, Ambl. 649. See Co. Litt. 187; 2 Br. C. C. 180.) So where there were two joint tenants of a manor, and a writ of entry of the whole manor was brought against one of them, on which a common recovery was suffered, it would only be good for the moiety of the person against whom the writ was brought, but as to the other moiety, it would be void for want of a tenant to the *præcipe*. (*Winchester's case*, 8 Rep. 1; *Collyer v. Mason*, 2 Brod. & Bing. 685.) The above clause in the act will not, it is conceived, be applicable to cases similar to the three last cited.

(1) Allusion has been already made to the stat. 14 Geo. 2, c. 20, which dispensed with the concurrence of persons holding freehold leases in making tenants to the *præcipe*. (See *ante*, p. 304.)

### Remedial Clauses qualified.

Certain cases in which fines and recoveries shall not be made valid by this act.

12. Provided always, and be it further enacted, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery, on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall

retain such right, so that he commence proceedings within six calendar months after the death of such party (*m*). 3 & 4 Will. 4,  
c. 74, s. 12.

(*m*) A decision in the Exchequer Chamber in Ireland, reversing the decision of the Queen's Bench, is stated to have put a construction upon the 9th section of the Irish act (which is the same as the 12th section of the English act, and which excepts, out of the previous sections, cases where any person at the passing of the act was in possession in respect of any estate which the recovery, if valid, would have barred), which does not seem to be warranted by the words and intention of the legislature. (Sugd. Statutes, p. 187, 2nd ed.; *Davies v. D'Arcy*, 3 Ir. C. L. Rep., N. S. 617; 4 Ir. Ch. Rep., N. S. 87.)

## V. CUSTODY OF THE RECORDS OF FINES AND RECOVERIES.

13. After the thirty-first day of December, one thousand eight hundred and thirty-three, the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Westminster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said Court of Common Pleas shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in his Majesty's Court of Common Pleas at Lancaster, and all the proceedings thereof, shall be deposited in such places and kept by such persons as his Majesty's justices of assize for the county palatine of Lancaster for the time being shall from time to time order or direct; and the records of all fines and common recoveries levied and suffered in the court of pleas of the county palatine of Durham, and all the proceedings thereof, shall be deposited in such places and kept by such persons as the said court of pleas shall from time to time order or direct: and in the meantime the said records and proceedings shall remain in the same places respectively where they are now deposited, and be kept by the respective persons who would have continued entitled to the custody thereof if this act had not been passed; and while the said records and proceedings respectively shall be kept by such persons respectively, searches may be made and extracts and copies obtained as heretofore, and on paying the accustomed fees; and when any of the records and proceedings shall, by the order of the court or justices having the control over the same, be kept by any other person, then, so far as relates to the records and proceedings in the custody of such other person, searches may be made, and extracts or copies obtained, at such times and on paying such fees as shall from time to time be ordered by the court or justices having the control over the same; and the extracts or copies so obtained shall be as available in evidence as they would have been if obtained from the person whose duty it would have been to have made and delivered out the same if this act had not been passed (*n*).

As to the records of fines and recoveries in the Courts of Common Pleas at Westminster and Lancaster, and the Court of Pleas at Durham, after the 31st of December, 1833.

(*n*) By 5 & 6 Will. 4, c. 82, the offices in the Court of Common Pleas connected with fines and recoveries are abolished. The records and documents concerning the duties of such offices are to be transferred to the officer of the Court of Common Pleas appointed under 3 & 4 Will. 4, c. 74, for

3 & 4 Will. 4,  
c. 74, s. 13.

All fines levied in the late courts of great sessions in Wales and the court of session in Cheshire shall be held to be good in law, notwithstanding any neglect in keeping the record.

Certain fines taken to be levied with proclamations.

Certain recoveries declared good in law.

registering the certificates of acknowledgment of married women subject to the order of that court (s. 2). The business of the abolished offices is transferred to the same officer (s. 3). Searches may be made and copies taken of the records and documents, which copies and extracts, signed by the same officer shall be as available in evidence and as effectual as the same would have been if signed by the officers of such abolished offices.

The 5 Vict. sess. 2, c. 82, passed on 18th June, 1842:—"Whereas the records of fines levied and recoveries suffered in the lately abolished courts of great sessions in the principality of Wales, and the lately abolished court of session in the county palatine of Chester, were in many cases so irregularly and carelessly engrossed and kept, that divers purchasers, and others whose titles were intended to be secured by and under the said fines and recoveries, are in danger to have the same impeached, notwithstanding that the said fines and recoveries had duly passed all the offices, and that the lands intended to be thereby assured are sufficiently described in the proceedings upon such fines and recoveries: be it enacted, that all fines levied in the lately abolished courts of great sessions in the principality of Wales, or in the lately abolished court of session of the county palatine of Chester, of which the writ of covenant was duly returned and compounded, and of which the acknowledgment was before the judge or by commissioners duly taken and allowed, and of which the said writs and concords, with other proceedings, were lodged in the office of the prothonotary of the county in which the lands named in such writs are situated, shall be holden good and firm in law, notwithstanding the misprision or neglect of any prothonotary, deputy prothonotary, secondary, or other officer of any of the said courts, or their clerks, or any other public officer whatsoever, to file the same, or to engross the chirograph or foot of such fine, to endorse or record the proclamations thereof, or to enrol or docket the said fine, or do any other thing which by his office he ought to have done after the acknowledgment of the said fine."

Sect. 2. "That where it shall be needful to prove that any fine which appears to have been duly acknowledged was levied with proclamations in any of the said courts, it shall be taken to have been so levied, and shall have all the force of a fine levied with proclamations, although no chirograph or foot of such fine be found endorsed with proclamations, nor any entry of them or any of them appear on record, if such fine were duly enrolled or entered on the plea roll of the session in which it was levied, or docketed in the docket roll or docket book of such session, so as to set forth the names of the parties, and the places in which the lands are situated of which such fine was levied; or if within three years from the passing of this act, or such further time as the Court of Common Pleas shall in any case allow, such fine shall have been docketed, in such form as aforesaid, in docket rolls or docket books of parchment or vellum, by the several late prothonotaries of the said abolished courts, or in case of the death or inability of any such prothonotary, by some person or persons appointed for that purpose by the Master of the Rolls; or if within the said period of three years, or such further time as the Court of Common Pleas shall in any case allow, the writ of covenant, and the concord and all other proceedings of such fine, shall have been enrolled, with the allowance of the said court, in a book or books, roll or rolls of parchment or vellum, as hereinafter provided: provided always, that any such fine may be reversed by writ of error issued within twenty years from the levying thereof." To prove the levying of a fine with proclamations in a court of great session in Wales, the chirograph was produced, having one proclamation indorsed, and the plea roll of the same session, at which the chirograph stated the fine to have been levied, containing the entry of a *licentia concordandi* between the same parties, and respecting the said premises, as those mentioned in the chirograph. It was held sufficient, by virtue of the stat. 5 Vict. c. 32, s. 2. (*Doe d. Cadwalader v. Price*, 16 Mees. & W. 603.)

Sect. 3. "That all recoveries suffered in any of the said abolished courts whereof the writ of entry was duly returned, and the appearance of the tenant and vouchees or vouchees duly recorded by the court, or the warrant or warrants of attorney duly executed and allowed, and of which the said



writ and other proceedings (if any) was or were lodged in the office of the prothonotary of the county in which the lands named in the said writ are situated, shall be holden good and firm in law, notwithstanding the non-enrolment or non-exemplification of such recovery, or any other misprision or neglect of any prothonotary or other officer as aforesaid to do any thing which by his office he ought to have done, after the recording of the appearance of the tenant and vouchee or vouchees, or the execution and allowance of the warrant or warrants of attorney: provided, nevertheless, that where no enrolment on the plea roll of the session in which such recovery was suffered or any exemplification of a pretended enrolment thereof, sealed with the judicial seal of the court, or any entry on the remembrance roll sufficient to prove the arraignment of the writ of entry, can be found or produced, no such recovery shall be holden good by virtue of this act, unless within three years after the passing of this act, or such further time as the Court of Common Pleas shall in any case allow, the writ of entry or other proceedings extant of record touching the said recovery shall be enrolled as hereinafter provided, or such recovery shall have been docketed in full and ample manner as aforesaid: provided also, that any such recovery may be reversed by writ of error issued within twenty years from the suffering thereof."

3 & 4 Will. 4,  
c. 74, s. 13.

Sect. 4. "That, subject to such orders as the Court of Common Pleas from time to time shall make, any person may at any time henceforward cause the writ, concord, chirograph, proclamation, appearance, warrant of attorney, and all or any other proceedings in any fine or recovery levied or suffered in any of the said abolished courts, and now extant among the public records thereof, to be enrolled in the office of the registrar of certificates and affidavits of acknowledgments of deeds by married women in the Court of Common Pleas, which office, for the purposes of an act passed in the twenty-seventh year of Queen Elizabeth, intituled 'An Act for Reformation of Errors in Fines and Recoveries in the Twelve Shires of Wales and Counties Palatine, and for Exemplification of Fines and Recoveries generally,' and under such of the provisions of the said act as are now capable of taking effect, shall be deemed to be the enrolment office therein named: provided always, that no such enrolment of any writ of covenant or writ of entry shall be made as aforesaid where such writ shall not have been duly filed upon the proper file of the session in which the same was returnable, unless the compounding of such writ shall be proved to the satisfaction of the said registrar by an entry thereof duly made in the book of the compounder of king's silver for the county in which the lands named in such writ are situated; and in every such case such entry or certificate of composition made shall be enrolled together with such writ."

Fines and recoveries may be enrolled in the office of registrar of Court of Common Pleas.

27 Eliz. c. 9.

Sect. 5. "And be it declared and enacted, that the Court of Common Pleas shall have the same power of amending any fine or recovery, and the record or enrolment thereof, whether as now extant, or as such fine or recovery, or any proceedings thereof, shall hereafter be enrolled, in manner aforesaid, as if the same had been originally levied, suffered or had in the Court of Common Pleas."

Saving the amending power of Court of Common Pleas.

## VI. ESTATES TAIL NOT BARRABLE BY WARRANTY.

14. All warranties of lands which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail (o).

Estates tail, and estates expectant thereon, no longer barrable by warranty.

(o) See 3 & 4 Will. 4, c. 27, s. 39, *ante*, p. 228.

3 & 4 Will. 4,  
c. 74, s. 15.

## VII. DISPOSITION OF LANDS ENTAILED.

### General enabling Clause.

Power after the  
31st of December,  
1833, to dispose of  
lands entailed in  
fee simple, or for  
a less estate,  
saving the rights  
of certain persons.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,\* including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made (*p*).

Corresponding  
clause of Irish  
Act.

\* The remainder of the corresponding clause in the Irish act, 4 & 5 Will. 4, c. 92, s. 12, runs thus: "whose estates are to take effect after the determination or in defeasance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made."

Actual tenant in  
tail.

(*p*) Actual tenant in tail means exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right. (*Ante*, s. 1.)

Equitable tenants  
in tail.

As to equitable tenants in tail, and the form of assurance made necessary in that case by this act, see 1 Haycs, Conv. 155, 5th ed. As to fines and recoveries of equitable estates, see note to sect. 11, *ante*, p. 314.

Tenant in tail in  
contingency.

The owner of a contingent estate tail was deemed incompetent to suffer a common recovery with effect (1 Prest. Conv. 142): but tenants in tail in contingency are expressly within the words of this section. (See Sugd. R. P. Stat. 192; 1 Hayes, Conv. 194, 5th ed.) As to the alienation of contingent interests, see note to sect. 20, *post*.

Disentailing deed  
executed by  
tenant for life.

A disentailing deed, executed by a tenant for life, has not the same effect as a fine or recovery formerly had in divesting subsequent contingent estates, and so creating a tortious fee. Such a deed would have had no such operation at common law, and its effect under the statute depends entirely upon its having been executed by a tenant in tail. (*Slater v. Dangerfield*, 15 Mees. & W. 263.)

By a disentailing deed under this act, after reciting that A. was tenant for life, with remainder to B. in tail of the two estates therein comprised, and that A. being called upon to pay a debt of 1,200*l.* had applied to C., who had agreed to advance that sum in consideration of B. joining in the deed, which he had also agreed to do; in order to defeat all estates tail of B., and to convey the inheritance in fee therein, A. and B. jointly conveyed the two estates and all the interest of A. and B. therein to C., for 500 years, to

secure the repayment of 1,200*l.* and interest, with remainder to A. for life, remainder to B. in fee. In fact, A. was tenant in tail, not tenant for life of one of the two estates: it was held, that the conveyance being for valuable consideration as to both B. and C., the tenant in tail under A.'s entail could not be heard to say, that such entail was not barred by the deed, the intention to convey the whole fee simple in the property so entailed being sufficiently expressed, and the operative words of the disentailing deed being large enough to bar such entail. (*Evans v. Jones*, Kay, 29.)

3 & 4 Will. 4,  
c. 74, s. 15.

A tenant for life in possession with a remote remainder in tail could by a recovery with double voucher bar such entail, but without prejudice to the intermediate interests between his estate for life and remainder in tail. (*Smith v. Clifford*, 1 Term Rep. 738; *Meredith v. Leslie*, 6 Br. P. C. 388; see *Doe d. Lumley v. Earl of Scarborough*, 3 Add. & Ell. 43.)

The recovery of a tenant in tail extended to the barring of executory devises and springing uses. (1 Hayes, Conv. 135, 5th ed.) And it seems that a disposition under this act will have a similar operation. "All estates which, properly speaking, do take effect in defeasance of the estate tail, will be barred by a statute deed: therefore an executory or shifting limitation over after an estate tail, to take effect in defeasance of, and not to await the regular determination of the estate tail, will be barred." (Sugd. R. P. Stat. 193.) In some cases, however, estates which take effect in defeasance of the estate tail may be in strictness estates prior to the estate tail, which a disposition under the statute will not bar. As to the destruction of powers by a disposition under the statute, see Sugden, Powers, 91, 8th ed., and *Hill v. Pritchard*, Kay, 394.

Effect of disposition under statute upon executory limitations.

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him by the exercise of the power which that interest gives him to render it perpetual. (*Lilford v. Att.-Gen.*, L. R., 2 H. L. 63.)

A rent being an incorporeal hereditament, and susceptible of the same limitations as other hereditaments, may be granted or devised for life or in tail with remainders or limitations over. But there is a difference between an entail of lands and an entail of rent; that the tenant in tail of lands, with the immediate reversion in fee in the donor, might, by a common recovery, bar the entail and reversion; whereas the grantee in tail of a rent *de novo*, without a subsequent limitation of it in fee, acquired by a common recovery only a base fee, determinable upon his decease and failure of the issue in tail; but if there was a limitation of it in fee after the limitation in tail, the recovery of the tenant in tail gave him the fee simple. (*Smyth v. Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks v. Peach*, Lutw. 1218, 1224; S. C., Salk. 577; *Chaplin v. Chaplin*, 8 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3.) It will deserve consideration, whether a tenant in tail by an assurance under this act of a rent *de novo*, without any limitation in fee on its original creation, will acquire more than a base fee, as he would have done by a recovery; the act makes no distinction between a tenant in tail of land and of rents. (See *ante*, p. 297.)

Tenant in tail of rent.

An alien might suffer a common recovery (4 Leon. 404; Shep. Touch. 404), and may execute a disentailing deed. (1 Jarm. Wills. 37.)

Aliens.

### *Ex provisione Viri, &c. Restraining Clause.*

16. Provided always, and be it further enacted, that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the

Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen 7, c. 20, except with assent.

3 & 4 Will. 4,  
c. 74, s. 16.

The stat. 11 Hen.  
7, c. 20, and con-  
struction of it.

provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands (*q*).

(*q*) By stat. 11 Hen. 7, c. 20 (confirmed by stat. 32 Hen. 8, c. 86, s. 2), "if any woman who has any estate in *dower* or for *life*, or in *tail jointly* with her husband, or *only to herself*, or to *her use*, in any lands or hereditaments of the *inheritance or purchase of her husband* (Co. Litt. 326 b), or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, shall hereafter, being *sole*, or with any *after-taken husband*, discontinue, alien, release or confirm with warranty, or by *covin* suffer any recovery of the same against them, or any of them, or any other seised to their or either of their use; all such recoveries, discontinuances, alienations, releases, confirmations and warranties shall be utterly void and of none effect." And a right of entry is given to the persons entitled to the estate, and if such alienation were made by such wife and her second husband, such entry may be made during his life; but after his decease such women may re-enter and enjoy according to their *first estate*: but women if sole at the time of such alienation are barred, and an immediate right of entry is given to the persons entitled. The statute excepts discontinuances and recoveries made with the consent of the persons next entitled to the inheritance, and preserves the widow's right to *alien* for the term of her *life only*.

The last-mentioned statute extends not only to cases in which the gift is confined to the issue of the husband (*Foster v. Pitfal*, Cro. Eliz. 2, 524), but to a limitation to the heirs of the body of the wife in tail general, with a remainder or reversion in favour of the *husband* or his ancestors. (*Symson v. Turner*, 1 Eq. Cas. Abr. 220; see *Grotton v. Howard*, 6 Taunt. 94; *S. C.*, 2 Marsh. 9.) Where an estate is settled partly in consideration of the marriage, and partly in consideration of the money paid, the consideration of marriage will prevail and bring the case within the statute. (*Villars v. Beaumont*, Dyer, 145 a; *Watkins v. Lewis*, 1 Russ. & M. 390.)

Some cases, though within the words of the statute, have been construed not to be within its meaning, as where an estate was devised by the husband to his wife in tail, with remainder over to a *stranger* in fee. (Cro. Eliz. 2; 1 Leon. 261.) So, also, where the husband purchased an estate, but the whole consideration was paid by the wife's sister upon condition that such estate should be settled to the use of the husband and wife in tail: it was held, that the alienation of the wife after the death of the husband was valid, and not within the act. (*Watkins v. Lewis*, 1 Russ. & M. 378.) The statute 11 Hen. 7, c. 20, being made for the protection of the interests of the issue, did not apply when the heir in tail himself joined with his mother either in a fine, or in the conveyance declaring the uses it was intended to effectuate. (*Curtis v. Price*, 12 Ves. 97. See the cases on the last-mentioned statute collected in 1 Roper on Husband and Wife, by Bright, pp. 497, 515; Cruise's Dig. tit. XXXVI. c. 10; Prest. Conv. 19—21, 146—149.)

### Repeal of 11 Hen. 7, c. 20.

Except as to lands  
in settlements  
before this act,  
the act 11 Hen. 7,  
c. 20, repealed.

17. Provided always, and be it further enacted, that, except, as to lands comprised in any settlement made before the passing of this act, the said act of the eleventh year of the reign of his Majesty King Henry the Seventh shall be and the same is hereby repealed.

### Reversion in Crown, &c., not to be barred.

The power of dis-  
position not to  
extend to certain  
tenants in tail.

18. Provided always, and be it further enacted, that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embar feigned Recovery of

Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct (*r*). 3 & 4 Will. 4  
c. 74, s. 18.

(*r*) Whenever there is any reason to suspect that an estate has belonged to the crown, it is necessary to require the production of the original grant from the crown, or to search for it.

By statute 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands *given by the crown*, whereof the reversion or remainder, at the time of such recovery had, shall be in the king, shall bind the heirs in tail, whether any voucher be had in such recovery or not; but after the death of such tenant in tail, the heirs in tail may enter and enjoy the lands according to the form of the gift; the recovery or any other thing done or suffered by or against such tenant in tail notwithstanding. In order to bring an estate tail with a reversion in fee to the crown within the protection of the act, it must be clearly a gift or provision of the king; for where a grant made by the crown, reserving the reversion on failure of the issue of the grantee, was made neither as a *gift* nor as a *reward* for services, but as an act of justice in execution of some secret trust or obligation binding the crown, it was held not to be within that act, and that a recovery barred the reversion. (*Perkins d. Vouls v. Sewell*, 4 Burr. 2223; *S. C.*, 1 Bl. Rep. 654; see *Co. Litt.* 372 b, 373 a; *Cruise's Dig. tit. XXXVI. c. 10, s. 42—51*; 1 *Prest. Conv.* 18, 19, 144—146, 221.) If the king, having made a gift in tail, reserving the reversion to himself, afterwards gave leave to the tenant in tail to suffer a common recovery, for the purpose of passing the reversion out of himself in order to be reconveyed to him, which was done accordingly, the tenant in tail or his issue might afterwards bar such reversion by a common recovery, notwithstanding the statute, because the reversion having been once severed from the crown the privity of estate was gone, and the statute was intended only to restrain where the reversion continued in the crown without any alteration. (*Earl of Chesterfield's case*, *Hardr.* 409.) That mode of barring the crown was prevented by statute 1 Anne, sess. 1, c. 7, which restrains the alienation of lands belonging to the crown, except for a term not exceeding thirty-one years or three lives, or for a term determinable upon one, two or three lives; but see statute 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24.

Tenants in tail of the gift of the crown.

34 & 35 Hen. 8, c. 20.

A common recovery previously to the statute of Hen. 8, did not bar the reversion or remainder in the crown, because it was not like common persons bound by the fictitious recompense on which the effect of a recovery was founded. (2 *Roll. Abr.* 293, 294; *Hob. R.* 339.) It was decided that, where tenant in tail made with the reversion in the crown, before the statute 34 & 35 Hen. 8, c. 20, suffered a common recovery with single voucher, the recoveror gained a *base fee* determinable on failure of issue male of the donee; that such base fee was descendible and alienable; that the issue in tail were barred, and the ancient reversion remained in the crown, which might come into possession and take effect whenever there should be a failure of such issue. (*Bro. Tail.* 41; *Cro. Car.* 430; *Plowd.* 555; *Dyer*, 32 a; *Neal d. Duke of Athol v. Wilding*, 1 *Wils.* 275.) It was a question in a recent case, whether a reversion in an estate in Ireland (to which the statute 34 & 35 Hen. 8 does not extend, *Co. Litt.* 372 b, n. 3), after an estate tail, which had vested in the crown in consequence of the attainder of the reversioner, could be barred by a common recovery suffered by the issue in tail when in possession. The point was considered so doubtful by the House of Lords, that a purchaser, who objected to the title on that ground, was held not bound to accept it. (*Blosse v. Clanmorris*, 8 *Bligh*, 62. See 19 & 20 *Vict. c.* 120, s. 42, *post.*)

Recoveries by tenants in tail where reversion in crown.

Where tenant in tail of the gift of the crown was disseised, and the disseisor levied a fine with proclamations, and five years elapsed: it was held, that the issue in tail was not barred. (*Stratfield v. Dover*, *Cro. Eliz.* 595; but see 1 *Sid.* 166; 1 *Roll. R.* 171; and the remarks on *Stratfield v. Dover*, in *Earl of Abergavenny v. Brace*, *L. R.*, 7 *Exch.* 156, 176.

Tenant in tail of the gift of the crown disseised; fine by disseisor.

By letters patent, King Charles the Second, in the 25th year of his reign,



3 & 4 Will. 4,  
c. 74, s. 18.

Inalienable  
estates tail.

Tenants in tail  
after possibility of  
issue extinct.

in consideration of natural love and affection, granted an estate tail in certain lands to his illegitimate son, H. F., afterwards created Duke of Grafton. It was held, that such estate and all other estates tail and remainders, and reversions thereupon expectant or depending, were effectually barred and extinguished by indentures of bargain and sale under 3 & 4 Will. 4, c. 74, s. 15, notwithstanding the stat. 34 & 35 Hen. 8, c. 20. (*Duke of Grafton v. London and Birmingham R. Co.*, 6 Scott, 719. See Com. Dig. Estates, B. 21; Bac. Abr. Fines and Recoveries, 2nd division, C.)

In several acts of parliament conferring estates on eminent individuals, tenants in tail are restrained from aliening such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4 (see *Davis v. Duke of Marlborough*, 1 Swanst. 74), the Duke of Wellington (see statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28), and the Earl of Abergavenny. (2 & 3 Ph. & M. c. 23. See *Earl of Abergavenny v. Brace*, L. R., 7 Exch. 145.)

By statute 14 Eliz. c. 8, (repealed by 26 & 27 Vict. c. 125,) it is provided that recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, or with voucher over against any such particular tenant, shall be void against him in reversion or remainder. But this act shall not be prejudicial to any person who shall by *good title* recover lands by reason of a former right: and recoveries of lands by assent of him in reversion or remainder (so as such assent appear of record) shall be of like force against such person so assenting as before this act. A common recovery with double voucher, suffered by a bare tenant for life as vouchee, without feoffment or fine, was held to destroy contingent remainders immediately expectant on the life estate, notwithstanding the statute 14 Eliz. c. 8. (*Doe d. Davis v. Gatacre*, 5 Bing. N. C. 609.) A tenant in tail after possibility of issue extinct has no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation is considered merely as tenant for life (Co. Litt. 28 a; 11 Rep. 80): although not impeachable for waste.

Thus where by a settlement before marriage the husband's estate was conveyed to trustees to the use of the husband for life, without impeachment of waste, remainder to trustees to preserve contingent remainders; remainder to the use of the wife for life for her *jointure* and in bar of dower; remainder to the first and other sons of the marriage in tail male; remainder to the first and other daughters in tail male; *remainder to the heirs of the body of the husband and wife*; remainder to the right heirs of the husband: the wife survived the husband, and had no issue: and it was held, that she was tenant in tail after possibility of issue extinct, and that she was unimpeachable of waste, and entitled to the property of the timber when cut by her. (*Williams v. Williams*, 15 Ves. 419; *S. C.*, 12 East, 209; 3 Madd. 519.) Where a testator, being seised in fee of the reversion of an estate, devised it to his wife during her natural life, and after her decease to the heirs of her body by the testator lawfully begotten or to be begotten, and for want of such issue with remainder over, the wife was held to be a tenant in tail after possibility, after the period from her husband's death when she might have had issue by him, though there never was any issue of the marriage. (*Platt v. Pomles*, 2 Maule & S. 65.)

### Power to enlarge Base Fees.

Power after 31st  
December, 1333,  
to enlarge base  
fees; saving  
rights of certain  
persons.

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the king's most excellent majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the

base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*s*); saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

3 & 4 Will. 4,  
c. 74, s. 19.

(*s*) The remainder of the corresponding section of the Irish statute 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the king's most excellent majesty, his heirs and successors, as regards the title to\* his majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his majesty, or any of his predecessors, in any reversion or remainder which may have come to the crown by attainder or otherwise."

Corresponding  
clause of Irish  
Act.

\* Sic.

*Disposition by Heirs Expectant restrained.*

20. Provided always, and be it further enacted, that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*t*) which he may have as issue inheritable to any estate tail therein (*u*).

Issue inheritable  
not to bar expect-  
ancies.

(*t*) The words in the corresponding section of the Irish stat. 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or *possibility*."

Corresponding  
clause of the Irish  
Act.

By sect. 22 of the same statute it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be existing and in operation at the time of the disposition." As to the nature of this provision, see 1 Hayes, Conv. 219, 5th ed., and compare 8 & 9 Vict. c. 106, s. 6, *post*. This provision is not in terms confined to Ireland, but from the context it would probably be held to be so confined. (Sugd. R. P. Stat. 243.)

(*u*) Sect. 20 of 3 & 4 Will. 4, c. 74, and the abolition of fines will have the effect of putting an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple has during the life of his father. It may be useful to advert to the power of alienation possessed by persons having expectant or contingent interests, although all of them do not come within the operation of this act. A fine levied by a person who afterwards became heir was an estoppel. (1 Roll. Abr. 482 (S.) pl. 2; *Helps v. Hereford*, 2 B. & Ald. 242; *W. Jones*, 456; *Doe v.*

Alienation of  
expectant or con-  
tingent interests.

3 & 4 Will. 4,  
c. 74, s. 20.

When fine barred  
collateral heirs of  
cognisor.

Alienation of  
possibilities at  
law and in equity.

*Martyn*, 2 Mann. & R. 485; 8 B. & C. 497; *Christmas v. Oliver*, 10 B. & C. 181.) But where a tenant in tail of an advowson and his son and heir joined in a grant of the next avoidance, and the tenant in tail died, it was adjudged that the grant was utterly void against the son and heir who joined in the grant, because he had nothing in the advowson neither in possession or right, nor in actual possibility at the time of the grant. (*Sir M. Wivel's case*, Hob. 45; Perk. s. 65; 1 Anstr. 11; 3 Term Rep. 865.) A fine would in some cases have barred the collateral heirs of the cognisor, though he was never seised of the entail, provided the right to such entail had descended upon him. For in a formedon in the descender the demandant had to mention every one to whom any right to the entail descended, by which means he became privy to all such persons. (8 Rep. 88 b.) Thus if a father, tenant in tail, had three sons, and the eldest levied a fine in his father's lifetime, if he or any of his issue, inheritable to the entail, survived the father, the younger sons and their issue would have been barred by the fine, because by the death of the father a right to the entail descended to the elder brother and his issue, and so the younger brothers became privies to him. But where neither the cognisor nor any of his issue ever acquired a right to the entail, such fine would not have barred any of his collateral heirs, because in making out their title and pedigree to the person last seised of the entail, they need not have mentioned the person who levied the fine or any of his descendants, and consequently were not privies to them. So were an eldest son levied a fine of an estate tail, which was then vested in his mother, and then died in her lifetime, so that the estate tail never descended on him, it was held that such fine did not bar the second brother, because the estate tail never having descended to the elder brother, the younger was not privy to him. (*Bradstock v. Scorel*, Cro. Car. 434.)

A mere possibility could be only bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale v. Lower*, Pollex. 54), or in equity by contract. (*Beckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, Id. 191; see *Lyde v. Mynn*, 1 M. & Keen, 698; 1 Madd. Ch. 437; 3 Mer. 671.) But when a possibility is coupled with an interest, as where the person is fixed and ascertained, it may not only be bound by estoppel or contract, but may be released (*Jemson v. Moulson*, 2 Atk. 417), or be devised, though it cannot be granted or transferred by the ordinary rules of the common law. (*Lampet's case*, 10 Rep. 46.) A contingent remainderman conveyed his interest to secure a debt. The remainder was afterwards destroyed by the tenant of the prior estate. The interest which the remainderman afterwards acquired under the will of such tenant was held to be available by the creditor. (*Noel v. Bemley*, 3 Sim. 103. See *Smith v. Baker*, 1 Yo. & Coll. C. C. 223.) A testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case she died without leaving issue, for her next of kin, exclusive of her husband. During the lifetime of the daughter, her mother, as presumptive next of kin, by a voluntary deed, assigned her expectant interest in reversion to the husband. It was held, on the death of the daughter, without leaving issue, that the assignment operated only as an agreement to assign; and consequently, that being voluntary, a court of equity would not enforce it. (*Meek v. Kettlerwell*, 1 Phill. C. C. 342; 1 Hare, 464.) An agreement, of which the subject is in expectancy contingent upon the will of a living person, is not illegal, but will be enforced in equity. (*Lyde v. Mynn*, 1 My. & Keen, 683. See *Pope v. Whitcombe*, 3 Russ. 124.) A specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease. (*Wethered v. Wethered*, 2 Sim. 183; see *Harwood v. Tooke*, 2 Sim. 192; *Alexander v. Duke of Wellington*, 2 Russ. & M. 55; *Carlton v. Leighton*, 3 Mer. 667.) If an heir apparent levied a fine of lands, and survived his ancestor, he was bound by estoppel after the descent to him. (*Edwards v. Rogers*, Sir W. Jones, 756; *Wright v. Wright*, 1 Ves. sen. 412.) But where, in pursuance of an agreement made before marriage, certain estates belonging to the wife, and other lands belonging to her father, in which she had no interest, were conveyed by lease and release according to the

articles, and then a fine was levied by the husband and wife to the uses of the settlement, as well of the lands to which she was then *entitled*, as of other lands belonging to her father, one moiety of such lands having descended to her on his death as one of his co-heiresses: it was held that such moiety became subject to and bound by the uses of the settlement, the fine having operated as an estoppel. (*Helps v. Hereford*, 2 Barn. & Ald. 242.)

3 & 4 Will. 4,  
c. 74, s. 20.

A fine by a contingent remainderman did not operate by estoppel only, but it had an ulterior operation when the contingency happened; that the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied. (*Rawlin's case*, 4 Rep. 52; *Weale v. Lomer*, Pollex. 54; *Trevilian v. Lawrence*, 6 Mod. 258; *Ld. Raym.* 1051; *Vick v. Edwards*, 3 P. Wms. 372; *Doe d. Christmas v. Oliver*, 10 Barn. & Cress. 181; *Doe v. Howell*, *Id.* 191; *Doe v. Martyn*, 8 B. & C. 527; *Davies v. Bush*, 1 M'Clel. & Y. 58; see *Fearne*, 365.) A fine by a contingent remainderman passed nothing, but left the right as it found it, and therefore was no bar when the contingency happened in the mouth of a stranger to the fine against a claim in the name of such remainderman; as the fine operated by estoppel only, which was available only by parties and privies. (*Doe d. Brune v. Martyn*, 8 B. & C. 527.)

Fines by contingent remaindermen.

A contingent interest in terms of years may be assigned in equity for valuable consideration, or for love and affection between parent and child. (1 Ves. sen. 411; *Wind v. Jekyl*, 1 P. Wms. 572.)

As to the alienation of contingent interests by married women, see sect. 77, *post*; *Crofts v. Middleton*, 8 D., M. & G. 192; *Jones v. Frost*, L. R., 7 Ch. 773.

Contingent interests in any tenements or hereditaments are now made alienable by deed. (8 & 9 Vict. c. 106, s. 6, *post*.) And all contingent, executory or other future interests in any real or personal estate are devisable. (1 Vict. c. 26, s. 3, *post*.)

Contingent interests now alienable by deed and devisable.

The doctrine of estoppel is a curious and important head of the law, and well deserving attention. It would exceed the limits of these annotations to discuss it at large, but it may be useful to state some of its principles. An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth. (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a.) There are three kinds of estoppels, by matter of record, by deed, whether an indenture or a deed poll (*Bonner v. Wilkinson*, 5 B. & Ald. 682; 1 D. & R. 328), with this difference, that in the case of a deed poll only the party making the deed is estopped, while by a deed indented both parties are concluded (Co. Litt. 47 b; *Lewis v. Willis*, 1 Wils. 814; Litt. s. 693); and by matter *in pais*, as by livery, by entry, by acceptance of rent, by partition, &c. (Co. Litt. 352.)

ESTOPPEL.

The acts *in pais*, which bind parties by way of estoppel, are but few, and these acts are of notoriety, not less formal and solemn than the execution of a deed, such as livery, entry, acceptance of an estate, and the like. (Co. Litt. 352 a.) Whether a party had or had not concurred in an act of this sort was deemed a matter which there could be no difficulty in ascertaining, and then the legal consequences followed. (*Lyon v. Reed*, 13 Mees. & W. 285, see p. 309. See *Nicholls v. Atherstone*, 10 Q. B. 944.) Titles would be placed in uncertainty and peril by the extension of the doctrine in *Thomas v. Cooke*, 2 B. & Ald. 119. The doctrine of this and subsequent cases as to what constitutes a surrender by operation of law within the stat. 29 Car. 2, c. 3, s. 3, will be taken to be law until it shall be overruled by a court of error. (*Davison v. Gent*, 1 H. & N. 744; 3 Jur., N. S. 342; 26 L. J., Exch. 122.) See further, 2 Smith, L. C. 755 *et seq.*, 6th ed.

Estoppel by matter in pais.

It was held by *Leach*, Master of the Rolls, that where by deed indented a man represents himself as the owner of an estate, and affects to convey it for valuable consideration, having at the time no possession or interest in the estate, and where nothing therefore can pass, whatever be the nature of the conveyance, there, if by any means he afterwards acquire an interest in the estate, he is estopped in respect of the solemnity of the instrument from saying, as against the other party to the indenture, contrary to his

Estoppel by deed. Conveyance by lease and release does not operate by estoppel.

3 & 4 Will. 4,  
c. 74, s. 20.

own averment in it, that he had not such interest at the time of its execution. A conveyance by lease and release will operate as an estoppel; and where the releasee can have the benefit of the conveyance at law, a court of equity will not interfere in his behalf. (*Bensley v. Burdon*, 2 Sim. & Stn. 519, afterwards affirmed by the Lord Chancellor; see 2 B. & Ad. 282.) But where A., having an equitable fee in certain lands, mortgaged the same to B., by lease and release, and the latter recited that A. was *legally or equitably* entitled to the premises conveyed; and the releasee covenanted that he was lawfully and equitably seised in his demesne of and in and otherwise well entitled to the same, and the legal estate was subsequently conveyed to A., and he afterwards, for a valuable consideration, conveyed the same to C.: upon an ejectment brought by B. against C., it was held, first, that there being in the release no certain and precise averment of any seisin in A., but only a recital and covenant that he was legally or equitably entitled, C. was not thereby estopped from setting up the legal estate acquired by him after the execution of the release, and that the release did not operate as an estoppel by virtue of the words granted, bargained, sold, aliened, remised, released, &c., because the release passed nothing but what the releasor had at the time, and A. had not the legal estate in the premises. (*Right d. Jefferys v. Bucknell*, 2 B. & Ad. 278.) In this case there was a want of that certainty which is requisite to create an estoppel, the recital being in the alternative, "that the mortgagor was lawfully *or* equitably entitled," and the covenant for title was to the same effect. Sir *E. Sugden*, L. C., observed, "an innocent conveyance by lease and release could not operate by estoppel. It is true that Sir *J. Leach*, in *Bensley v. Burdon*, did hold the contrary, and decided that an estoppel could be worked by lease and release. The point was subsequently ruled the other way in *Right v. Bucknell*, and it is now clearly settled, that a conveyance of this nature has no effect upon the legal estate which the party subsequently acquires." (*Lloyd v. Lloyd*, 4 Dru. & War. 369; *Stackpoole v. Stackpoole*, 4 Dru. & War. 847.)

Estoppel by deed.

The party is not estopped by a deed upon the face of which the truth appears; for if the deed alleges the truth, it is obvious that the truth cannot be alleged against the deed, and the case of an estoppel cannot arise. While A. was in possession, B. and his eldest son, by deed truly reciting the facts, released their interest to trustees; it was admitted, that this being a release of a possibility to a party not privy in estate, and the whole truth appearing by the deed, no legal interest passed either by way of conveyance of interest, or by way of estoppel. (*Doe d. Lumley v. Earl of Scarborough*, 3 Ad. & Ell. 2; 4 Nev. & M. 730. See *Doe d. Barber v. Lawrence*, 4 Taunt. 23.) The recital of a particular fact in a deed will estop the party making the statement. (1 Show. 57; *Shelley v. Wright*, Willes, 9; *Lainson v. Tremere*, 1 Ad. & Ell. 792; 3 Nev. & M. 603; *Bowman v. Taylor*, 2 Ad. & Ell. 278; 4 Nev. & M. 264; *Hill v. Manchester and Salford Waterworks Company*, 2 B. & Ad. 544; *Pargeter v. Harris*, 7 Q. B. 708.) A party taking under a conveyance is not estopped by recitals in a previous deed, on which the title conveyed is founded, when the suit relates to other lands than those comprised in such conveyance. (*Doe d. Shelton v. Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265.) Where an untrue recital has been introduced into a deed by mistake, and without fraud, there is no estoppel in equity. (*Brooke v. Haymes*, L. R., 6 Eq. 25.) The execution by the lessee of the counterpart of a lease granted in exercise of a power given by a will, recited in the lease, was held an admission of the execution of such will. (*Bringloe v. Goodson*, 5 Bing. N. C. 738; 8 Scott, 71.) A married woman is bound by estoppel by a recital in a deed duly executed and acknowledged by her. (*Jones v. Frost*, L. R., 7 Ch. 773.)

An estoppel is always in some action or proceeding based on the deed in which the fact in question is recited. In a collateral action or proceeding there can be no estoppel. (*Carter v. Carter*, 3 Kay & J. 618.)

Effect of an  
estoppel.

The effect of an estoppel is to prevent the party who has executed it from impugning the general effect of the deed, or any particular statement or clause it contains. (Cowp. 600; Co. Litt. 47 b; *Doe v. Ford*, 3 Ad. & Ell. 649; *Gryn v. Neath Canal Navigation Co.*, L. R., 3 Ex. 209.) The



receipt for the consideration money in the body of the deed is binding upon the parties at law (*Rountree v. Jacob*, 2 Taunt. 141); and cannot be contradicted by parol evidence (*Baker v. Dewey*, 1 B. & C. 704); but equity, on proof that the money was not paid, will grant relief. (*Ryle v. Haggie*, 1 Jac. & W. 234.) But the operation of the words of the release and receipt may be restrained by the recitals in a deed, showing that the money has not been paid. (*Lampon v. Corke*, 5 B. & Ald. 606; 1 D. & R. 211. See *Alner v. George*, 1 Camp. 392; *Legh v. Legh*, 1 Bos. & P. 447; *Hickey v. Burt*, 7 Taunt. 42; *Jones v. Herbert*, 7 Taunt. 421; *Payne v. Rogers*, Dougl. 407.) But the receipt for the consideration money indorsed on a deed being no part of it, is not an estoppel, but only evidence open to contradiction. (*Lampon v. Corke*, 5 B. & Ald. 606; *Graves v. Key*, 3 B. & Ad. 313.) A nominal consideration being expressed in a deed does not prevent the admission of evidence *aliunde* of the real consideration, provided such real consideration be not inconsistent with the deed. (*Leifchild's case*, L. R., 1 Eq. 231.)

3 & 4 Will. 4,  
c. 74, s. 20.

The rule which requires a man to be bound by his own deliberate representations of matters of fact, may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power. (*Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169. See *Doe d. Baggely v. Hares*, 4 B. & Ad. 435, and *Webb v. Herne Bay Commissioners*, L. R., 5 Q. B. 642.) So a party to the deed is not estopped from pleading its illegality (*Collins v. Blantern*, 2 Wils. 347; *Paxton v. Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy. (*Prole v. Wiggins*, 3 Bing. N. C. 230; 3 Scott, 601.) So a party is not estopped from showing that a deed is void under the Mortmain Act, 9 Geo. 2, c. 36. (*Doe d. Preece v. Howells*, 2 Ad. & Ell. 744.) But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game. (*Doe v. Roberts*, 2 B. & Ald. 367. See also the cases, *Doe d. Leming v. Skirron*, 7 Ad. & Ell. 157; 2 Nev. & P. 123; *Gaunt v. Wainman*, 3 Scott, 413; *Whitton v. Peacock*, 2 Bing. N. C. 411; 3 M. & Keen, 792; *Bringloe v. Goodson*, 4 Bing. N. C. 726; 6 Scott, 502; see an article on Estoppel by Deed, 5 Jur. 858, 1170.)

Cases where there  
is no estoppel.

In order to pass a copyhold estate by surrender, the estate must pass into the hands of the lord, through which it must be taken. A fine differed from the case of a surrender, inasmuch as it was good against the heir by estoppel, although it passed no estate; but if a surrender be not valid, there will be no estoppel, and no estate can pass into the hands of the lord. (*Taylor v. Phillips*, 1 Ves. sen. 230.) It was held that a surrender of a copyhold estate made by the heir apparent in the lifetime of the ancestor, whom he survived, did not operate by estoppel so as to prevent the heir at law of the surrenderor from recovering the possession. (*Goodtitle v. Morse*, 3 Term R. 365.) And a court of equity afterwards refused to compel the heir at law to surrender to the purchaser, on the ground that the original contract to convey made by one not then entitled was a personal equity attaching on the conscience of the party, and not descending with the land. (*Morse v. Faulkner*, 1 Anstr. 11; 3 Swanst. 429.) On the same principle devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest; and such a surrender will not operate by estoppel against the parties or their heirs. (*Doe d. Blacksell v. Tomkins*, 11 East, 185.) And where a copyhold was surrendered to the use of the husband and wife for their natural lives and the life of the longer liver of them, and after the death of the survivor of them to the right heirs of the survivor for ever: it was held that the husband and wife took a vested estate, not only for their joint lives, but also for the life of the survivor, with a contingent remainder in fee to the survivor, which neither passed nor was bound by their joint surrender to a purchaser for a valuable consideration. (*Doe v. Wilson*, 4 Barn. & Ald. 303.) In the case last cited, Lord Tenterden, C. J., observed that the surrender to the purchaser for a valuable consideration must receive the utmost effect of which it was legally

Copyholds not  
bound by estoppel.

8 & 4 Will. 4,  
c. 74, s. 20.

capable, and be construed to pass all that the surrenderors could lawfully convey. Now the *quantum* of estate which they might lawfully convey must be commensurate with the *quantum* of estate that was actually vested in them at the time of the surrender, which was an estate held in entirety for their joint lives and the life of the survivor, and that a surrender of a copyhold could not operate by estoppel. (*Id.* 312, 313. See *Doe d. Bacerstock v. Rolfe*, 3 Nev. & P. 648.)

It has been seen that by the 15th section of this act, (*ante*, p. 320,) every actual tenant in tail, whether in possession, remainder, *contingency*, or otherwise, has power to alien; and as this clause is applied to copyholds by the 50th section of this act (see *post*), it should seem that a *contingent tenant in tail* of copyholds may now dispose of such interest by the modes prescribed by this act. (See 8 & 9 Vict. c. 106, s. 6, *post*.)

### Dispositions for limited Purposes.

Extent of the  
estate created by  
a tenant in tail by  
way of mortgage,  
or for any other  
limited purpose.

21. Provided always, and be it further enacted, that if a tenant in tail of lands shall make a disposition of the same under this act, by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act by a tenant in tail of lands, an interest, charge, lien or incumbrance shall be created without a term of years absolute or determinable, or any greater estate for securing or raising the same, then such disposition shall in equity be a bar only so far as may be necessary to give full effect to the mortgage, or to such other limited purpose, or to such interest, lien, charge or incumbrance, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected (x).

Effect of this  
section.

(x) By this section of the act, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "interest, charge, or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge created, although there be an express declaration of intention that the deed shall operate as a complete bar of the entail. Assuming, what is not clear, that a conveyance by a tenant in tail to a trustee to the use of a mortgagee for a term of years, with remainder to such uses as the tenant in tail should appoint, or to the use of himself in fee, would not extinguish the entail altogether, it will be necessary, where the object is to make a mortgage for years, or to create a charge, and to bar the entail in the equity of redemption, to attain the latter object by a distinct deed, either before or after the creation of the mortgage or charge. Assuming also, what is not clear, that where a mortgage in fee is made with a proviso that on payment of the money the estate shall be re-conveyed to the former uses, either by reference or by express limitation to the same uses, that the entail would not be revived, it will be necessary to have a distinct deed for preserving the entail, as to the equity of redemption; it may, however, be contended that the object of this section is not to apply to express limitations, but merely to prevent a simple declaration that

the entail shall or shall not be barred from having any operation; (see 9 Jarm. Conv. 404, 405;) and therefore that, by one deed either of the last-mentioned objects may be accomplished. In mortgages in fee, whether of freeholds or copyholds, when it is intended that the equity of redemption shall be discharged from the entail without any further assurance, it will be proper to frame the proviso of redemption not so as to make the estate of the mortgagee void on payment of the money, but to direct that he shall reconvey it (which is the usual form) to the uses intended; for if the condition in the former case should be performed, it might be contended that the tenant in tail became seised of his former estate tail. (See further as to the effect of this section, 1 Hayes, Conv. 183—185, 5th ed.)

3 & 4 Will. 4,  
c. 74, s. 21.

It has been suggested, as following from a comparison of the present section with sect. 50, *post*, that if a legal tenant in tail of copyholds mortgages by conditional surrender which is not followed by admittance, but the money is paid off and the surrender vacated by the entry of satisfaction, the estate tail remains unaffected; but that the estate tail would be barred if the surrender were followed by admittance. (2 Davidson, Conv. 588, 3rd ed.)

Mortgage of entailed copyholds.

Interests, charges, liens or incumbrances may be created by a tenant in tail under the act; but they must be created, and not left to vest in contract. (Sugd. R. P. Stat. 197.) Sect. 40 (*post*) expressly requires in every case a formal legal assurance: it would seem, therefore, that the words "interest, charge, lien or incumbrance" do not include an equitable mortgage by mere deposit of title deeds.

Interest, charge, lien or incumbrance.

The deposit of title deeds is evidence of an agreement to execute a mortgage, and an equitable title to a mortgage is, in the Court of Chancery, as good as a legal title in a court of law. (*Ex parte Wright*, 19 Ves. 258.) It has long been settled law, that a mere deposit of deeds, without a single word passing, operates as an equitable mortgage, if no other purpose be shown; (*Ex parte Kensington*, 2 Ves. & B. 83; *Ex parte Langston*, 17 Ves. 230;) a rule which has often been reprobated, and, as it seems, is not to be extended. (*Ex parte Wetherell*, 11 Ves. 398; *Ex parte Haigh*, 11 Ves. 403; *Norris v. Wilkinson*, 12 Ves. 192.) So the deposit of the copy of court roll, by which a copyhold estate is held, gives a *lien* thereon in the nature of a mortgage. (*Ex parte Warner*, 19 Ves. 202.) A written agreement accompanying the deposit must *prima facie* determine the purpose for which it was made; (*Ex parte Coombe*, 17 Ves. 371; *Ex parte Mountfort*, 14 Ves. 607;) though a deposit originally for a particular purpose may be enlarged by a subsequent parol agreement. (*Ex parte Kensington*, 2 Ves. & B. 84.) Where the object of the deposit is not evidenced by writing, the court must decide upon parol evidence with what intent the deposit was made, although in truth it is in the very teeth of the Statute of Frauds, 29 Car. 2, c. 3. (*Ex parte Whitbread*, 19 Ves. 211; *Ex parte Haigh*, 11 Ves. 402; *Norris v. Wilkinson*, 12 Ves. 197; see 2 Hov. Suppl. to Ves. jun. 148. On equitable mortgages, see 5 Jarm. Conv. by Sweet, 109 *et seq.*; Coote on Mortgages, ch. viii.; Shelford on the Law of Bankruptcy, pp. 407—410, 3rd ed.; *Russel v. Russel*, 1 White & Tudor, L. C., Eq. 674.)

Equitable mortgages.

## VIII. DEFINITION OF THE PROTECTOR.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this

The owner of the first existing estate under a settlement, prior to the estate tail under the same settlement, to be the protector of the settlement.

3 & 4 Will. 4,  
c. 74, s. 22.

act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause (y).

(y) In cases of lunacy the Lord Chancellor is protector. (See *post*, ss. 33, 48.) Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder under this statute; and where the tenant in tail in possession is a lunatic, the Lord Chancellor will, as such protector, consent to a disentailing deed by the tenant in tail in remainder, where it is for the benefit of the near relatives of the lunatic. (*In re Blewitt*, 6 D., M. & G. 187, overruling *In re Blewitt*, 3 M. & Keen, 250; *In re Wood*, 3 M. & Cr. 266. See note to section 48, *post*.) When there will be a resulting trust, see *Hill v. Bishop of London*, 1 Atk. 618; *King v. Denison*, 1 Ves. & B. 260; *Cook v. Hutchinson*, 1 Keen, 42; Lewin on Trusts, 115 *et seq.*, 5th ed.

#### *Protector as to undivided Shares.*

Each of two or more owners of a prior estate to be the sole protector as to his share.

23. Provided always, and be it further enacted, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share (z).

(z) See *Church v. Edwards*, 2 Br. C. C. 180; *Oakley v. Smith*, Amb. 90; 1 Eden, 261; 3 Prest. Conv. 90 *et seq.*

#### *Protector in case of Married Women.*

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

24. Provided always, and be it further enacted, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and

her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement (a).

3 & 4 Will. 4,  
c. 74, s. 24.

(a) Where, by a settlement executed prior to the passing of this act, real estate was settled to the separate use of a married woman for her life, with remainder in tail, she alone is, by virtue of this section, the protector of the settlement; and her husband's consent is not requisite, under the 34th section, to enable the tenant in tail to make an absolute disposition of the property. (*Keer v. Brown*, 5 Jur., N. S. 457; Johns. 138; 28 Law J., Chanc. 477.)

*Protector as to Estates restored or confirmed.*

25. Provided always, and be it further enacted, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

As to estates confirmed or restored by settlement.

*Lessees not to be Protector.*

26. Provided always, and be it further enacted, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

As to leases at rent created by settlement.

*Doweresses, &c., not to be Protector.*

27. Provided always, and be it further enacted, that no woman in respect of her dower (b), and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three (c)), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

No tenant in dower, heir, executor, &c. to be protector, except in the case of a bare trustee.

(b) It was not thought advisable to require the concurrence of the tenant in dower, for it seldom, if ever, happens that dower is set out by metes and bounds; and if such an estate does occur, her concurrence would have only a partial operation, as the estate is confined to a part of the lands entailed. (1 Real Prop. Rep. pp. 32, 33.)

(c) There is a discrepancy between this date and the date given in sect. 31 (28th August, 1833.) It seems doubtful which enactment must control the other. (1 Hayes, Conv. 180, 5th ed.; Sugd. R. P. Stat. 208.)

*Who to be Protector where owner of prior estate excluded by the two last Clauses.*

28. Provided always, and be it further enacted, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within

Who shall be the protector where the owner of the prior estate shall, by the two last



3 & 4 Will. 4,  
c. 74, s. 28.

clauses, be ex-  
cluded.

the meaning of this act of any such prior estate, in respect of which but for the two last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

*Tenant to the Præcipe to be Protector, when.*

Where, in the dis-  
position of an  
estate before the  
31st December,  
1833, the person  
to make the  
tenant to the writ  
of entry in a re-  
covery shall be  
the protector.

29. Provided always, and be it further enacted, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (*d*).

(*d*) This and the following section of the act will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the *immediate freehold* of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the *præcipe* in a recovery. (See *ante*, pp. 304, 314.) This section must be attentively considered in connection with the 27th, 30th and 31st sections. In *Corrall v. Cattell* (4 Meea. & W. 734, and see *Cattell v. Corrall*, 3 Y. & Coll. 413), a tenant in tail, in 1817, conveyed to trustees for the life of the tenant in tail upon certain trusts. The impression of the court seemed to be that the trustees were not protectors. Mr. *Hayes* (1 Conv. 177), and Lord *St. Leonards* (Sugd. R. P. Stat. 203), are of opinion that the trustees were protectors. (See s. 22, *ante*, p. 331.)

Where in the case  
of the disposition  
of a reversion on  
or before the 31st  
of December,  
1833, the person  
to make the  
tenant to the writ  
of entry in a re-  
covery shall be  
the protector.

30. Provided always, and be it further enacted, that where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make

the tenant to such writ of entry or other writ, be the protector of such settlement.

3 & 4 Will. 4,  
c. 74, s. 31.

*Bare Trustee to be Protector, when.*

31. Provided always, and be it further enacted, that where, under any settlement of lands made before the passing of this act, the person who, if this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement (e).

Where a bare trustee under a settlement made before the passing of this act shall be the protector.

(e) The husband of a married woman taking an estate for her separate use under a settlement is not a bare trustee under the settlement within this section. (*Keer v. Brown*, Johns. 138; 5 Jur., N. S. 457; 28 L. J., Chanc. 477. See *ante*, s. 24, p. 333, n.)

Under this section a trustee, having the first *immediate* estate of *freehold*, will be protector of a settlement made *before the passing of this act* (28 Aug. 1833). Thus under a settlement containing a limitation to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust by the usual means to preserve contingent remainders, with remainder to the first and other sons of A. in tail; the trustees would be protectors of the settlement during the life of A., and their concurrence would be necessary for enabling the first tenant in tail to make an effectual disposition. (See *Smith d. Dormer v. Packhurst*, 3 Atk. 135; 2 Str. 1105; Andr. 815.)

A bare trustee, who under this section is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist; that is, so long as, according to the rules of the Court of Equity, he is required to be a trustee. This section is intended to meet the case where there are contingent remainders, which the trustees were intended to protect, but not a case where there are no contingent remainders. Therefore where there was a devise of lands to trustees upon trust for the testator's daughter during her life, for her separate use without power of anticipation, with remainder to the use of her children as tenants in common in tail, with remainders over: it was held, that the testator's daughter, having become discoverte and being *sui juris*, could compel a conveyance by the trustees of the legal estate. (*Buttanshaw v. Martin*, Johns. 89; 5 Jur., N. S. 647.)

*Power to appoint Protector.*

32. Provided always, and be it further enacted, that it shall be lawful for any settlor entailing lands to appoint, by the settlement by which the lands shall be entailed, any number of persons in esse, not exceeding three, and not being aliens, to be protector of the settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall

Power to any settlor to appoint the protector.

3 & 4 Will. 4,  
c. 74, s. 32.

think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place (*f*).

Trustee of executory settlement a settlor within this section.

(*f*) The trustee of an executory settlement is a settlor within this section of the act, and as such is entitled to appoint a protector at his discretion. *Shadwell*, V.-C., said, "The act of parliament furnishes reasons why a protector should not be appointed by the court, unless upon a special case. By the 36th section the protector is made irresponsible, and is at liberty to act from mere caprice, ill-will or any bad motive. By the 37th section a protector is enabled to take a bribe for giving consent; and if two or three persons are made protector, and any one of them incurs a disability under the 33rd section, then it is questionable, at least, whether the Court of Chancery could act, in lieu of such person, with the other or others who are not disabled; and if it could not, there would be no protector capable of acting." (*Banks v. Le Despencer*, 11 Sim. 508; see pp. 527, 528. 7 Jur. 210; Law J., 1843, Ch. 293.)

#### *Where Protector a Lunatic, &c.*

In cases of lunacy, the Lord Chancellor or Lord Keeper, or Lords Commissioners, or other persons entrusted with lunatics, or in cases of treason or felony, &c., the Court of Chancery, to be the protector.

33. Provided always, and be it further enacted, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (*d*); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or

if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (*h*); or if any settlor entailing the lands shall, in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands.

3 & 4 Will. 4,  
c. 74, s. 83.

(*g*) All the jurisdiction and all the powers and authorities of a judicial nature, given by "The Trustee Act, 1850," and by any other act of parliament then in force, to the Lord Chancellor, entrusted, by virtue of the Queen's sign manual, with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic or of unsound mind, shall belong to and may be exercised by all or any of the persons or person for the time being entrusted as aforesaid. (15 & 16 Vict. c. 87, s. 15; see 14 & 15 Vict. c. 83, s. 13.)

Where the party has not been found a lunatic, &c. it will probably be referred to a Master in Lunacy to ascertain that fact, and whether the party, if of sound mind, would be protector of the settlement. (See *post*, note to section 48.)

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland. (*In re Graydon*, 14 Jur. 157; 1 Mac. & G. 655; 2 Hall & T. 182.) The cases as to the exercise by the Lord Chancellor of his power of consenting are stated in the note to sect. 48, *post*.

(*h*) On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement. (*In re Wainwright*, 1 Phill. C. C. 258.) There is, however, an omission in this section of *the case of a person convicted of treason or felony*. But Lord Cottenham, C., thought that the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony." Now these words cannot be struck out of the act, and it is much more natural to supply the words "in lieu of the person who shall be convicted," than to adopt a construction which would deprive the preceding words of all meaning. (*Ib.* pp. 261, 262.)

As to the form of petition, evidence and order on an application to the court to consent as protector of a settlement to the barring of an entail, see *In re Gravenor*, 1 De G. & S. 700; Seton, 522, No. 1; and see Daniell's Ch. Pr. 1923; Seton, 525.

8 & 4 Will. 4,  
c. 74, s. 34.

## IX. POWERS OF THE PROTECTOR.

### *His Consent required.*

Where there is a protector, his consent requisite to enable an actual tenant in tail to create a larger estate than a base fee.

34. Provided always, and be it further enacted, that if at the time when any person, actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same shall claim the lands entailed (i).

Advantage of consent to a conveyance.

(i) The advantage attending the new mode, of making the first beneficial owner merely a *consenting* and not a *conveying* party will be, that he will be able to give his concurrence to the alienation by the remainderman in tail without affecting the powers or contingent rights or interests of the tenant for life, anterior to the estate tail to be barred, and without letting in the incumbrances of the remainderman, which without due caution were the consequences of the old rule. (See 1 Real Prop. Rep. 33.) Several ingenious contrivances had been adopted by conveyancers for avoiding those inconveniences, respecting which further information will be found in Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's case*, 1 Rep. 14 b; *Smith d. Richards v. Clifford*, 1 T. R. 738; *Doe v. Lord Mulgrave*, 5 T. R. 320; *Earl Jersey v. Deane*, 5 B. & Ald. 575; *Roper v. Halifax*, 8 Taunt. 845; *Doe d. Lumley v. Earl of Scarborough*, 8 Ad. & Ell. 43.

According to the strict rules of the common law, the over-reaching power of a fine "*Sur conuzance de droit come ceo, &c.*" in divesting estates, and in extinguishing rights, powers, &c. was so inflexible that its operation could not be controlled even by the declared intention of the parties. It had, however, been recently decided that a fine might be prevented from operating beyond the particular purposes intended; provided such intention of the parties clearly appeared. (*Earl Jersey v. Deane*, 5 B. & Ald. 569; *Tyrrell v. Marsh*, 3 Bing. 31; *S. C.*, 10 B. Moore, 305. See Sugd. on Powers, 71—78, 8th ed.)

Power of consenting to sale not barred by donee consenting as protector to the bar of an entail.

A settlement, by which real estates were limited to the use of A. for life, with remainder to her son in tail, contained a power of sale and exchange to be exercised during the life of the tenant for life with her consent signified by writing under her hand and seal. By a disentailing deed, to which the tenant for life was a party, the tenant in tail, with the consent of his mother, the tenant for life, testified by her executing that deed, conveyed the settled estates subject to her life estate therein, and also other hereditaments of which he was tenant in tail in possession, to uses to bar dower in his own favour. This deed contained no recital of any contract, but in the operative part its object was stated to be in order to defeat the estate or estates tail of the tenant in tail in the hereditaments therein comprised, and all other estates, powers, rights and interests limited to take effect after the determination or in defeasance of such estate or estates tail, and to limit the fee simple in such hereditaments as to such parts thereof as were vested in the tenant for life, subject to her life estate therein to the uses thereafter ex-



pressed : it was held, that the concurrence of the tenant for life in the disentailing deed did not bar her power of assenting to a subsequent exercise of the power of sale and exchange, because this was a power to raise a use paramount to the estate tail, and there was nothing in the frame of the deed from which a contract could be implied that the tenant for life would not consent afterwards to the exercise of the power of sale and exchange. (*Hill v. Pritchard*, Kay, 394.)

3 & 4 Will. 4,  
c. 74, s. 34.

In a case where there was an adult tenant for life, and an infant tenant in tail, a vesting order under the Trustee Act, 1850, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under this act. (*Powell v. Matthews*, 1 Jur., N. S. 973.)

Vesting order.

*Protector must consent to Enlargement of Base Fee.*

35. Provided always, and be it further enacted, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands, in respect of which there shall be such protector, the power of disposition hereinbefore contained.

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

*Protector not to be controlled.*

36. Any device, shift or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void ; and that the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent ; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

The protector to be subject to no control in the exercise of his power of consenting.

*Exclusion of Equity as to Protector.*

37. Provided always, and be it further enacted, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act (k).

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

(k) Where a party has the power of appointing an estate, whether real or personal amongst several objects, and exercises such power upon condition that the party in whose favour the appointment is made shall confer on the appointor, or a stranger, some benefit at the expense of the objects of the power, such execution is fraudulent, and will be set aside in equity. (See *Pawlet v. Pawlet*, 1 Wils. 224; *Duke of Marlborough v. Lord Godolphin*, 2 Ves. sen. 71; *Lane v. Page*, Ambl. 238; *Boyle v. Bishop of Peterborough*, 1 Ves. jun. 299; *Tucker v. Sanger*, M'Clel. 430.) Thus, where a person having a power of jointuring, executed it in favour of his wife, but it was agreed between the parties that the wife should receive only part of the

The rule in equity referred to by last section.

Frands upon powers.

3 & 4 Will. 4,  
c. 74, s. 37.

jointure for her own benefit, and that the residue should be applied for the use of the husband, the execution of the power was set aside so far as it was in favour of the husband himself, on the ground of its being a fraud on the power and those creating it. (*Lane v. Page*, Ambl. 233; *Aleyn v. Belchier*, 1 Eden, 132.) So, if a parent under a power of appointing the estate unto any of his children, exclusively of the others, appoints to one, upon a previous bargain with such child that he should pay a consideration for it, equity will set aside the appointment altogether. (*M'Queen v. Farquhar*, 11 Ves. 467; *Palmer v. Wheeler*, 2 Ball & Beatty, 18; *Rhodes v. Cook*, 2 Sim. & Stu. 488; *Farmer v. Martin*, 2 Sim. 502; *Green v. Pulsford*, 2 Beav. 70.) The fraud consists not in the selection of one child in preference to another, but in the arrangement, which makes the appointment, though in form to the child, in effect an appointment to the father himself. To make such an appointment fraudulent, it is not necessary that it should be wholly for the benefit of the father; it is enough that it is partially so. (*Jackson v. Jackson*, 1 Dru. 113; 7 Cl. & Fin. 977; West, 575; Sugd. on Prop. 515—517.) So if the donee of the power appoints the fund to one of the objects of the power, upon an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad. (*Arnold v. Hardwick*, 7 Sim. 343. See Sugd. on Powers, 606—616, 8th ed.; 2 Chance on Pow. 441—446.) Strong suspicion that an appointment made by a father to his son was for the benefit of the father, is not sufficient to avoid the transaction. (*Hamilton v. Kirwan*, 2 Jones & L. 393.) But the principle of those cases has not been extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* has been conferred on the son as a consideration for his barring the entail. (*Tweddell v. Tweddell*, Turn. & Russ. 1; *Davis v. Uphill*, 1 Swanst. 129.) See further as to frauds upon powers, *Aleyn v. Belchier*, 1 White & Tudor, L. C. Eq. 377; *Re Huish's Charity*, L. R., 10 Eq. 5.

#### X. CONFIRMATION OF VOIDABLE ESTATES CREATED BY TENANT IN TAIL.

A voidable estate by a tenant in tail, in favour of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

38. Provided always, and be it further enacted, that when a tenant in tail of lands under a settlement, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards under this act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such

consent (l): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (m).

3 & 4 Will. 4,  
c. 74, s. 38.

(l) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

(m) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue; for whatever act bound the tenant in tail himself, was binding on the recoverers, or the persons to whose use the recovery was suffered, who were estopped from alleging that the person against whom they had recovered had but an estate tail. (*Capel's case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck d. Hawkins v. Welsh*, 1 Wils. 277; *Tourle v. Rand*, 2 Br. C. C. 652; *Goodright d. Tyrell v. Mead*, 3 Burr. 1703; *Cheney v. Hall*, 2 Eden, 357; 3 Atk. 9.) A common recovery was a conveyance on record, invented to give a tenant in tail an absolute power to dispose of his estate, as if he were tenant in fee simple. (Willes' Rep. 451.) What passed by the recovery did not come out of the remainder or reversion, but in continuance of the estate tail, which was expanded into a fee simple, and persons coming in under the recovery were liable to all the charges created by the tenant in tail.

Old rule as to the effect of recoveries in confirming prior acts of tenant in tail.

A mortgagee claiming under a recovery suffered expressly to his use was postponed to a settlement by lease and release made previous to marriage by a tenant in tail. (*Capel's case*, 1 Rep. 60; *Cheney v. Hall*, Ambl. 526; and see also *Goodright d. Tyrell v. Mead*, 3 Burr. 1703; *Tourle v. Rand*, 2 Br. C. C. 652; *Stapleton v. Stapleton*, 1 Atk. 2.) But a recovery suffered by a tenant in tail, who had previously made a voluntary settlement, had not the effect of confirming it as against a mortgagee claiming under an instrument made subsequent to the recovery. (*Cormick v. Trapaud*, 6 Dow, 60.)

But as the fine levied by a tenant in tail operated as an extinguishment of the estate tail and passed a base or qualified fee, it only gave validity to the prior charges on the estate as against himself and the persons claiming under the entail, but not as against those claiming in reversion or remainder. The operation of a fine levied by a tenant in tail, who had the immediate reversion in fee in himself, was to merge the estate tail, and bring the reversion in fee into immediate possession, by which means it became liable to the incumbrances of all those who had been seised of it. Therefore, where A. settled his estate on himself for life, remainder to B. his eldest son in tail male; remainder to C. his youngest son in like manner, remainder to his own right heirs; B., being in possession, granted leases, with covenants for a perpetual renewal, and afterwards died without issue; C. the remainderman entered and levied a fine, the uses of which were declared to himself in fee: it was held, that C. was bound to a performance of B.'s covenants in the leases. (*Shelburn v. Biddulph*, 6 Br. P. C. 356, Toml. ed.; *Symons v. Cudmore*, Show. 370; *S. C.*, 4 Mod. 1; 1 Salk. 338; Skin. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 82; Holt, 666; 1 Freem. 503; 2 Atk. 204; see 7 Ves. 497.)

Effect of fines.

If a man, who was tenant in tail, created an incumbrance or conveyed his estate by a voidable conveyance, and afterwards levied a fine, though for a different purpose, the first operation of the fine would be to give effect to the antecedent act, even against his own subsequent declaration; if it was a legal conveyance the fine operated as a confirmation of it, and the

8 & 4 Will. 4,  
c. 74, s. 88.

same rule was extended to the case of an *equitable charge*. (*Lloyd v. Lloyd*, 4 Dru. & War. 374.)

A base fee created by the lease and release of a tenant in tail might be confirmed by a subsequent fine levied, even after the death of the original releasee, in pursuance of a prior covenant. (*Doe v. Michelo*, 8 T. R. 211, 214.) But where the fee of an estate descended on a party who was equitable tenant in tail, under articles made on his father's marriage, and such son on his own marriage agreed to make a settlement of the estate upon himself and the issue of the marriage in the usual course of family settlement, and afterwards levied a fine: it was held, that although the fine, without more, would have brought the reversion in fee into possession, yet, being coupled with a declaration of uses, the uses of the second settlement were substituted for those of the first, and that the reversion in fee did not come into possession so as to be liable to the father's judgment debts. (*Browne v. Blake*, 1 Molloy, 368.)

Construction of  
the proviso.

The proviso at the end of this section does not require that the disentailing instrument should pass the estate to the purchaser. It is sufficient if the instrument forms part of a transaction in respect of which the person claiming the benefit of the proviso is a purchaser. (*Crocker v. Waine*, 5 B. & S. 697; 12 W. R. 905.)

## XI. ENLARGEMENT OF BASE FEES.

Base fee, when  
united with the  
immediate rever-  
sion, enlarged,  
instead of being  
merged.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person (n).

The effect of a  
fine in merging a  
base fee in the  
reversion.

(n) If a tenant in tail with a reversion in fee to himself, levied a fine, the effect of that on the estate tail was to create a base fee, which became merged in the other fee, and let in all the incumbrances of the ancestor, which had frequently happened, in practice, from such a person being ill-advised to levy a fine instead of suffering a recovery; generally speaking, when two estates unite in the same person in the same right, the smaller one is merged in the other, except in the case of an estate tail and a reversion in fee, which may exist together; in such a case, by the operation of the statute *De Donis*, the estate tail is kept alive, not merged in the reversion in fee. (5 Term Rep. 109, 110; 2 Rep. 61; *Kynaston v. Clarke*, 2 Atk. 204; *Shelburn v. Biddulph*, 4 Br. P. C. 594.) A base fee will merge by union with the absolute fee; the possibility of reverter on a conditional fee at common law will merge in the fee simple absolute; (*Simpson v. Simpson*, 4 Bing. N. C. 333; see 2 Ves. sen. 35; Hob. 323; *Symonds v. Cudmore*, 1 Salk. 338; Carth. 258; *Crow v. Baldmere*, 5 T. R. 109;) an estate tail after possibility of issue extinct, (Co. Litt. 27 b,) an estate of mere freehold, legal or conventional, (Co. Litt. 338 b,) a term of years, (*Salmon v. Swann*, Cro. Jac. 619; *Hughes v. Robotham*, Cro. Eliz. 302,) or estate at will, (Vin. Abr. tit. Est. at Will,) will be extinguished by the acquisition of the fee. On the subject of merger of base fees, the Real Property Commissioners made the following remarks: "If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby

## Enlargement of Base Fees.

not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense." (1 Real Property Report, p. 28; but see *Sperling v. Treco*, 7 Ves. 497.) It will be observed that this difficulty is removed by this section of the act, by preserving base fees from merger, and enlarging them, when united with the immediate reversion, into as large an estate as the tenant in tail, if in possession, could have created.

The rule, that where there is in the same person a legal and equitable interest the former absorbs the latter, (*Wade v. Paget*, 1 Br. C. C. 367,) must be always understood with some qualification, as it holds only where the legal and equitable estates are co-extensive and commensurate, but is not admitted where a party has the whole legal estate and a *partial* equitable estate, as the latter will continue to subsist for the benefit of the person seised of the whole legal estate. (*Champernoon v. Williams*, 2 Ch. C. 63—78; 1 Vern. 13; *Robinson v. Cummings*, Forr. 164; 1 Atk. 473; *Brydges v. Brydges*, 3 Ves. 126; see *Capel v. Girdler*, 9 Ves. 509; *Selby v. Alston*, 3 Ves. 339; *Alston v. Wells*, Dougl. 771, 2nd ed.) In order to effect a merger by the union of legal and equitable interests in the same party they must be of the same quality, and an estate tail and fee simple not being of the same quality, an equitable estate tail in a copyhold does not merge by the accession of the legal fee. (*Merest v. James*, 6 Madd. 118; *Brown v. Blake*, 1 Molloy, 382.)

Merger by union of legal and equitable interests in same person.

## XII. MODES IN WHICH DISPOSITIONS OF LAND UNDER THIS ACT BY TENANTS IN TAIL ARE TO BE EFFECTED.

40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed (o); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (p).

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

(o) This section of the act adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete any contract or agreement made by his ancestor, respecting the estate tail, because the issue claims, by a paramount title *per formam doni*, from the person by whom the estate tail was originally granted, and not from his ancestors. (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *Attorney-General v. Day*, 1 Ves. sen. 218.) And such rule applied, although the ancestor had covenanted to levy a fine or suffer a recovery, and had received part, or even the whole of the purchase-money, and a decree had been made against him to levy a fine or suffer a recovery; and he died in contempt and in prison for not obeying such decree. (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224.) And even where tenant in tail, in pursuance

Old rule as to effect of contracts by tenant in tail.



3 & 4 Will. 4,  
c. 74, s. 40.

Effect of this  
section upon con-  
tracts by tenant  
in tail.

of a covenant to settle a jointure, had acknowledged a fine, but died before it was perfected, the Court of Chancery refused to supply the defect against the issue. (2 Vern. 8.) And the rule was, it seems, applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold. (See Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153.) A decree directing the owner of a legal estate to do such acts as are requisite to bar the estate tail, but which are incomplete at his death, is not binding on the succeeding issue in tail. (*Frank v. Mainwaring*, 2 Beav. 115; see 1 Ch. Cas. 171.)

It is observed that there is nothing in this section to affect contracts as such, and therefore, although they will not operate to bar or bind the entail under the act, nor can equity give to them that operation, yet they may still be recovered upon at law, or be made the foundation of a specific performance against the tenant in tail. A specific performance of a covenant for further assurance in a deed of mortgage by a tenant in tail in remainder not inrolled, was refused by *Stuart*, V. C., in *Davis v. Tollemache*, 2 Jur., N. S. 1181; but this probably depended upon the frame of the deed, and other circumstances, and cannot be considered as an authority against the general power of the court to specifically enforce contracts for sale or mortgage, and covenants for further assurance against a tenant in tail either in possession or in remainder. (Sugd. on the Statutes, p. 197, 2nd ed.) See *Dering v. Kynaston*, L. R., 6 Eq. 210.

A. and B. (brothers) were tenants in common in tail of copyhold property, with cross remainders between them. B. obtained a loan for A. from C., for which A. gave his promissory note, and deposited the title deeds with C. as a collateral security, and gave a written memorandum by which he engaged "to make a formal surrender of my interest in the estate to which the said deeds relate, by way of further security, whenever thereunto required;" and B. wrote at the foot "I join in the deposit." A. died unmarried and without having surrendered to C. or barred the remainders. Upon a bill by C. against B. seeking to foreclose the entirety, it was held, affirming the decision of the court below, first, that this was a good equitable charge, not merely upon A.'s "interest" in his moiety, but also upon B.'s estate in remainder, and that B. must bear the expense of surrendering that moiety; secondly, that the charge extended only to the moiety of the estate which originally belonged to A. (*Pryce v. Bury*, 18 Jur. 967; 23 Law J., Chan. 676; 2 Drew. 11.)

No particular form  
of disentailing  
deed necessary.

No particular form of disentailing deed is necessary; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession and duly inrolled, bar the entail. Therefore, where a tenant in tail in possession granted "all his right, &c. in a lease of lands"—which was a grant in fee—"and all the profits, reservations, emoluments and appurtenances thereunto belonging," and "all his estate tail therein," "freed from such estate tail and all remainders and reversions, &c., to take effect after the determination or in defeasance of such estate tail" to the use of the grantor, his heirs and assigns: it was held, that such a deed was in form sufficient as a disentailing deed. (*Nelson v. Agnew*, I. R., 6 Eq. 232.)

M., a tenant in tail in possession of an estate, executed a disentailing deed, purporting to be a grant of the estate to A. and B., and their heirs free from all estates tail of the grantor, to the use of A. and B. and their heirs, upon trust for the grantor. The deed was inrolled but not executed by A. and B., who subsequently executed a deed of disclaimer. Held, that the disentailing deed operated as a grant, and not by the Statute of Uses; that it was rendered inoperative by the subsequent disclaimer by the grantees, and that the estate tail of M. was not barred under this statute. (*Peacock v. Eastland*, L. R., 10 Eq. 21.) But where the disentailing deed operates by the Statute of Uses, it is not necessary that it should be assented to or executed by the grantees to uses. (*Nelson v. Agnew*, I. R., 6 Eq. 232.)

As to the form of disentailing assurance necessary under this act, see further, 1 Hayes, Conv. 154 *et seq.* In every case the question to be asked is, what mode of assurance, if the estate or interest were really a fee simple at law, would be necessary to convey it. (*Ib.* 158.) As to the effect of

an order under the Trustee Act, 1850, vesting the estate of an infant tenant in tail, see *Powell v. Matthews*, 1 Jur., N. S. 973, *ante*, p. 339.

8 & 4 Will. 4,  
c. 74, s. 40.

Forms of disentailing assurances will be found in 3 Davidson, Conv. 1166 *et seq.*

(p) A married woman, tenant in tail, executed, with the concurrence of her husband, a disentailing deed, which was inrolled under this act within six months, but was not acknowledged by her till long afterward: it was held, that as it was not necessary that the acknowledgment should precede the inrolment, that the deed was effectual. (*Ex parte Tacerner*, 1 Jur., N. S. 1194; 7 De G., M. & G. 627.)

Acknowledgment by married woman, tenant in tail, need not precede inrolment.

### *Inrolment of Assurance.*

41. Provided always, and be it further enacted, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five-sixth parts of a rack rent), shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth (q).

Every assurance by a tenant in tail, except a lease not exceeding twenty-one years at a rack rent, or not less than five sixths of a rack-rent, to be inoperative unless inrolled in Chancery within six months.

(q) Where deeds are to be executed by parties abroad, there may in some cases be a difficulty, if not an impossibility, of having them returned within the six months. It would have been proper to have extended the period for inrolment in such cases. The inrolment of the deed of disposition under this statute may be made immediately upon the execution of the deed, and may be effected either by the vendor or the purchaser; and as the inrolment relates to the execution of the deed, it follows that a tenant in tail, who has not barred the entail under the statute, can nevertheless make a good title in fee simple. (*Cattell v. Corral*, 4 Y. & Coll. 228.) If the disentailing deed requires inrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered. But the inrolment of a bargain and sale, or of a conveyance to charitable uses, according to this act, will satisfy the requisition of the statutes 27 Hen. 8, c. 13; 9 Geo. 2, c. 36.

A disentailing deed, executed in pursuance of the act, is valid if inrolled within six months from the time of its execution, although such inrolment has not taken place until after the death of the tenant in tail who executed the deed. (*Re Piers*, 14 Ir. Ch. R. 452.) See further as to inrolment the note to sect. 74, *post.*)

Inrolment is not necessary in the case of copyholds, except on the court rolls, which must be done within six calendar months after the execution of the deed. (*Honeywood v. Foster*, 30 Beav. 1. See s. 54, *post.*)

Inrolment in case of copyholds.

3 & 4 Will. 4,  
c. 74, s. 42.

Consent of the protector to be given by the same assurance or by a distinct deed.

*Consent of Protector how to be given.*

42. The consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

*Consent by distinct Deed.*

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

*Consent irrevocable.*

Protector not to revoke his consent.

44. It shall not be lawful for the protector of a settlement, who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

*Consent of Married Women.*

A married woman protector to consent as a feme sole.

45. Any married woman, being either alone or jointly with her husband protector of a settlement may, under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

*Inrolment of distinct Deed.*

Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

46. Provided always, and be it further enacted, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

*Exclusion of Jurisdiction of Equity.*

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

47. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and

that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law (r).

3 & 4 Will. 4,  
c. 74, s. 47.

(r) See *Petre v. Duncombe*, 7 Hare, 24. As to whether a married woman can be compelled to execute a disentailing deed under a covenant to settle after-acquired property, see *Dering v. Kynaston*, L. R., 6 Eq. 210.

*Consent, how to be given where Lord Chancellor, &c. is Protector.*

48. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid (s), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (t); and if such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

Lord Chancellor, &c. to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any other person shall be joint protector, the disposition not to be valid without his consent.

(s) See *ante*, p. 337, n. (g).

(t) An order has been made by the Lord Chancellor, as protector, for enabling a *quasi* tenant in tail in remainder of a sum of stock, of which the tenant for life was a lunatic, to dispose of the fund.

In *Grant v. Yea* (3 M. & Keen, 245), the lunatic was tenant for life, and his eldest son *quasi* tenant in tail in remainder, of a sum in the three per

3 & 4 Will. 4,  
c. 74, s. 48.

Cases as to the  
exercise of the  
power of consent-  
ing given to the  
Lord Chancellor.

cent. consols, being the produce of lands which had been sold under an order of the court, and declared to be subject to the same uses as the lands had been subject to. The son petitioned that the Lord Chancellor, as protector under the above act, would concur with the petitioner in barring the estate tail and ulterior limitations to which the stock was subject, for the purpose of enabling the petitioner to convert the stock into money, to be applied in the purchase of a commission in the army. It was stated in an affidavit made in support of the petition by the lunatic's brother-in-law, who was committee of the estate, that the lunatic was in a state of hopeless lunacy; that he was possessed of landed estates of the value of 2,500*l.* a year, and of property in the funds yielding an annual income of 400*l.*; that a yearly allowance of 1,300*l.* was made to his wife for the maintenance of the lunatic; and that the petitioner, who was a lieutenant in the army, had an allowance of 400*l.* a year out of the estate; and the purpose to which the principal part of the money in question was to be applied was the purchase of a captain's commission for the petitioner, who had entered the army with the full approbation of his father, and who, it was represented, had now a favourable opportunity of purchasing a step. The 15th, 22nd, 33rd, 48th, 49th and 71st sections of the act were referred to. The committee of the estate and next of kin, and the lunatic's younger brother, who had a charge upon the fund, consented to the application. Lord Chancellor *Brougham* expressed his opinion that this was a case which fell within the provisions of the 33rd and 48th sections of the act referred to, and that the circumstances were such as to justify him in exercising his discretion. The master to whom a reference was made, having found the facts stated in the petition, an order was made directing the stock to be sold, and the produce to be paid to the committee, to be applied for the advancement of the petitioner in the army, and that the petitioner's allowance out of his father's estate should be reduced to the extent of the dividends of the stock sold.

The cases deciding (*In re Blewitt*, 3 M. & K. 259; *In re Wood*, 3 My. & Cr. 266), that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled. (*In re Blewitt*, 2 Jur., N. S. 217; 6 De G., M. & G. 187; see *ante*, p. 332, n. (y).)

The principles by which the Lord Chancellor, when protector of the settlement in the place of a lunatic, will be guided in giving or withholding his consent, are more fully laid down in a case which came before Lord *Cottenham*. *In re Newman* (2 Myl. & Cr. 112), the lunatic was tenant for life, with remainder to his children as tenants in common in tail, with remainder over to the brother and sisters of the lunatic as tenants in common in tail, with an ultimate remainder to the right heirs of the testator. The lunatic was forty-three years old, had no child, and was unmarried. The eldest son of the testator, and eldest brother of the lunatic, was the testator's heir-at-law; and he had a remainder in tail in one-sixth, with the ultimate remainder in fee in the entirety. Application was made to the Court by the husband of one of the daughters of the testator, who was entitled, in default of issue of the lunatic, to an estate tail in one-sixth, praying that the Lord Chancellor would consent on behalf of the lunatic tenant for life to a deed, the object of which was to bar the issue of that daughter, and of course to destroy the remainder to the heirs of the settlor, in order to give this share of the property to the husband and wife to dispose of as they pleased, for it was proposed to be settled to such uses as they should appoint. Lord *Cottenham*, C., in delivering judgment, said, "This petition came before me as protector of the settlement under the Fines and Recoveries Act, to induce me to consent to a deed of disposition on the part of the lunatic, who is tenant for life, to act, in fact, for the tenant for life, in order to give effect to a recovery (*thereby meaning a deed of disposition under this act*). As protector of the settlement, the only duty of the court is, to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to give any benefit to one member of the family to the exclusion of the others. Now, if nothing is done, one-sixth will go to this daughter and her children if she has any, and if not to the eldest son of



the testator as his right heir; and I am asked to consent to that which will take it away from the eldest son, and take it away from the family, by giving it to the husband of the daughter. That would be anything but protecting the settlement; it would be destroying the settlement; giving the estate to a person not a member of the family, namely, the husband of the daughter. I should not consider that it would be a proper act for the tenant for life to concur in a deed of disposition to that effect."

8 & 4 Will. 4,  
c. 74, s. 48.

The Lord Chancellor, in acting as protector of a settlement in the place of a lunatic, considers the moral as well as the legal result of his consent to bar remainders. And where the only child of the lunatic who, upon her marriage, had converted her estate tail into a base fee, reserving a power of appointment, required his consent to bar the remainders over, the Lord Chancellor refused his consent, the remainder over being to the brother of the lunatic. (*In re Graydon*, 14 Jur. 211; 1 Mac. & G. 655; 2 Hall & T. 182.)

Real estates were devised to trustees, upon trust, to raise by sale or mortgage thereof sufficient to pay the debts and legacies of the testatrix, and subject thereto, to the use of A. for life, with remainder to his first and other sons in tail male, with remainders over. In a suit, instituted in the Court of Exchequer, for the payment of the debts and legacies of the testatrix, a decree for a sale was pronounced, under which accordingly a sale was had; but pending the proceedings in the suit, A., the tenant for life, died, leaving him surviving three sons, of whom S., the eldest, and first tenant in tail under the will of the testatrix, was a lunatic, and so found by inquisition. Upon an application in the matter of the lunacy, on the part of the plaintiffs in the Exchequer suit, that the committee should be directed to execute the necessary deed, to bar the estate tail of the lunatic, the court refused to make the order. It seems that if the legal fee was in the trustees, the concurrence of the committee of the lunatic was not necessary. (*In re Sherrett*, 2 Dru. & War. 585.)

The court had no jurisdiction under stat. 1 Will. 4, c. 65, and 3 & 4 Will. 4, c. 74, to authorize the committee of the estate of a lunatic tenant in tail in possession to grant leases of the lunatic's estate for a term of twenty-one years, so as to bind the remainderman. (*In re Starkie*, 3 M. & Keen, 247; see *Cullum v. Upton*, 19 Law J., Chanc. 276.) By stat. 18 & 19 Vict. c. 13, the Lord Chancellor, in matters of lunacy, is enabled to empower committees of the estates of lunatics to grant leases binding on the issue or remaindermen.

Leases of lunatic's  
estate binding  
issue and re-  
maindermen.

### *Evidence of Consent of Lord Chancellor, &c. as Protector.*

49. Provided always, and be it further enacted, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind (u), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document, or instrument, as evidence of the consent of such protector to the disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

Order of the Lord  
Chancellor, &c.  
to be evidence of  
consent.

(u) See *ante*, p. 387, n. (g).

3 & 4 Will. 4,  
c. 74, s. 50.

### XIII. ESTATES TAIL IN COPYHOLDS.

#### *Qualified Application of previous Clauses to.*

The previous  
clauses to apply  
to copyholds,  
with certain  
variations.

50. All the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estates shall be merely an estate in equity, may be made either by surrender, or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained (v).

Entails in copy-  
holds.

(v) Copyholds are not within the stat. *De donis* (13 Edw. 1, c. 1; Cro. Car. 44, 45), and therefore not entailable, except by special custom; (*Doe v. Truby*, 2 W. Bl. 946; 3 Dougl. 803;) and where no such custom exists in the manor, the party, who would otherwise be tenant in tail, will take a fee simple conditional at common law. (*Doe d. Spencer v. Clark*, 5 B. & Ald. 458; *Simpson v. Simpson*, 4 Bing. N. C. 333; *Moore v. Moore*, 2 Ves. sen. 596; *Doe d. Blesard v. Simpson*, 3 Scott, N. R. 774; *Hardcastle v. Dennison*, 10 C. B., N. S. 606. See *ante*, p. 300.)

The testator having surrendered copyholds to the use of his will, devised them to trustees for sixty years, on certain trusts, subject to which he devised to H. for life, remainder to his first son in tail, with remainders over, with a proviso for cesser of the term. On the death of the testator, in 1813, the trustees were admitted and a fine was paid: the trusts of the term were satisfied. By a private act, the 7 & 8 Vict. c. xxiv, new trustees therein named were empowered to sell the copyholds, freed and discharged from the limitations of the will, and by any surrender by them made, according to the custom of the manor, and in the same manner as if they were the copyhold tenants of the same, to surrender them to the use of the purchaser, his heirs and assigns. No estate was given to the new trustees by the act: it contained a clause saving the rights of all persons except those interested under the will. The new trustees sold the copyholds, and tendered a surrender to the steward, which was refused, on the grounds that they must be admitted tenants of the manor before they could surrender, and that the estate tail could only be barred by surrender for that purpose, on which by the custom of the manor a fine would be due to the lord. The court thought the custom of the manor by no means showed the necessity of two surrenders, and in reference to sections 15, 22, 40, 42, 50 and 52 of 3 & 4 Will. 4, c. 74, it seemed clear that the tenant for life and remainderman in tail might (independent of the private act) by one surrender have barred the entail and conveyed to the purchaser, and that only one fine would in such case have been payable, it being always recollected that the tenant for life and remainderman had already been admitted by the operation of the admittance of the original trustees. (*Reg. v. Lords of the Manor of Weedon-Beck*, 18 Law J., Q. B. 289; 13 Q. B. 808.)

Old mode of bar-  
ring entails in  
copyholds.

Before the passing of this act there were several modes of barring entails in copyholds besides that by recovery:—By forfeiture and re-grant, a custom said to be peculiar to the manor of Wakefield; (*Pilkington v. Stanhop*, 1 Sid. 314; 2 Keb. 127;) although it seems that it would have been effectual if established in any other manor. (*Pilkington v. Bagsham*, Sty. 450; *Carr v. Singer*, 2 Ves. sen. 606.) Concurrent customs in a manor court to bar entails in copyholds, by recovery and by surrender, were good; (*Doe d. Wallhead v. Ossingbrooke*, 2 Bing. 70; *Everall v. Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe v. Truby*, 2 W. Bl. R. 944;) and slight evidence was held sufficient to prove the latter, because it was adverse to the interest of those who made the evidence. (*Doe d. Dauncey v. Dauncey*, 7 Taunt. 674. See *Roe d. Bennett v. Jeffrey*, 2 Maule & Selw. 92; *Doe v. Mason*,

3 Wils. 63.) And as a custom of entailing copyhold estates would create a perpetuity, unless there were some means devised to bar them, it has been adjudged, that where there was no custom to bar the entail by recovery, it might be barred by common surrender, or even by a surrender to the use of a will, (*Carr v. Singer*, 2 Ves. sen. 606,) by three judges, against the opinion of *Willes*, C. J., who thought a recovery was the proper method of barring the entail. The presumption is, that a surrender will bar an estate tail in copyholds until a contrary custom is shown. (*Goold v. White*, Kay, 683. See 1 Watk. on Cop. 178; Scriv. on Cop. pp. 44—56, 5th ed.) Before this act the same mode of barring an equitable entail in copyholds must have been pursued, as was required by the special custom of the manor for barring an entail in the legal estate. (3 Ves. 127; 8 Atk. 815; 1 Watk. on Cop. 180, 181.) It will be seen that, by this act, an equitable entail in copyholds may be barred either by surrender or by deed. (See *post*, s. 53, p. 352.)

3 & 4 Will. 4,  
c. 74, s. 50.

*Consent of Protector by Deed.*

51. Provided always, and be it further enacted, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless such deed shall be so executed and produced; and on the production of the deed the lord, or steward, or deputy steward, shall, by writing under his hand to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be *primâ facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds consents by deed to the disposition of a tenant in tail.

*Consent of Protector not by Deed.*

52. Provided always, and be it further enacted, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memo-

As to the consent of the protector of a settlement of copyholds when not given by deed, and the preserving of evidence of the same on the court rolls.

3 & 4 Will. 4,  
c. 74, s. 52.

random, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls, and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof (x).

Evidence of entry  
in court rolls.

(x) A copy of a court roll under the steward's hand is good evidence to prove the copyholder's estate: so an examined copy of the court roll is good evidence, if sworn to be a true one. (1 Keb. 567, 720; Comb. 138, 337; 12 Mod. 24; Bull. N. P. 247 a, 7th ed.) A surrender and admittance may be proved by the original entries made by the steward, without producing a copy stamped, as required by stat. 48 Geo. 3, c. 149. (*Doe d. Bennington v. Hall*, 16 East, 208.)

Where a surrender of a copyhold was duly made and presented by the homage, but no entry of such surrender and presentment was made on the court rolls, it was held that such surrender and presentment might be proved by a draft of an entry produced from muniments of the manor, and the parol testimony of the foreman of the homage who made such presentment. (*Doe d. Priestley v. Calloway*, 6 Barn. & Cress. 484.)

The provisions in stat. 48 Geo. 3, c. 149, ss. 32, 33, requiring every surrender of copyhold and admittance, &c., *made out of court*, or a memorandum thereof, to be stamped; and in case of a surrender, &c., *in court*, the steward to make and deliver to the tenant a stamped copy of the court roll; are merely revenue regulations, and not intended to vary the rules of evidence: and, therefore, a surrender and admittance out of court (presented and inrolled afterwards) may be proved by an examined copy of the court roll, without producing the original surrender, &c., or memorandum thereof. (*Doe d. Camthorn v. Mee*, 4 B. & Ad. 617.) An examined copy of court rolls is admissible in evidence to prove a surrender of copyhold lands, without being stamped; the provision in 55 Geo. 3, c. 184, as to copies of court rolls, applying only to such copies as are given out and signed by the steward. (*Doe d. Burrows v. Freeman*, 12 Mees. & W. 844.) In ejectment for copyholds, the court rolls of the manor, containing an entry of a presentment by the homage of a surrender to the plaintiff out of court, and of his admittance, are evidence of his title against the alleged surrenderor. (*Doe d. Garrod v. Olley*, 4 P. & Dav. 275; 12 Ad. & Ell. 481.)

### Disposition of equitable Estates Tail in Copyholds.

Power to equitable tenants in tail of copyholds to dispose of their lands by deed.

53. Provided always, and be it further enacted, that a tenant in tail of lands held by copy of court roll, whose estate (p) shall be merely an estate in equity, shall have full power by deed to dispose of such lands under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall

be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls (*y*), and it shall be imperative on the lord of the manor, or his steward or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor\* of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (*z*).

3 & 4 Will. 4,  
c. 74, s. 53.

\* *Lege manor.*

(*x*) It seems that the expression ought to have been "whose estate *tail* shall be merely an estate in equity." See the 50th section, *ante*, p. 350, which probably supplies the omission. (Sugd. Stat., p. 224, pl. 6, 2nd ed.)

(*y*) It seems to be the intention of the act that the deed of consent must be entered on the court rolls at or before the time when the principal assurance is so entered. (Dart V. & P. 632, note (*k*).)

In applying for a mandamus to the steward of a manor to inrol a deed of disposition pursuant to stat. 3 & 4 Will. 4, c. 74, s. 53, it is not necessary to annex a copy of the deed itself, if the contents are stated in the affidavit. (*Crosby v. Fortescue*, 5 Dowl. P. C. 275.)

(*z*) In commenting upon the proviso at the end of this section, Lord St. Leonards considers it probable that notice will not be held to supply in equity the want of an entry on the court rolls. (Sugd. Stat. 223, 2nd ed.)

This section only applies to equitable estates of tenants in tail of lands held by copy of court roll; the court, therefore, refused a mandamus to the lord of a manor, commanding him to enter on the court rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not inrol the deed by which they were granted. (*Reg. v. Ingleton (Lord of Manor)*, 8 Dowl. P. C. 693; 4 Jurist, 700. See *Carlisle v. Towns*, 2 B. & Ad. 585.)

This section does not extend to customary freeholds.

### *Dispensation with Inrolment.*

54. Provided always, and be it further enacted, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls (*a*).

Inrolment not necessary as to copyholds.

(*a*) A disentailing assurance, in order to operate upon copyhold lands under this act, must be entered on the court rolls within six calendar months

Entry on court rolls to be within six months.



3 & 4 Will. 4,  
c. 74, s. 54.

after the date of its execution, by analogy to the time within which an assurance affecting freehold lands is required to be enrolled in the Court of Chancery. (*Honeywood v. Foster*, 30 Beav. 1; 7 Jur., N. S. 1264; 30 Law J., Chan. 980; 9 W. R. 855; *Gibbons v. Snape*, 1 D., J. & S. 621. See sect. 41, *ante*, p. 345.) An indorsement by the steward of a manor at his residence, that the same was produced before him at his residence, is not a sufficient enrolment within the statute. (*Boyd v. Pawle*, 14 W. R. 1009.)

#### XIV. BANKRUPT'S ESTATE TAIL.

##### *Partial Repeal, 6 Geo. 4, c. 16.*

Repeal of the Bankrupt Act, 6 Geo. 4, c. 16, s. 65, so far as relates to estates tail, but not to extend to lands of a bankrupt under a commission or fiat issued on or before the 31st December, 1833, nor to revive former acts.

55. After the thirty-first day of December, one thousand eight hundred and thirty-three, so much of an act (6 Geo. 4, c. 16), as empowers the commissioners named in any commission of bankrupt issued against a tenant in tail to make sale of any lands, tenements and hereditaments, situate either in England or Ireland, whereof such bankrupt shall be seised of any estate tail in possession, reversion or remainder, and whereof no reversion or remainder is in the crown, the gift or provision of the crown shall be and the same is hereby repealed: provided always, that such repeal shall not extend to the lands, whatever the tenure may be, of any person adjudged a bankrupt under any commission of bankrupt, or under any fiat which, in pursuance of the said act (6 Geo. 4, c. 16), or of any former act concerning bankrupts, or of an act (1 & 2 Will. 4, c. 56), hath been or shall be issued on or before the thirty-first day of December, one thousand eight hundred and thirty-three: provided also, that such repeal shall not have the effect of reviving in any respect the acts repealed by the said act of the sixth year of the reign of King George the Fourth, or any of them (*b*).

Power of commissioners under former bankrupt acts.

(*b*) By stat. 6 Geo. 4, c. 16, s. 65, (re-enacting the 21 Jac. 1, c. 19, s. 12,) it was enacted, that the commissioners should, by deed indented and enrolled, make sale, for the benefit of the creditors, of any lands, tenements and hereditaments, situate either in England or Ireland, whereof the bankrupt is seised of any estate in tail in possession, reversion or remainder, and whereof no reversion or remainder was in the crown, the gift or provision of the crown; and every such deed should be good against the bankrupt, and the issue of his body, and against all persons claiming under him after he became bankrupt, and against all persons whom the said bankrupt, by fine, common recovery, or any other means, might cut off or debar from any remainder, reversion, or other interest in or out of any of the said lands, tenements and hereditaments.

Where a remainderman in tail became a bankrupt, the commissioners could only convey a base fee, and even where a joint commission issued against the tenant for life and the tenant in tail in remainder, it was held that the execution of the power by the commissioners operated separately on each estate; and that when executed, it could not do more than convey an estate for life and a base fee. (*Jervis v. Tayleur*, 3 B. & Ald. 557.)

A tenant in tail in remainder of copyholds became bankrupt, and by the custom the entail could not be barred until it fell into possession. The bankrupt obtained his certificate and purchased of his assignees his life estate only. On the subsequent death of the tenant for life, it was held that the assignees had then no power to bar the entail, and acquire the remainder in fee subject to the life estate sold to the bankrupt. (*Johnson v. Smiley*, 17 Beav. 223.)

Where there is no custom of entailing lands in a manor under a limitation to a man and the heirs of his body, he takes a fee simple conditional, which might have been conveyed during the life of the bankrupt by the commissioners under the provisions of the 18 Eliz. c. 7, s. 11; and notwithstanding his death before any such conveyance, the commissioners might execute a valid conveyance of such estate after his death, pursuant to stat. 1 Jac. 1, c. 15, s. 17. (*Doe d. Spencer v. Clark*, 5 B. & Ald. 458.) In that case it was observed by *Holroyd, J.*, that it was unnecessary to determine what would be the effect of a bargain and sale executed by the commissioners after the death of the bankrupt, in a case where, during his life, he had been seised of an estate tail. But it seems, by a recent case, (*Ex parte Somerville, In re Loscombe*, 1 Mont. & Ayr. 408,) that an estate tail passed by the common bargain and sale, which used to be made to the assignees; and that under the 65th section of 6 Geo. 4, c. 16, the commissioners could convey an estate tail, of which the bankrupt was seised, after his death, or if not, that the commissioners would be justified in executing such a conveyance, in order to have the question settled. See now 3 & 4 Will. 4, c. 74, s. 65, *post*.

3 & 4 Will. 4,  
c. 74, s. 55.

Power of commissioners after bankrupt's death.

Where a tenant in tail mortgaged his estate, and became bankrupt, it was held that the bargain and sale of the commissioners (under 21 Jac. 1, c. 19, s. 12) did not confirm the mortgage, and that the assignee took the estate discharged of the mortgage. (*Beck v. Welsh*, 1 Wils. 276. See *Fisher on Mortgages*, 645, 2nd ed.; *Sturgis v. Morse*, 2 D., F. & J. 223, and the remarks of *Turner, L. J.*, at p. 232.) But if the bankrupt had covenanted with the mortgagee for further assurance, a court of equity would compel the assignees either to redeem or be foreclosed, and execute proper conveyances to the mortgagee. (*Pye v. Daubuz*, 3 Br. C. C. 595; *Edwards v. Appleby*, 2 Br. C. C. 652, n.; *Cooté on Mortgages*, 214—222.) Where a trader sold an estate, and conveyed it as tenant in fee simple, with the usual covenant for further assurance, and became bankrupt, and it was afterwards considered that he was tenant in tail only, it was ordered that the commissioner should be at liberty to execute a deed of confirmation to the purchaser. (*Ex parte Fripp*, 1 De Gex, 293.) Under the 6 Geo. 4, c. 16, s. 65, the equitable mortgagee of a bankrupt tenant in tail was entitled to have his lien made good as against the fee simple of the premises of which the bankrupt was seised in tail. (*Ex parte Wise*, 1 Mont. & M. 65.) See now 3 & 4 Will. 4, c. 74, s. 62, *post*.

Voidable estates created by bankrupt.

The stat. 6 Geo. 4, c. 16, s. 70, did not enable the assignees of a bankrupt mortgagor to revest the legal estate in themselves by tender or payment to the mortgagee after the day on which, by the deed, the mortgage becomes absolute in default of payment; though a tender or payment before the day will, under that section, vest the legal estate in them. (*Dunn v. Massey*, 6 Ad. & El. 479; 1 Nev. & P. 578.) Where a legal mortgage was executed by the bankrupt in pursuance of a previous equitable mortgage, but not till after the mortgagee had notice of the act of bankruptcy, and was consequently an unavailable security: it was held, that it did not operate as a merger of the equitable mortgage, and that the party was entitled to the usual order as equitable mortgagee. (*Ex parte Harvey, Re Emery*, 3 Dea. 547; 4 Dea. 52; see *Ex parte Haines, Re Barnett*, 4 Dea. 20.) Although an equitable mortgagee gives notice to the tenant to pay him the rent, he does not thereby entitle himself to the rent accruing before the order for sale. (*Ex parte Scott, Re Pearson*; *Ex parte Burrell, Re Norman*, 3 Dea. 76; *Ex parte Somerville*, 3 Dea. & Ch. 668; 1 Mont. & A. 408.) Where the deposit was of deeds conveying an equity of redemption of premises in fee, of which the party subsequently paid off the mortgage, it was held that the creditor was entitled to the full benefit of the security so exonerated; so also of shares in estates at the time of the deposit undivided, but for the equality of partition of which the bankrupt had subsequently paid a consideration, and acquired the entirety of a portion. (*Ex parte Bisdée*, 1 Mont., D. & D. 333.) Where the mortgage deed contained a covenant not to call in the mortgage money for five years, if the interest was paid regularly, it was held that, on the bankruptcy of the mortgagor, the mortgagee claiming to prove was entitled to the usual order of sale. (*Ex parte Bignold*, 3 Dea. 151; 3 Mont. & A. 447; see *Ex parte Jones*,

Mortgages of bankrupt's estate.

3 & 4 Will. 4,  
c. 74, s. 55.

4 Dea. 750.) See further as to mortgages existing on the estate of a bankrupt, Robson on Bankruptcy, 256 *et seq.*, 2nd ed.

### *Actual Tenant in Tail.*

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector (c).

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under subsequent bankruptcy acts.

(c) By 12 & 13 Vict. c. 106, s. 208, such of the clauses of the act 3 & 4 Will. 4, c. 74, as are numbered respectively in the copies of that act printed by her Majesty's printers, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 71, 72, 73, shall extend and apply to proceedings in bankruptcy under a petition for adjudication of bankruptcy as fully and effectually as if those clauses were re-enacted in this act and expressly extended to such proceedings.

Sect. 25 of the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), empowers the trustee of the bankrupt's estate to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same. And the same section provides that sects. 56—73 (both inclusive) of 3 & 4 Will. 4, c. 74, shall extend and apply to proceedings in bankruptcy under the Bankruptcy Act, 1869, as if those sections were there re-enacted and made applicable in terms to such proceedings.

It would seem that under 32 & 33 Vict. c. 71, the trustee can exercise those powers of disposition which by 3 & 4 Will. 4, c. 74, were given to the commissioners after the bankrupt's death. (See sect. 65, *post.*) Robson on Bankruptcy, 369, 2nd ed.

By 24 & 25 Vict. c. 134, s. 115, it was enacted, that where, under any settlement or will, a bankrupt non-trader should be entitled to a life estate in remainder expectant upon the death or deaths of any previous tenant or

tenants for life, with any remainder over to the bankrupt's issue, or the heirs of his body or any of them as purchasers, the life estate of such bankrupt non-trader should not be sold before it fell into possession without an express direction of the court.

8 & 4 Will. 4,  
c. 74, s. 56.

*Base Fee.*

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created ; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

Commissioner in case of a tenant in tail entitled to a base fee becoming bankrupt, and of there being no protector, by deed to dispose of the lands of the bankrupt to a purchaser.

*Consent of Protector.*

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector ; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act with the consent of such protector ; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the enrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected,

As to the consent of the protector in case of bankruptcy.

3 & 4 Will. 4. 4, shall, except so far as the same may be varied by the clause next  
c. 74, s. 58. hereinafter contained, apply to every consent that may be given  
 by virtue of this present clause.

*Inrolment, &c. of Deeds of Disposition and Consent.*

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

59. Every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

*Enlargement of Base Fees.*

Subsequent enlargement of base fees created by the disposition of the commissioner.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

*Enlargement of Base Fees subsequent to Conveyance.*

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of



King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

3 & 4 Will. 4,  
c. 74, s. 61.

*Confirmation of voidable Estates.*

62. Provided always, and be it further enacted, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

3 & 4 Will. 4,  
c. 74, s. 62.

such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this act : provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him (*d*).

(*d*) See note to sect. 55, *ante*, p. 355.

### *Avoidance of Acts of Bankrupt.*

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

### *Powers of Bankrupts reserved, where.*

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

64. Provided always, and be it further enacted, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt (*e*).

*Davis v. Tolle-mache.*

(*e*) A., in November, 1841, mortgaged estates of which he was tenant in tail in remainder, and the indenture, which was not enrolled, contained the usual covenant for further assurance. In September, 1842, A. was adjudicated a bankrupt, and subsequently received his certificate. In July, 1855, an order was made which declared that A. was entitled to two parts of the estates in S., and that they were comprised in the mortgage deed. A disentailing assurance was in February, 1856, tendered by the mortgagee to A. for execution, but he refused to execute it; and thereupon a bill was filed against A. and his assignees in bankruptcy, praying that it might be decreed pursuant to his covenant for further assurance, to execute and deliver to the plaintiff a proper disentailing assurance of all the hereditaments in S., to which he was entitled for an estate in tail male. A demurrer to the bill by A. was allowed, and the bill was subsequently dismissed. (*Davis*

*v. Tollemache*, 2 Jur., N. S. 1181.) It seems that, unless there be words in a conveyance to show it was intended that the covenant for further assurance should extend to enlarging the estate conveyed, and to barring an interest in other persons than the grantor, the court will not resort to its extraordinary jurisdiction for specific performance to compel the grantor to execute an assurance of a kind that was not contemplated when the grant was made. (*Ib.*) *Stuart*, V.-C., said, "What the intention of the legislature was in passing this particular clause I cannot exactly define, but it is perfectly plain that it reserved to the bankrupt, from the operation of the bankrupt laws, an extraordinary power which, but for this clause, he could not have had. In case the deed had contained a specific covenant for barring the entail, he was by no means prepared to say that upon the construction of this section it is not possible that at law the bankrupt might have been liable for damages for non-execution of that covenant. But his impression was that the right to recover upon a covenant expressly to execute a disentailing deed, and a right to recover damages for the non-execution of a disentailing deed, such non-execution being averred as a breach of the covenant for further assurance, are entirely different things." (*Davis v. Tollemache*, *Ib.* 1185.)

8 & 4 Will. 4,  
c. 74, s. 64.

*Disposition where Bankrupt is dead.*

65. Any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition (*f*).

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be dead, have in the cases herein mentioned the same operation as if he were alive.

(*f*) See note to sect. 55, *ante*, p. 355.

*Disposition of Copyholds.*

66. Every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as

Every disposition by the commis-

3 & 4 Will. 4,  
c. 74, s. 68.

stioner of copyhold lands where the estate shall not be equitable, to have the same operation as a surrender; and the person to whom such land shall have been disposed of may claim to be admitted on paying the fines, &c.

As to copyholds and customary lands of bankrupt.

aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted (g).

(g) See 12 & 13 Vict. c. 106, s. 210. By 24 & 25 Vict. c. 134, s. 114, the Court of Bankruptcy shall have power to dispose for the benefit of the creditors of any estate or interest, at law or in equity, which at adjudication or afterwards before order of discharge a bankrupt has in any copyhold or customary land, and to make an order vesting the land or such estate or interest as the bankrupt has therein, in such person and in such manner as the court shall direct. It was held under this section that a bankrupt's assignees were necessary parties to a bill for specific performance of an agreement to execute a mortgage of the bankrupt's copyholds. (*Poole v. Bursell*, 10 W. R. 861.)

Sect. 22 of the Bankruptcy Act, 1869, enacts, that where any portion of the bankrupt's estate consists of copyhold or customary property or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if such property had been capable of being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted or otherwise invested with the property accordingly.

### *Rents, Covenants, and Conditions.*

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposition, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in

evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents and servants, shall also have all such and the same remedies, powers, privileges and advantages of pleading, avowing and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof as landlords, their bailiffs, agents and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt: provided always, that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

3 & 4 Will. 4,  
c. 74, s. 67.

*Clauses as to Bankrupts to apply to their Lands in Ireland.*

68. All the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland (*h*).

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

(*h*) Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (*i. e. issued under Irish stat. 11 & 12 Geo. 3, c. 8,*) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and

Provisions of the Irish Act as to bankrupts apply to their lands in England.



3 & 4 Will. 4,  
c. 74, s. 68.

effectually as if the act had throughout extended to land of any tenure in England.

### *Inrolment of Deeds in Ireland.*

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

69. Provided always, and be it further enacted, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England (*i*).

Deeds relating to Irish bankrupts' lands in England to be inrolled in Court of Chancery there.

(*i*) The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

## XV. MONEY TO BE LAID OUT IN LANDS TO BE ENTAILED.

### *Repeal of Stat. 7 Geo. 4, c. 45.*

Repeal of the statute 7 Geo. 4, c. 45, except as to proceedings commenced before 1st January, 1834.

70. After the thirty-first day of December, one thousand eight hundred and thirty-three, an act (7 Geo. 4, c. 45), shall be and the same is hereby repealed, except as to such proceedings under the act hereby repealed as shall have been commenced before the first day of January, one thousand eight hundred and thirty-four, and which may be continued under the authority and according to the provisions of the act hereby repealed: provided always, that the act (39 & 40 Geo. 3, c. 56) repealed by the said act of the seventh year of the reign of his late Majesty King George the Fourth shall not be revived (*k*).

39 & 40 Geo. 3, c. 56, not to be revived.

Old mode of barring estates tail in entailed money.

(*k*) Money directed to be laid out in the purchase of land is considered by a court of equity as converted into real estate. Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery. This inconvenience was removed by the two acts mentioned in this section, which provided that in all cases where money under the control of any court of equity, or of which trustees were possessed, should be subject to be invested in the purchase of freehold or copyhold lands, to be settled in such manner that it would be competent for the persons who would be the tenants in tail of any estate therein, either alone or with the owners of any particular preceding estates therein, to bar such estates tail and remainders, it should not be necessary to have such money actually invested in lands, but a court of equity, on the petition of the person who would be tenant of such estates tail and the party having any antecedent estates (being adults, or *femes covert* separately examined), might order such money to be paid to them, or applied as they should appoint. The order under the act, if made in vacation, was to take effect only in case the party should be living on the

second day of the ensuing term. (5 Ves. 12; 6 Ves. 116.) The order would not have been made in term unless there were time to suffer a recovery, (8 Ves. 609,) nor in any case, without a reference to the master to inquire whether the parties had incumbered their interests in the money. (6 Ves. 576.) But where the fund was subject to charges, the court would order it to be transferred to the tenant in tail, after providing for such charges. (*In re Lord Somerville*, 2 Sim. & Stu. 470. See other cases which arose under the 7 Geo. 4, c. 45, in 3 Russ. 369, 416; 5 Russ. 5.) The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stat. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45, after the 31st October, 1834, except as to proceedings commenced before 1st November, 1834.

3 & 4 Will. 4,  
c. 74, s. 70.

*Mode of Disposition of entailed Money.*

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of land to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

8 & 4 Will. 4,  
c. 74, s. 71.

Object of this  
section.

inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll (1).

(1) The object of this section is to make the substitute for fines and recoveries applicable to money to be laid out in land to be entailed, and to allow it to be unfettered by the same process as the land itself would be if purchased. When by means of the substitute the money is discharged from the entail and remainder, or, as may sometimes happen, from an entail only, the trustees will, if the money should be discharged from all interests and charges subsequent to the entail, and there should be none such subsisting, either upon the interest in tail, or prior thereto, pay it over immediately to the person barring the entail, and will, if there should be any interests and charges still subsisting, hold it in trust for the person barring the entail, and the persons entitled to such interests and charges. If the money should be in court, it may be paid upon application to the court, on producing evidence that the person barring the entail is entitled to receive it. (See 1 Real Property Rep. 36.) For the earlier cases, see 1 L. C., Eq. 867, 4th ed.; and as to entailed money, see also *Mosley v. Ward*, 29 Beav. 407.

Fund in court.

An order was made for payment out of court of a sum of stock, of which the petitioner was *quasi* tenant in tail in possession under a settlement, on his producing the deed inrolled, or an affidavit of the inrolment of the deed, whereby, in pursuance of the provision of this section, he had barred the estate tail and remainder over in the stock in question. (*In re Smythe*, 8 M. & Keen, 249.) A. being entitled as *quasi* tenant in tail to a sum of stock, executed a disentailing deed, which was duly inrolled in Chancery, and presented a petition for the transfer of the stock. This deed was produced at the hearing of the petition, with the certificate of the clerk of inrolments indorsed, but no evidence was given of the execution of the deed. It was held, that the petitioner's title was not made out by the production of the deed, and that evidence of his execution of the deed ought to be given. (*Bishop v. De Burgh*, 15 L. J., Ch. 35.)

Fund in court  
paid out to tenant  
in tail without  
disentailing deed.

Where a tenant in tail became entitled to a fund in court under 200*l.*, it was paid out to him without a disentailing deed. (*Sonry v. Sonry*, 8 W. R. 339.) Where the fund in court exceeded 200*l.*, a disentailing deed was in one case required. (*Re Tylden's Trust*, 11 W. R. 869.) But it appears now to be generally dispensed with. (*Re Tyler's Estate*, 8 W. R. 540; *Re South Eastern R. Co.*, 30 Beav. 215; *Re Holden*, 1 H. & M. 445; *Notley v. Palmer*, L. R., 1 Eq. 241.) For the practice in Ireland, see *Ex parte Maunsell*, L. R., 2 Eq. 32.

Costs of deed.

Where the money had been paid into court by a company and a disentailing deed had been executed, the company was ordered to pay the costs of the deed. (*Re Brooking*, 2 Giff. 31; *Re North Staffordshire R. Co.*, 3 Giff. 224.) The deed must be made an exhibit: an affidavit proving its execution is not sufficient. (*Re Field*, 11 W. R. 927.)

Evidence.

The entail of lands to be purchased with rents hereafter to become due to trustees may be barred under this section. (*Fordham v. Fordham*, 34 Beav. 59.)

### Entailed Money—Ireland.

Lands of any  
tenure in Ireland,  
to be sold, where  
the purchase-  
money is subject  
to be invested in  
the purchase of  
lands to be en-  
tailed, and money  
under the control  
of a court of  
equity in Ireland,  
subject to be in-  
vested in like  
manner, to be

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subjected to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be pos-

essed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland: saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold (*m*).

8 & 4 Will. 4,  
c. 74, s. 72.

subject to this act  
in cases of bank-  
ruptcy.

(*m*) This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

## XVI. THE INROLMENT OF DEEDS, &c.

73. Any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland (*n*).

As to deeds being  
acknowledged  
before inrolment.

(*n*) The stat. 12 & 13 Vict. c. 109, ss. 17, 18, directs a seal to be provided for the inrolment office, and certificates of inrolment to be written upon every deed to be inrolled, which certificates, when sealed, are to be admitted as evidence.

By the Irish Act, 4 & 5 Will. 4, c. 92, s. 73, it is provided that any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

### *Relation back of inrolled Deeds.*

74. Every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled (*o*).

Every deed to be  
inrolled by which  
lands or money  
shall be disposed  
of under this act,  
to take effect as  
if inrolment not  
required.

(*o*) See sect. 41 (*ante*, p. 345). Sect. 74 will render it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. A bargain and sale when

8 & 4 Will. 4,  
c. 74, s. 74.

Section does not  
apply to disentail-  
ing deeds executed  
by successive  
tenants in tail.

acknowledged and inrolled, has relation to the time of execution, and if the grantee dies within six months, and afterwards it is acknowledged and inrolled, it is good, because it is a collateral act required by act of parliament, and not arising from the nature of the instrument itself. (2 Ves. sen. 79. See Com. Dig. Bargain and Sale (B. 9).)

It has been held, under the corresponding section of the Act for the Abolition of Fines and Recoveries in Ireland (4 & 5 Will. 4, c. 92, s. 66), that this section applies only to disentailing deeds executed by the same tenant in tail, and not to deeds executed by successive tenants in tail. Therefore where A., a tenant in tail, executed a disentailing deed, which was inrolled within the six months prescribed by the statute, but not until after A.'s death, and B., a succeeding tenant in tail, executed a disentailing deed to a purchaser for value after A.'s death, which was inrolled prior to the inrolment of the deed executed by A.: it was held by the Court of Appeal, that the deed executed by A. was entitled to priority over the deed executed by B. (*Re Piers' Estate*, 14 Ir. Ch. R. 452.)

### *Fees on Inrolment of Deeds.*

The Court of  
Chancery to regu-  
late the fees to be  
paid for the in-  
rolment of deeds,  
&c.

75. It shall be lawful for his Majesty's High Court of Chancery in England, as to deeds to be inrolled in England under this act, and for his Majesty's High Court of Chancery in Ireland, as to deeds to be inrolled in Ireland under this act, from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the inrolment of such deeds (*p*), and to be paid for searches for such deeds in the office of inrolments, and to be paid for copies of the inrolment of deeds under this act, where such copies are examined with the inrolments, and signed by the proper officer having the custody of such inrolments.

(*p*) It is understood that no order has been made as to the fees; the charge now made for inrolling deeds in Chancery is about 1s. per folio.

The Court of  
Common Pleas to  
regulate the fees  
for entries on  
court rolls and in-  
dorsements on  
deeds, and for  
taking consents,  
&c.

76. It shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls.

## XVII. OF ALIENATION BY MARRIED WOMEN.

### *General enabling Clause.*

A married  
woman, with her  
husband's con-  
currence, to dis-  
pose of lands and  
money subject to

77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act (*q*), by deed



to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*r*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole (*s*), save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this act shall not extend to lands held by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

8 & 4 Will. 4,  
c. 74, s. 77.

be invested in the purchase of lands, and of any estate therein; and to release and extinguish powers as a feme sole.

Not to extend to copyholds in certain cases.

(*q*) See section 40, *ante*, p. 343.

(*r*) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim."

(*s*) Sir *J. Romilly*, M. R., was of opinion that on principle and preponderance of authority it is established that before this statute a fine was necessary to pass the interest of a married woman in that part of her fee simple estate which did not belong to her husband, and that since this statute an acknowledgment under this section is necessary for that purpose, notwithstanding that the estate of the wife is given to her separate use. A married woman may dispose of her life interest in real estate given to her for her separate use, and which she is not restrained from anticipating, and also of her absolute interest in personalty, whether in possession or reversion, without a deed acknowledged. (*Lechmere v. Brotheridge*, 32 Beav. 353.) In *Adams v. Gamble*, (12 Ir. Ch. R., N. S. 102,) it was held that a married woman could dispose of freeholds settled to her separate use as if she were a feme sole without an acknowledgment under the statute. It is now settled that a married woman having realty settled to her separate use in fee and not restrained from alienation, has, in equity, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* (not acknowledged under this act) or by will. (*Taylor v. Meads*, 13 W. R. 394; *Hall v. Waterhouse*, 5 Giff. 64; *Pride v. Bubb*, L. R., 7 Ch. 64.)

Acknowledged deed not necessary in equity to pass realty settled to separate use of married women.

Assuming that between the passing of this act and the 7 & 8 Vict. c. 76, (see 8 & 9 Vict. c. 106, s. 6, *post*,) a man or a feme sole could not by any means effectually dispose at law of a contingent remainder in fee by act *inter vivos*, except by estoppel by means of a false recital, still, upon the true construction of 8 & 4 Will. 4, c. 74, a married woman could convey such an estate by deed acknowledged. And, supposing such a deed could not operate so as to pass the legal estate, still, if made for a valuable consideration, it would be good to confer an equitable title by way of contract, for this act gives a married woman power, with the concurrence of her husband, to contract by an acknowledged deed, so as to bind her real estate, though not herself personally. (*Crofts v. Middleton*, 2 Jur., N. S. 528; 25 L. J., Ch. 513; 8 De G., M. & G. 192.) As to the contracts of a married woman affecting real estate not settled to her separate use, see *Nicholl v. Jones*, L. R., 3 Eq. 696; *Barnes v. Wood*, L. R., 8 Eq. 424; *Castle v. Wilkinson*, L. R., 5 Ch. 534; *Pride v. Bubb*, L. R., 7 Ch. 64.

Conveyance of contingent remainder by deed acknowledged.

Power to contract.

3 & 4 Will. 4,  
c. 74, s. 77.

Married woman a  
lunatic.

Court will not  
supply want of  
acknowledgment.

Acknowledgment,  
&c. dispensed  
with by statute.

Purchase-money  
in court belong-  
ing to married  
woman.

Proceeds of real  
estate and charges  
on land.

By 8 & 9 Vict. c. 106, contingent and other like interests, and also rights of entry, may be disposed of by deed; but every such disposition by a married woman must be conformable to the provisions of this act. (See *post*.)

Sect. 116 of 16 & 17 Vict. c. 70, which enables the Lord Chancellor to direct the committee of a lunatic on a sale to make a conveyance of the lunatic's property "in the name and on behalf of the lunatic," does not authorize an order for such committee to convey the legal estate of a married woman, which, if sane, she could only dispose of by a deed acknowledged under this statute. (*Re Stables*, 12 W. R. 513.)

A lease by a husband and wife of the wife's lands, not acknowledged by her, was held binding on the lessee. (*Toler v. Slater*, L. R., 3 Q. B. 42.)

The Court of Chancery will not supply the want of an acknowledgment of a deed by a married woman; to do so would deprive married women of that protection which the law has thrown round them. (*Lassence v. Tierney*, 14 Jur. 182, 186; 1 Mac. & G. 551; see p. 572.)

Where an act of parliament authorizes the purchase of lands in which a *feme covert* is interested, and gives the Court of Exchequer authority to distribute the purchase-money amongst the parties beneficially entitled thereto, the exercise of that authority by the court is in lieu of the solemnities ordinarily required for the conveyance of the real property of a *feme covert*, or on payment of her money out of court. (*Ex parte Ellison, Re Trinity House Corporation Act*, 2 Y. & Coll. 528.)

Purchase-money of real estate belonging to a married woman, which has been paid into court, may be paid out to her upon her examination without a deed acknowledged. (*Re Hayes*, 9 W. R. 769. See *Re Trevelyman*, 31 L. J., Ch. 560; *Gibbons v. Kibbey*, 10 W. R. 55; *Clark v. Clark*, 14 W. R. 449; *White v. Herrick*, L. R., 4 Ch. 345.) Where the fund is small the examination will be dispensed with. (*Re Clarke's Estate*, 13 W. R. 401; *Knapping v. Tomlinson*, 18 W. R. 684.)

The definition of the word "estate," in the interpretation clause (*ante*, p. 298), taken in connection with this section, enables a married woman by deed acknowledged to dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity. (*Briggs v. Chamberlain*, 11 Hare, 74.)

Where a married woman was entitled to a fund to be raised out of real estate on the death of a tenant for life, it was held that a deed executed during the lifetime of the tenant for life, by her and her husband, and the parties entitled to the estate, and acknowledged by her under this act, would not bar her right. (*Hobby v. Allen*, 15 Jur. 835; 20 Law J., Chanc. 199; 4 De G. & Sm. 289. But it has since been decided that a married woman may convey a reversionary interest in a sum of money the produce of real estate directed to be sold by trustees after the death of the tenant for life. (*Tuer v. Turner*, 20 Beav. 560; 24 Law J., Chanc. 663. See *Cooke v. Williams*, 11 W. R. 504.) The interest of a married woman in the proceeds of real estate devised by the will under which she took such interest, upon trust for sale, was held to pass by her deed executed and acknowledged according to the provisions of this statute, whether such interest be in possession or reversion, and whether the sale of the real estate be or be not made. (*Briggs v. Chamberlain*, 11 Hare, 69. See also *Cooke v. Williams*, 11 W. R. 504; *Bowyer v. Woodman*, L. R., 3 Eq. 313.)

Land was held by the trustee of a will upon trust for sale and for immediate division of the proceeds among the testator's children, two of whom were married women. By a deed in which the *cestui que trusts* joined, the trustee became the purchaser of the estate at the price therein named. The two married women and their husbands concurred in the deed, but it was not acknowledged under this act; and the husbands received their wives' shares of the purchase-money. Held, that the deed was inoperative against one of the daughters who had survived her husband. (*Franks v. Bollans*, L. R., 8 Ch. 717.)

R., being entitled to a sum of money charged on land, on his marriage with E. assigned the money to trustees on trust to pay the income to himself for life, and after his decease to E. for life, and after the decease of the survivor upon certain trusts for the children of the marriage. R. died,

leaving E. surviving, who married again. The money was subsequently raised and paid to the trustees of the settlement executed upon the first marriage. E. and her husband joined in assigning her life interest in the income by deed duly acknowledged under this statute. Held, that the charge having been paid off and converted into a money fund in the hands of the trustees, the assignment had not the effect under this section of barring the wife's contingent right by survivorship. (*Re Algeo*, I. R., 2 Eq. 485.)

3 & 4 Will. 4,  
c. 74, s. 77.

As to the effect of fines under the old law, see *May v. Roper*, 4 Sim. 360; *Forbes v. Adams*, 9 Sim. 462.

Soon after the passing of this act doubts were raised whether under this clause a married woman could extinguish her right of dower. The question could apply only to women who were married before the 1st January, 1834, and whose rights of dower are saved by stat. 3 & 4 Will. 4, c. 105, s. 14. (See the word "estate" in the interpretation clause, *ante*, p. 298; Co. Litt. 345 b.) Sir E. Sugden observes (Sugd. on Stat. 234, 2nd ed.), the Dower Act (3 & 4 Will. 4, c. 105) does not prevent a married woman, with the concurrence of her husband, from barring her dower; but the statute 3 & 4 Will. 4, c. 74, has abolished the only modes by which that could have been accomplished. In framing the present section, the right of dower is not scientifically provided for, but the intention is obvious, and the married woman is empowered to extinguish any estate which she has in the lands; and the word "estate" is, by the first section, extended to any interest in lands, and a power, therefore, does appear to be given to married women and their husbands to bar dower.

Dower.

By a deed to which a husband and wife were parties, the equity of redemption of the husband was conveyed in certain lands. The deed recited that the husband and wife had both agreed to join in it, and also that the wife intended to acknowledge it in compliance with this act; and it was executed by both husband and wife, and duly acknowledged by the wife, but her name was not inserted as a co-grantor, nor in the covenants for title. Held, that, notwithstanding the omission, the wife had extinguished her right to dower. (*Dent v. Clayton*, 12 W. R. 903.)

A married woman can elect so as to affect her interest in real property, without deed acknowledged under this act, and where she has so elected, the court can order a conveyance accordingly, the ground of such order being, that no married woman shall avail herself of fraud. (*Barrow v. Barrow*, 4 Kay & J. 409; 4 Jur., N. S. 1049; 27 L. J., Ch. 678; *Griggs v. Gibson*, L. R., 1 Eq. 685.)

Election.

Doubts were entertained whether a married woman could disclaim, by a deed acknowledged according to this act. (See 4 Cruise Dig. 19, 7 ib. 13.) The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of." By 8 & 9 Vict. c. 106, s. 7, a married woman may disclaim by deed made conformable to this act.

Disclaimer by  
married women.

The old doctrine was, that an estate of freehold could be disclaimed only by matter of record. (*Butler and Baker's case*, 3 Rep. 26.) But it is established by modern authorities that a deed is sufficient for that purpose. Although a devise, being *prima facie* for the devisee's benefit, is supposed to be accepted by him until he does some act to show his dissent, yet he may by deed under his hand and seal, without matter of record, renounce the estate, and make it as to him null and void. (*Townson v. Tickell*, 3 B. & Ald. 81.) This case has been followed in a case where a deed of disclaimer by a devisee in trust of freehold and copyhold property was held to vest the entire legal estate in his co-trustees. (*Begbie v. Crook*, 2 Bing. N. C. 70; 2 Scott, 128; and see observations on *Townson v. Tickell*, in 4 M. & R. 189, and in 2 Scott, 130.)

Disclaimer gene-  
rally.

It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, because such deed is clear evidence of the disclaimer, and admits of no ambiguity; but there may be conduct which amounts to a clear disclaimer. As where a person named as executor and trustee under a will did not formally renounce probate until after the death of the acting executrix, nor did he ever disclaim by deed the trust of the real estate; but he purchased a part of the real

8 & 4 Will. 4,  
c. 74, s. 77.

estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended, upon the disclaimer of the trust. During the life of the acting executrix, however, he interfered in the disposition of the testator's property, as her friend or agent: it was held, that he was not under the circumstances chargeable as executor or trustee. (*Stacey v. Elph*, 1 Mylne & Keen, 195.) A disclaimer by one of the three executors of a will, who were directed to sell copyholds by a deed executed some time after the sale, reciting that he had from the testator's decease declined to act, and had never acted in the executorship or trusts of the will, was held to be a refusal *ab initio*, there being nothing to impeach the *bona fides* of the transaction. (*Peppercorn v. Wayman*, 5 De G. & S. 280; 21 Law J., Chanc. 827. See *Harris v. Watkins*, 2 Kay & J. 473, as to presuming a disclaimer by a devisee.) A disclaimer by two out of three joint tenants surrenderees of certain copyhold lands belonging to a manor, executed before the admittance of the remaining joint tenant, but after the exercise by all the three of various acts of ownership over the estate, is void. (*Bence v. Gilpin*, L. R., 3 Ex. 76.)

An interest devised vests in the devisee by presumption of law before entry. (Co. Litt. 111 a.) Where the devisee of an estate refused to take it saying she was entitled, as heir at law, and would not accept any benefit by the will of the devisor: it was held, that this was not such a disclaimer as prevented her from afterwards bringing an ejectment on her title as devisee. (*Doe d. Smyth v. Smyth*, 6 B. & C. 112; 9 D. & R. 136.) In the last case it was said by the court not to be necessary to decide whether the renunciation and disclaimer may be by parol; because in whatever form they are made, a disclaimer of an estate in land must be clear and unequivocal. (*Ib.* 117.) It seems that a devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted. (*Rea v. Wilson*, 10 B. & C. 5; 5 M. & R. 140; see Shepp. Touchs. 452.) A gift of personal chattels, as well as a lease for a term of years, may be waived and avoided by parol. (1 Ventr. 128.) On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman. (*Ib.* 116.) And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other. (*Smith v. Wheeler*, 1 Vent. 128; 2 Keb. 772.) The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively. (*Small v. Marwood*, 9 B. & C. 300; *Browell v. Reed*, 1 Hare, 435.) At the reading of a testator's will after his death, which devised lands upon certain trusts, the devisee in trust said, "I ought to have had 5*l.* for being trust." The trustee, by deed executed sixteen years after the testator's death, had disclaimed all the property devised by the will, with all the trusts thereof. It was left to the jury to decide whether the trustee had assented to the devise; but the court held, that the above expression was so ambiguous, that it ought not to have been left to the jury as evidence importing the trustee's assent to the devise. Unless there was unequivocal evidence of assent, the subsequent disagreement by deed of disclaimer would avoid the estate *ab initio*, and vest the legal estate in the other trustee; so that, as his heirs had disclaimed, it would revert to the heir at law of the testator. (*Doe d. Chidgey v. Harris*, 16 Mees. & W. 517.)

The execution of a conveyance of trust premises has been held sufficient evidence of acceptance of the trust. (*Urch v. Walker*, 3 Myl. & C. 702.) In *Crewe v. Dickinson*, (4 Ves. 97,) one of two trustees released and conveyed to his co-trustee, and he having sold, the trustee who had released refused to join in the receipt for the purchase-money: and it was held, that the trustee must be considered as having accepted the trust, he having conveyed and released to his co-trustee, and that the purchaser was not bound to accept the title. With reference to the last case Lord Eldon said (2 Swanst. 370), "If the essence of the act is disclaimer, and if the point were *res integra*, I should be inclined to say, that if the mere fact of disclaimer is to remove all difficulties, and vest the estate in the other trustees, a party who releases, and thereby declares that he will not take as trustee, gives the best evidence that he will not take as trustee. The answer that the release amounts to more than a disclaimer, is much more technical than

any reasoning that deserves to prevail in a court of equity." And his lordship expressed an opinion, that if a person who is appointed co-trustee by any instrument, executes no other act than a conveyance to his co-trustees, where the meaning and intent of that conveyance is disclaimer, the distinction is not sufficiently broad to act upon. (*Nicholson v. Wordsworth*, 2 Swanst. 371.) But a trustee of real estate, who disclaimed all estate, powers, &c. in the estate devised, was held not to be a necessary party in a conveyance to a purchaser, nor in a receipt for the purchase-money. (*Adams v. Taunton*, 5 Madd. 433. See, in addition to the cases cited, Litt. ss. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113 a; *Bonifant v. Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.* 4 Leon. 207; *Hawkins v. Kemp*, 3 East, 410; *Thomson v. Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holt, 665.) It was held, that a discretionary power given to two trustees to sell copyholds, one of whom disclaimed, might be exercised by the other trustee. (*Affleck v. James*, 13 Jur. 739.) Trustees who declined to act have been directed to convey by the Court of Chancery. (*Attorney-General v. Doyley*, 2 Eq. Cas. Abr. 194; *Hussey v. Markham*, Rep. temp. Finch, 258.) In these cases the trustees were discharged from the trusts by force of the decree, and therefore an acceptance could not be inferred from the form of the instrument. In *Sharp v. Sharp*, (2 B. & Ald. 405,) it was held that trustees had not acted, though they had conveyed the estate instead of disclaiming.

3 & 4 Will. 4,  
c. 74, s. 77.

A *feme covert* made a disposition of property, as to which it was doubtful whether it was settled to her separate use. The husband disclaimed: it was held, that, whether separate property or not, the husband's disclaimer gave effect to the disposition of the wife. (*Rycroft v. Christy*, 3 Beav. 238.) See further as to disclaimer, Lewin on Trusts, 161 *et seq.*, 5th ed.

Powers are either appendant or in gross, or altogether collateral; appendant, when the exercise of them is in the first instance to interfere with, and to a certain extent, to supersede, the estate of the donee of such power; in gross, when they do not commence until the determination of the estate of the donee; and collateral, when the donee has no estate at all in the property which is the subject of the power. A power reserved to a tenant for life to make leases in possession is appendant; for, by the exercise of it, the term created by it necessarily precedes the estate of the tenant for life, to whom it is reserved. A power to a tenant for life to jointure is a power in gross; for the jointure created by it must necessarily take effect after the death of the particular tenant. Where an estate is limited to the use of A. for life, with remainders over to other persons, and with a power of revocation and new appointment reserved to A., this power is both appendant and collateral. It is appendant as to the estate for life of A., and collateral as to the estates in remainder. A power wholly collateral is reserved to a stranger, having no legal estate in the property settled. As where an estate is limited in strict settlement, and a power is reserved to a stranger to revoke the existing uses, and limit new ones. (1 Sand. on Uses, 169, 170, 4th ed.)

Different kinds of  
powers.

In *Albany's case* (1 Rep. 111), it was held, that the reserved power of the grantor, who took an estate for life under the settlement, might be extinguished by his release. In *Digge's case* (1 Rep. 173), it was held, that the reserved power of the grantor, who took by the deed also an estate for life, being to be executed by deed indented and inrolled, was extinguished by his fine, levied after a revocation, but before inrolment. In *Leigh v. Winter* (Sir W. Jones, 411), it was held, that the grantor who took by the settlement an estate for life could release his reserved power of revocation. In *Bird v. Christopher* (Styles, 389), it was held, that if A. enfeoff with power of revocation, and afterwards levy a fine, the power is extinguished. In *King v. Melling* (1 Ventr. 225), it was held, that a power in the devisee for life to jointure his wife was extinguished by a recovery. In *Tomlinson v. Dighton* (1 P. Wms. 149), it seems to be admitted, that where there is a devisee for life, with power to appoint to her children, the power would be extinguished by fine. In *Saville v. Blacket* (1 P. Wms. 777), it was held, that a tenant for ninety-nine years, if he should so long live, extinguished his power to charge the estate with

Destruction of  
powers appendant  
and in gro



3 & 4 Will. 4,  
c. 74, s. 77.

a sum of money, by joining in a recovery and resettlement of the estate, because he would otherwise defeat his own grant. Where a tenant for life, having a power to charge the estate after his death for the benefit of his children, levied a fine, the power was held to be extinguished. (*Bickley v. Guest*, 1 Russ. & Mylne, 440.) So where an estate was devised to A. for life, remainder to such of his children surviving him as he should by deed or will appoint, with remainder to the use of the first son of A. in tail, with remainders over, and the son joined with his father in suffering a recovery, it was held, that the power was destroyed (*Smith v. Deane*, 5 Madd. 371; and see *Jesson v. Wright*, 2 Bligh, 15), where Lord *Redesdale* said, "How can a man, having a power for the benefit of his children, destroy it?" Lord *Hale*, in *Edwards v. Slater* (Hardres, 410), seemed to be of opinion, that where the party to execute the power has or had an estate in the land, it is not simply collateral; and whether it be appendant to his estate, as a leasing power, or unconnected with his particular estate, and therefore in gross, might be destroyed by release, fine or feoffment. In *West v. Berney* (1 Russ. & Mylne, 435), Sir *J. Leach*, M. R., expressed an opinion, "that every power reserved to a grantee for life, though not appendant to his own estate, as a leasing power, but to take effect after the determination of his own estate, and therefore in gross, may be extinguished. In respect of his freehold interest, he can act upon the estate; and his dealing with the estate, so as to create interests inconsistent with the exercise of his power, must extinguish his power. The general principle is, that it is not permitted to a man to defeat his own grant. Such a power in gross, in tenant for life, would not be defeated by a conveyance of his life estate, as a power appendant or leasing power would be defeated; because his conveyance of the life estate is not inconsistent with the exercise of his power."

Effect of bankruptcy.

A general power of appointment given to husband and wife, during their joint lives, was held not to be destroyed by a conveyance by the husband under the Insolvent Act to the provisional assignee. (*Jones v. Winwood*, 3 Mees. & W. 653; 10 Sim. 150; *Morgan v. Rutson*, 16 Sim. 234; *Badham v. Mee*, 7 Bing. 695; 1 M. & Scott, 14; 1 M. & Keen, 32.) By a marriage settlement of the husband's lands, after a life estate limited to the husband, &c., a joint power was reserved to the husband and to his wife to appoint the estate in favour of children, with a contingent limitation to the children (which in the events which happened could not take effect) and the reversion in fee to the husband. It was held, that the bankruptcy of the husband prevented a subsequent exercise of the joint power to the prejudice of the assignees. (*Hole v. Escott*, 2 Keen, 444; 4 My. & Cr. 187; see *Thorpe v. Goodall*, 17 Ves. 388; 1 Rose, 40, 270.) By 6 Geo. 4, c. 16, s. 77, and 12 & 13 Vict. c. 106, s. 147, the assignees of a bankrupt are enabled to exercise for the benefit of the creditors all powers vested in a bankrupt, which he might execute for his own benefit, except the right of nomination to a vacant ecclesiastical benefice. (See *Buckland v. Papillon*, L. R., 2 Ch. 67.) Section 15 of the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, enacts that the property of a bankrupt, divisible among his creditors (which by sect. 17 is vested in the trustee), shall comprise the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the bankrupt for his own benefit at the commencement of his bankruptcy or during its continuance, except the right of nomination to a vacant ecclesiastical benefice.

Power of leasing.

It was determined by Lord *Mansfield* (*Ren d. Hall v. Bulkeley*, 1 Dougl. 292), that if a tenant for life, with power to grant leases when in possession for twenty-one years, to take effect in possession and not in reversion, reserving the best rent, &c., convey his life estate to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished; but he may still grant leases, agreeably to the terms of the power. So where there was a power in a strict settlement, enabling three successive tenants for life, "respectively when and as they shall respectively be in the actual possession of the said lands," &c., by virtue of the limitations of the settlement, and not before, to make leases, &c. for

lives or years. The second tenant for life conveyed his life estate to three persons, in trust to secure to them an annuity during his life, and subject thereto to pay the surplus rents to him—the conveyance containing a covenant on the part of the grantees, that in case the then lease should expire during the life of the grantor, it should be lawful for him to let the premises as *he should think proper*, with their consent, provided a rent not less than the existing rent should be reserved. The old lease having expired, the second tenant for life, with the consent of the grantees, made a new lease. Under these circumstances it was held, that the power was not inseparably annexed to the estate for life; and though it might not be competent for the tenant for life to derogate from his own act, still he had here expressly reserved an authority to let; and that the new lease, being conformable both to the power and the covenant, was good. *Abbott, C. J.*, said, “We ought not to hold that such a power is extinguished by a transfer of the estate, unless we see clearly in the language of the deed, whereby the power is created, that the donor of the power intended inseparably to annex it to the life estate given, and to a continuance of that estate in the identical person to whom it is given.” The words “and not before” were much relied on to show that the clause pointed out only the order in which the successive tenants for life were to execute. (*Long v. Rankin*, App. Sugd. on Powers, 895, 8th ed.; 2 Chance on Powers, 569, 600.) See also as to the extinction of a power of leasing, *Simpson v. Bathurst*, L. R., 5 Ch. 193.

3 & 4 Will. 4,  
c. 74, s. 77.

An authority to *consent* to the exercise of a power of sale appears to be subject to the same rules, with reference to extinguishment and suspension, as an authority to execute a power. (*Earl and Countess of Jersey v. Deane*, 5 B. & Ald. 569; 10 Moore, 311; *Roper v. Halifax*, 8 Taunt. 845.) The trustees of a marriage settlement were empowered to invest the trust funds in land, and afterwards to resell the lands, with the consent of the husband and wife. After the trustees had invested part of the funds in land, the husband, who was tenant for life, conveyed his interest under the settlement to a purchaser by the description of all his life, and other estate and interest in all the monies, stocks, fund and securities, and messuages, lands, &c. into which the monies, &c. were, or at any time thereafter might be, converted and changed. It was held, that the husband's power to consent to a resale of the lands was not destroyed by his alienation of his interest under the settlement. (*Warburton v. Furn*, 16 Sim. 625; 18 Law J., Chanc. 312. See *Hill v. Pritchard*, Kay, 894, *ante*, p. 338; and *Alexander v. Mills*, L. R., 6 Ch. 124.)

Power to consent  
to sale.

A power *simply collateral*, that is, a power to a stranger who has no interest in the land, cannot be extinguished or suspended by any act of his own or others with respect to the land. It is clear, too, it cannot be released, where it is to be exercised for the benefit of another, as in the case of a power to executors to sell lands. (Co. Litt. 265 b; 11 Rep. 111 a.) But where the power is for the benefit of the party, as a power to charge a sum of money for himself, it may be released; and in such a case his joining in a conveyance of the land, clear of the charge, would be a release. (*West v. Berney*, 1 Russ. & Mylne, 434, 435.) As to the suspension and extinction of powers, see further Sugden on Powers, 49 *et seq.*, 8th ed.; *Edwards v. Slater*, Tudor's L. C. Conv. 305, 2nd ed.

Powers simply  
collateral.

A husband and wife cannot, either jointly or severally, appoint an attorney to alienate the wife's lands. (*Graham v. Jackson*, 6 Q. B. 811; 14 L. J., Q. B. 129.)

### Saving of other Powers.

78. Provided always, and be it further enacted, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so

The powers of  
disposition given  
to a married  
woman by this  
act not to inter-  
fere with any  
other powers.

3 & 4 Will. 4,  
c. 74, s. 78.

far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition (t).

(t) In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." Lord *Lyndhurst*, C., took this clause in the subsequent act to be an expression by the legislature of what was meant by the English act. (*Baggett v. Moux*, 1 Phill. C. C. 628.)

No clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any powers given by the Settled Estates Act. (19 & 20 Vict. c. 120, s. 87.)

The act which authorizes a judicial separation between husband and wife makes her, after such separation, in effect, a *feme sole*, but provides that the act shall not prevent her from joining at any time during the separation in the exercise of any joint power given to herself and her husband. (20 & 21 Vict. c. 85, s. 26.)

Dominion of married women over their property.

By means of powers.

The disabilities of married women at common law, independent of particular customs, to alien their property, whether real or personal, either by deeds or wills, are well known. (See Harg. Co. Litt. 111 b, n. (4).) The wife of a man who has abjured the realm, or been transported, may act as if her husband were dead. (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37.) Through the medium of powers and trusts, however, a married woman has long been allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife may, without her husband, execute a naked authority, as to sell lands whether given before or after coverture, and though no special words are used to dispense with the disability of coverture. (Co. Litt. 112 a, and n. (6).) The rule is the same where both an *interest* and an authority pass to the wife, if the authority is collateral to and does not flow from the interest, because then the two are unconnected, as if they were vested in different persons. (Rep. temp. Finch, 346.) As, too, a *feme covert* may without her husband convey lands in execution of a mere power or authority, so she may with equal effect in performance of a *condition*, where land is vested in her on condition to convey to others. (W. Jones, 187, 138.) The reason why in these instances the wife may convey without her husband seems to be, that he can receive no prejudice from her acts, but a great one might arise to others if his concurrence should be essential. (Harg. Co. Litt. 112 a, n. (6).) The same reasoning has been urged in favour of the power of a married woman to convey an estate of freehold vested in her as a trustee; but as the law takes no notice of trusts, the better opinion, sanctioned by uniform practice, is, that as to estates of freehold which a married woman has as trustee, no effectual conveyance could formerly be made by her without fine or recovery, nor now without a deed duly acknowledged. (See 1 Prest. on Abs. 337.)

Customs.

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, and of several other cities and boroughs, as Norwich, &c., &c., a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled (Hob. 225; Com. Dig. London (N. 3)), according to the custom of the city or borough. (2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii. ch. 2, pl. 33.) By statute 32 Hen. 8, c. 28, the husband and wife were empowered to make leases of the wife's lands. (See *Doe v. Weller*, 7 T. R. 478.) This act has been repealed by 19 & 20 Vict. c. 120, s. 35, and certain powers of leasing a married woman's lands are given by 19 & 20 Vict. c. 120, s. 32. (See *post*.)

Powers of leasing.

Power to surrender leases.

By statute 11 Geo. 4 & 1 Will. 4, c. 65, s. 12 (repealing 29 Geo. 2, c. 31), a married woman entitled to any lease or leases for life or lives, or for any term of years, either absolute or determinable upon the death of one or more person or persons, may apply to a court of equity by petition or motion, and by the order of such court may by deed only surrender such lease or

leases, and accept and take for her own benefit a new lease or leases, during such number of lives, determinable upon lives, or for such number of years as were mentioned in the lease or leases surrendered at the making thereof respectively, or otherwise, as those courts should direct. This act was extended to Ireland by 5 & 6 Will. 4, c. 17. Before 29 Geo. 2, c. 31, married women could not surrender leases without a fine. (*Price v. Butts*, 2 Roll. 168.)

3 & 4 Will. 4,  
c. 74, s. 78.

A power of disposing of real estate may be given to a married woman, either by way of trust or of power over an use. In the first instance, suppose a woman having a real estate before marriage, and either before or after marriage by a proper conveyance conveys such estate to trustees in trust for herself during her coverture for her separate use; and afterwards that it shall be in trust for such person as she shall by any writing under her hand and seal or by will appoint, and in default of appointment to her heirs, and after marriage she makes an appointment in pursuance of the power, it will be a good declaration of trust, and would defeat the right of her heir at law. (2 Ves. sen. 191.) A power is a mode which the owner of an estate reserves to himself or gives to another, through the medium of the Statute of Uses, of raising and passing an estate. (10 Ves. 266.) The right of disposing of an estate may be reserved to a married woman by way of power over an use, as where an estate is conveyed to the use of herself for life, remainder to the use of such persons as she shall appoint, and, in default of appointment, to her own right heirs, by the execution of such power, she alone can dispose of the remainder in exclusion of her heirs (2 Ves. sen. 191.)

In what way  
powers may be  
reserved to mar-  
ried women.

It has long been firmly settled, that a married woman may execute a power whether appendant, in gross or simply collateral. (*Harris v. Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons v. Moulton*, Finch, 346; *Daniel v. Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Travel v. Travel*, 3 Atk. 711; cited 2 Ves. sen. 191), as well over a copyhold as a freehold estate. (*Driver v. Thompson*, 4 Taunt. 294.) Thus, if a married woman is tenant for life, with a power of leasing in possession, she could not heretofore create a mortgage term without a fine or recovery, nor now without a deed acknowledged according to this statute, but by the mere execution of her power she may make a lease, which will at least in part, and may perhaps wholly, take effect out of her interest. So if she has a general power of appointment, with remainder, in default of appointment, to herself in fee, she could not by the old law affect the remainder vested in her, except by a fine or recovery, nor under this act without a deed acknowledged; but she may defeat the remainder, and convey away the estate by the execution of her power.

Exercise of powers  
by married  
women.

A power coupled with an interest given to a single woman to be executed by her, *being sole*, cannot be exercised during marriage. (*Marquis of Antrim v. Duke of Buckingham*, 1 Ch. Cas. 17; 1 Eq. Abr. 343, pl. 4.) And where there is an express dispensation with coverture, powers coupled with an interest may be exercised notwithstanding coverture. An opinion had prevailed that where there is no dispensation with coverture such powers could be executed. (Sugd. on Powers, 150; Harg. Co. Litt. 112 a, n. (b); 1 Prest. on Abs. 338; Watk. Conv. by Cov. 390, n. (a).) And it has been decided that an appointment made by a married woman during coverture is valid, notwithstanding the surrender by which the power was created did not contain any express dispensation with the disability arising from coverture, the court being of opinion that there was an implied dispensation with coverture, and that the meaning of the settlement was, that the power should be executed by the married woman, whether she were covert or sole. (*Doe d. Blomfield v. Eyre*, 3 C. B. 557; see p. 578, affirmed in error, 5 C. B. 713; see pp. 741, 745.) See further Sugd. on Powers, 154, 8th ed.; *Wood v. Wood*, L. R., 10 Eq. 220.

A power resting on articles only made before marriage will enable the wife to dispose of property. By articles before marriage the intended husband covenanted that he would execute all such acts and conveyances as should be necessary for vesting any estate which might descend to his

Equitable power.

3 & 4 Will. 4,  
c. 74, s. 78.

Trust for separate  
use of married  
woman.

wife, in such persons as she should name, in trust for her sole and separate use, and to be subject to such disposition as she should make thereof, by any deed or writing under her hand and seal, or by her last will and testament. The wife having become entitled to a trust estate in some lands devised them by her will. And it was decreed that the power was well created and executed. (*Wright v. Cadogan*, 1 Br. P. C. 486; Ambl. 468; 2 Eden, 239; see *Doe v. Staple*, 2 T. R. 684; Sugd. on Powers, 158.) A mere contract by the wife to convey, entered into after marriage, whether for her own benefit or that of others, would be void. (*Dillon v. Grace*, 2 Sch. & Lef. 462; *Worrall v. Jacob*, 3 Mer. 256.)

Although the law acknowledges no separate estate in the wife, it is otherwise in a court of equity, where the wife in the absence of any clause against anticipation is permitted to deal with such property as if she were a *feme sole*, not only as to strangers, but as to her husband. (*Logan v. Birkett*, 1 Mylne & Keen, 220; *Woodward v. Woodward*, 11 W. R. 1007.)

By marriage settlement, lands of the wife were conveyed by her to trustees and their heirs, in trust for the wife and her assigns during her life, for her own sole and separate use; and from her decease to the use of the husband, his heirs and assigns: it was held, that the trustees did not take the legal estate during the life of the wife, but that the use was executed in her, notwithstanding the words "to her own sole and separate use," &c. *Parke*, B., observed, "We cannot collect clearly from the words of the deed, that it was intended to give the trustees an active trust, to exclude the husband from control, by giving the estate to the trustees in order to pay over the rents and profits to the wife. The limitation to her sole and separate use is therefore void at law, and the use is executed in the wife, although the husband is a trustee for her in equity." (*Williams v. Waters*, 14 Mees. & W. 166; see p. 173.)

Where a testator devised a freehold estate to trustees, in trust to pay the rents as the same should become due and payable into the hands of his wife, and not otherwise, for her life for her separate use, and directed that the receipts of his wife alone for what was actually paid into her own proper hands should be good discharges to his trustees, it was held that the wife had power to alienate her life estate. The construction given to the expressions in question was, that they were intended only to exclude the marital claims of any present or after-taken husband, and not to control that right of disposition which is incident to property. (*Acton v. White*, 1 Sim. & Stu. 429; see Sugd. Pow. 118, 119, 5th ed.; *Barrymore v. Ellis*, 8 Sim. 1. See *Cox v. Chamberlain*, 4 Ves. 631; *Roach v. Wadham*, 6 East, 289; *Wilde v. Fort*, 4 Taunt. 334.) A mere direction to pay income to the wife's separate use from time to time will not restrain her from alienation. (*Parke v. White*, 11 Ves. 222.)

Married woman's  
power of disposi-  
tion over per-  
sonalty settled to  
her separate use.

It seems well established, that a settlement, gift, or limitation of personal property to the separate use of a woman, or in similar words, without any restraint on her alienation, enables her not only to receive and apply to her separate use the income, but to dispose of the capital or corpus, either by an act *inter vivos*, or by will. (*Rich v. Cockell*, 9 Ves. 369; *Fettiplace v. Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock v. Monk*, 2 Ves. sen. 191; *Hearle v. Greenbank*, 3 Atk. 696; 1 Ves. sen. 298.) And her power of disposition extends to reversionary interests in personalty settled to her separate use as well as to interests in possession. (*Keene v. Johnstone*, 1 Jones & Carey, 1 R. 255; *Sturgis v. Corp*, 13 Ves. 190.) And to contingent as well as vested interests. (*Leahmere v. Brothoridge*, 32 Beav. 353; but see *Batt v. Cuthbertson*, 4 Dr. & War. 392; *Stamford Banking Co. v. Ball*, 10 W. R. 196.)

A married woman to whom a rent-charge for life in reversion was devised to her separate use without the intervention of trustees, joined with her husband in assigning it for valuable consideration: such assignment was held to bind her after her husband's decease, although no fine had been levied. (*Major v. Lansley*, 2 R. & M. 355.)

Married woman's  
power of disposi-  
tion over realty  
settled to her  
separate use.

Different doctrines were laid down formerly as to a married woman's power of disposing of real estate settled to her separate use. (See 1 Sand. Uses, 345, 4th ed.; Chance on Powers, pl. 545; *Goodill v. Brigham*, 1



Bos. & P. 192; *Doe d. Stevens v. Scott*, 4 Bing. 505; *Churchill v. Dibben*, 9 Sim. 447.) But it is now established that a married woman having real property settled to her separate use in fee and not restrained from alienation, has, in equity, as incident to her separate estate, and without any express power, a complete right of alienation by instrument *inter vivos* (not acknowledged under this act) or by will. (*Taylor v. Meads*, 13 W. R. 394; see *ante*, p. 369.)

3 & 4 Will. 4,  
c. 74, s. 78.

The old way of expressing a trust for a married woman was, that the trustees should pay into her proper hands and upon her receipt only; and under such a trust she could dispose of her interest. When once it was established that the separate estate of a married woman was to be so far enjoyed by her as a *feme sole*, as to possess all the incidents of property, and that she might therefore dispose of it as if *sole*, it was necessary, in order to protect her against the husband's rights, to qualify the gift by prohibiting anticipation. (*Pybus v. Smith*, 1 Ves. jun. 189; 3 Br. C. C. 340.) The words "not to be paid by *anticipation*" seem to have been first introduced by Lord *Thurlow*, who, it is said, did not attempt to take away any power the law gave her as incident to property, which, being a creature of equity, she could not have at law; but as under the words of the settlement it would have been hers absolutely, so that she could alien, Lord *Thurlow* endeavoured to prevent that, by imposing upon the trustees the necessity of paying to her from time to time, and not by anticipation, reasoning thus—that equity making her the owner of it, and enabling her, as a married woman, to alien, might limit her power over it; but the case of a disposition to a man, who, if he has the property, has the power of aliening, is quite different. (See *Brandon v. Robinson*, 18 Ves. 434, 435.)

Restraint upon  
anticipation.

A court of equity will give effect during coverture to a clause in restraint of alienation annexed to a gift to a married woman for her separate use, whether the subject of the gift be real or personal estate, or whether it be in fee or only for life. Lord *Lyndhurst*, C., said, "After the case of *Tullett v. Armstrong*, (4 My. & Cr. 377,) there can be no doubt about the doctrine of this court respecting the property given to the separate use of a married woman; and it is clear that that doctrine applies as much to an estate in fee as to a life estate. The object of the doctrine was to give a married woman the enjoyment of property independent of her husband; but to secure that object it was absolutely necessary to restrain her during coverture from alienation. The reasoning evidently applies to a fee as much as to a life estate, to real property as much as to personal. The power of a married woman, independent of the trust for separate use, may be different in real estate from what it is in personal; but a court of equity having created in both a new species of estate may in both cases modify the incidents of that estate." (*Baggett v. Meux*, 1 Phill. C. C. 627.)

Operation of the  
restraint.

A married woman was entitled to a gross sum payable on the death of her father, for her separate use, subject to a restraint on anticipation. During her father's life, she promised by letters to repay to D. out of the fund when it fell in advances made by him to her and her husband: held that D. had no charge on the fund, the letters being ineffectual by reason of the restraint on anticipation. (*Re Sykes' Trusts*, 2 J. & H. 415). A married woman restrained from anticipation can only deal with income after it has become payable. (*Re Brettell*, 2 D., J. & S. 79. See *Kenrick v. Wood*, L. R., 9 Eq. 333.) But the restraint on anticipation does not prevent a married woman's separate property from being liable, under 33 & 34 Vict. c. 93, to satisfy debts contracted by her before marriage. (*Sanger v. Sanger*, L. R., 11 Eq. 470.)

In *Barton v. Briscoe*, (Jac. 603,) it was held, that the restraint on anticipation continued in force only during the coverture, and therefore where, by a settlement made after marriage, the dividends of certain sums of stock were to be paid by trustees to the separate use of a married woman, but not so as to deprive herself of the benefit thereof by sale, mortgage, charge, or otherwise in the way of anticipation, with remainder as she should appoint by will, and in default of appointment to A., the court after the death of the husband ordered the fund to be transferred upon the consent of the widow and her daughter, the latter being entitled in default of appointment.

Restraint only  
operates during  
coverture.

8 & 4 Will. 4,  
c. 74, s. 78.

So a clause against anticipation, annexed to a life interest in a trust fund bequeathed to a female infant, does not prevent her, after she comes of age and before marriage, from effectually assigning her whole interest in the legacy. (*Brown v. Pocock*, 2 Russ. & Mylne, 210; 2 Mylne & Keen, 189. See *Massey v. Parker*, *Id.* 174.) The restraint on anticipation does not continue in force after a decree for judicial separation; (*Munt v. Glynes*, 20 W. R. 823;) and by converting the property while she is discovert and *sui juris*, she may determine the trust for her separate use. (*Wright v. Wright*, 2 J. & H. 647.) As to the power of a woman when discovert to call for a transfer of property settled to her separate use, without power of anticipation, see *Buttanshaw v. Martin*, John. 89, *ante*, p. 335; see also 8 Davidson, Conv. 184, 2nd ed.

May operate  
during subsequent  
covertures.

It is now settled, that if property be given or settled to the separate use of a woman *unmarried* when the settlement or gift takes effect, and she be prohibited against anticipating it, it will, if not alienated by her when discovert, be enjoyed by her as her separate estate during any coverture or covertures to which she may afterwards be subject; and she will, during the existence of such coverture or covertures, be unable to anticipate it. (*Tullett v. Armstrong*, 1 Beav. 1; affirmed, on appeal, by Lord *Cottonham*, 4 My. & Cr. 377.) The clause against anticipation may be confined to a particular coverture. (*Knight v. Knight*, 6 Sim. 121; *Bradley v. Hughes*, 8 Sim. 149.) Real estate was devised to A., the wife of B., her heirs and assigns for ever, for her use and benefit, with power to appoint, and in default, remainder over. Personal estate was given to A. for her sole and separate use, independent of her husband B., and her receipts alone to be sufficient discharges: it was held, that the limitations to the separate use of A. did not extend beyond the husband specifically named. (*Moore v. Morris*, 4 Drew. 38; 3 Jur., N. S. 552.)

It is now settled that a gift to the separate use without power of anticipation will operate upon all the covertures of a woman, unless the provisions are destroyed while she is discovert; whether or not the provisions for separate use and against anticipation are applicable to the whole of the life estate given, or only to a particular coverture, must depend upon the construction of the words of the gift. (*In re Gaffee*, 1 Mac. & G. 541; 1 Hall & T. 635; 7 Hare, 101; *Hawkes v. Hubback*, L. R., 11 Eq. 5; *Shafto v. Butler*, 19 W. R. 595.)

What words will  
create a restraint  
on anticipation.

The intention to restrain anticipation must be clearly expressed, but it is not necessary in all cases that negative words should be introduced in the receipt clause to complete the restraint on alienation, for that clause must be construed to relate to the income, subject to such restraints as are imposed by the former part of the settlement. (*Harrop v. Howard*, 3 Hare, 624; *Moore v. Moore*, 1 Coll. 54; *Medley v. Horton*, 8 Jur. 853.) No particular form of words is necessary to impose a restraint on anticipation in a limitation to the separate use of a married woman, the question being one of intention. (*Baker v. Bradley*, 2 Jur., N. S. 98; 25 Law J., Chanc. 7.) By an instrument giving property in trust for a married woman and her assigns for her life for her separate use, it was declared that the receipts of the married woman alone, or of some person or persons authorized by her to receive any payment of the rents and income after such payment should have become due, should alone be good discharges: it was held, that she was restrained from anticipation. (*Ib.*) A testator bequeathed leasehold and other personal estates to trustees in trust to pay the rents, &c., to such person or persons as a married woman should, by writing under her hand from time to time, but not by way of anticipation, appoint, and in default of such appointment, or so far as the same should not extend, into her proper hands for her sole and proper use, with a direction that her receipts, notwithstanding coverture, should be good discharges, and after her death in trust for her children. It was held, upon the particular terms of the gift, that the restraint on anticipation applied to an assignment, by the married woman, of her separate estate as well as to an appointment in execution of her power, notwithstanding the will did not provide that her receipts alone should be good discharges. (*Brown v. Bamford*, 1 Phill. C. C. 620; 11 Sim. 127. See *Moore v. Moore*, 1 Coll.

C. C. 54; *Field v. Evans*, 15 Sim. 375; *Harnett v. Macdougall*, 8 Beav. 187.) A gift of property to the separate use of a woman, "but not to be sold or mortgaged," was held to restrain anticipation. (*Steedman v. Poole*, 6 Hare, 193.)

3 & 4 Will. 4,  
c. 74, s. 78.

In *Alexander v. Young*, (6 Hare, 893,) stock was bequeathed to the separate use of a married woman for life, and after her decease to her appointee by deed or will; with a direction that any appointment by deed should not come into operation until after her death. *Wigram, V.-C.*, held, an irrevocable appointment by deed might be made, and that the clause could not be read as amounting to a restraint against anticipation.

Lands were devised to trustees "for the use and benefit of T., the rents and profits of which estate she should receive from the tenants herself while she lives, whether married or single." In a later part of the will, which did not contain anything authorizing a sale or mortgage, the testatrix directed that no sale or mortgage of the estate or its rents should take place during the life of T., who was unmarried when the will was made, but who had married after the death of the testatrix: it was held, that she took an estate for life for her separate use, without power of anticipation, and that a mortgage made by her and her husband was therefore invalid. (*Goulden v. Camm*, 1 De G., F. & G. 146.)

See further, *Hulme v. Tenant*, 1 White & Tudor, L. C., Eq. 481 *et seq.*, 4th ed.; *Lewin*, 554 *et seq.*, 5th ed.

A testator bequeathed personal estate in trust for the use of a *feme covert*, and without power of anticipation. The legatee was, at the date of the will, domiciled abroad, and had continued so ever since. By the law of her domicile the restraint against anticipation was disregarded, but the court, nevertheless, refused to give effect to a beneficial arrangement made by her anticipating her income. (*Peillon v. Brooking*, 25 Beav. 218.) Although the power to impose a restraint against anticipation in the case of a married woman is a creature of equity, still the imposition of the restraint is the act of the settlor, and the court will not assist in removing the restraint, although it would be for the benefit of the married woman. Therefore a legacy to a married woman, upon condition that she and her husband absolutely convey, or caused to be conveyed, their interests in an estate vested in trustees, upon trust for herself for life, without power of anticipation, with remainder to her children, cannot be paid to her, as she is unable to comply with the condition. (*Robinson v. Wheelwright*, 2 Jur., N. S. 554; 25 Law J., Chanc. 885; 21 Beav. 214; 2 Jur., N. S. 82.)

The court will not dispense with the restraint on anticipation.

Where there is an absolute gift to a married woman, but with a restraint upon anticipation, the fund cannot be parted with by the trustees. (*Gaskell's Trusts*, 11 Jur., N. S. 780.)

In the case of an executory trust for the separate use of a married woman, the court will direct a restraint on anticipation to be inserted in the settlement. (*Turner v. Sargent*, 17 Beav. 515; *Dunnill v. Dunnill*, L. R., 6 Eq. 323.)

Under a trust to pay the dividends of a fund from time to time into the proper hands of a man, or on his proper order or receipt subscribed with his own hand, to the intent that the same should not be grantable, transferable or otherwise assignable, by way of anticipation of any unreceived payment or payments thereof, or any part thereof, and on his decease the principal to be paid to such persons as in a course of administration would become entitled to his personal estate: it was held, that it was a life interest, liable to be assigned under a commission of bankruptcy; for, generally speaking, where property is given to a man for life, the donor cannot take away the incidents to a life estate, one of which is a power of disposition. (*Brandon v. Robinson*, 18 Ves. 429; 1 Rose, 197; see *Graves v. Dolphin*, 1 Sim. 66; 19 Ves. 88; and the cases cited 1 Swanst. 481, n.) So where trustees under a will have a discretion as to the manner of the application of the trust fund for the benefit of a particular person, but no power to apply it otherwise than for the benefit of such *cestui que trust* during his life, his interest passed to his assignees under the Insolvent Act, notwithstanding a proviso in the will that he should not have power to sell, mortgage or anticipate the income of the fund. (*Green v. Spicer*, 1 Russ. &

Gift to a man of life interest in personalty determinable on bankruptcy or alienation.

3 & 4 Will. 4,  
c. 74, s. 78.

M. 395; see *Lear v. Leggett*, *Ib.* 690; 2 Sim. 479; *Pym v. Lockyar*, 12 Sim. 394.) But where, by the expressions used in a will, it can be collected to have been the intention of the testator that the estate shall cease on bankruptcy, it will do so. As where there was no gift, but a direction that the payment should be made into the donee's proper hands, *but not to his assigns*, and for his own use and benefit, and there was a proviso that if the party should by any ways or means whatever sell, dispose of or incumber the right he had for life, then his interest to cease, and the trustees to apply it for the benefit of his children: it was held, that on the bankruptcy of the tenant for life his interest ceased, and that his children became entitled. (*Cooper v. Wyatt*, 5 Madd. 482; *Page v. Way*, 3 Beav. 20.) In *Shee v. Hale*, (13 Ves. 404,) a gift for life, with comprehensive words restraining the disposition of it, giving it over in that event, was held to cease by the party's taking advantage of the Insolvent Act. (See *Wilkinson v. Wilkinson*, Coop. C. C. 295; 2 Wils. C. C. 47; *Snowdon v. Dales*, 7 Sim. 524; *Godden v. Crowhurst*, 10 Sim. 642; *Avison v. Holmes*, 1 Johns. & H. 530.)

The form and effect of these gifts is discussed in 8 Davidson, Prec. Conv. 86 *et seq.*, 2nd ed.; see also *Trappes v. Meredith*, L. R., 9 Eq. 229; 7 Ch. 248; *Re Lady Amherst's Trusts*, 20 W. R. 290; *Re Parnham's Trusts*, L. R., 13 Eq. 413.

Condition re-  
straining aliena-  
tion of realty.

A condition in a feoffment or grant not to alien to any person is void. (6 Rep. 41 b.) A grantee may be restrained from aliening for a particular time or to a particular person. (*Large's case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's case*, Bridgm. 134.) So a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good. (*Doe v. Pearson*, 6 East, 172; *Cuthbert v. Purrier*, Jac. 417; *Ross v. Ross*, 1 Jac. & W. 158.) *Doe v. Pearson* has been overruled in *Attwater v. Attwater*, 18 Beav. 330. See *Bradley v. Peixoto*, Tudor's L. C., Conv. 861, 2nd ed.

### Acknowledgment of Deeds.

Every deed by a  
married woman,  
not executed by  
her as protector,  
to be acknow-  
ledged by her  
before a judge,  
&c.

79. Every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or a master in chancery (*u*), or before two of the perpetual commissioners, or two special commissioners, to be respectively appointed as hereinafter provided (*v*).

(*u*) The office of Master in Chancery is now abolished. (15 & 16 Vict. c. 80, s. 1.)

Acknowledgments  
by married  
women may be  
received by judge  
of county court.

Any acknowledgment to be made by any married woman under 3 & 4 Will. 4, c. 74, may be received by a judge of a county court, in the same manner as such acknowledgment may be received by a judge of a superior court. (19 & 20 Vict. c. 108, s. 73.)

By schedule C. to the latter act, the fee for taking the acknowledgment of a married woman is 1*l*.

(*v*) Where any married woman shall be seised or possessed of or entitled to any estate or interest, manorial or otherwise, in land proposed to be conveyed for the purposes of the act affording facilities for the conveyance and endowment of sites for schools, she and her husband may convey the same for such purposes by deed, without any acknowledgment thereof. (4 & 5 Vict. c. 38, s. 5.)

An acknowledgment by a married woman before two commissioners, one of whom was interested, was held to be void. (*Banks v. Ollerton*, 10

Exch. 168; 23 Law J., Exch. 285; *Re Ollerton*, 15 C. B. 796.) Since this decision the statute 17 & 18 Vict. c. 75, was passed on the 7th August, 1854. This act recites the above section, and continues—

3 & 4 Will. 4,  
c. 74, s. 79.

And whereas it is apprehended that deeds executed by married women under the provisions of the said act may be liable to be invalidated by the circumstance that the judge, or master in chancery, or one or both of the commissioners, taking the acknowledgment, may be or may have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such acknowledgment, and it is not expedient that deeds executed in good faith under such circumstances should be invalidated : it is therefore enacted as follows :—

17 & 18 Vict.  
c. 75.

1. No deed which has been acknowledged or which shall hereafter be acknowledged by a married woman before a judge of one of the superior courts of Westminster, or a master in chancery, or before two of the perpetual commissioners or two special commissioners appointed as by the said act is required, shall be impeached or impeachable at any time after the certificate of such acknowledgment has been filed of record in the Court of Common Pleas at Westminster, by reason only that such judge or master in chancery, or such commissioners, or either of them, was or were interested or concerned, either as a party or parties, or as attorney or solicitor or clerk to the attorney or solicitor of one of the parties, or otherwise, in the transaction giving occasion for such acknowledgment.

Acknowledgment  
of deed not im-  
peachable by  
reason only of  
party before  
whom same was  
taken being  
interested.

2. Provided, that if any proceeding instituted before the thirteenth day of July, one thousand eight hundred and fifty-four, in the said Court of Common Pleas, for the purpose of quashing or taking off the file of records of the said court any certificate of an acknowledgment of a deed by a married woman, on the ground that such judge or master in chancery, or either of such commissioners, was interested or concerned as aforesaid, shall be pending at the passing of this act, it shall be lawful for the said court to proceed with and dispose of the same as if this act had not passed, except that if the said court shall be satisfied that any person or persons acting *bonâ fide* has or have been induced by the terms of the orders made by the said court in Hilary Term, one thousand eight hundred and thirty-four, to acknowledge, or to accept a title depending on the acknowledgment of, any deed or deeds before commissioners, one of whom may have been interested or concerned as aforesaid, the said court may refuse to permit the certificate to be quashed or taken off the file on such terms as to the payment of costs and expenses as the said court shall think fit to make.

Staying proceed-  
ings for quashing  
certificate of ac-  
knowledgment.

3. The Court of Common Pleas may from time to time make any rules which to them may seem fit for preventing any commissioners interested or concerned as aforesaid from taking any acknowledgment under the said recited act, anything herein contained to the contrary notwithstanding, so nevertheless that no such rule shall make invalid any acknowledgment after the certificate shall have been filed of record as aforesaid.

Court of Common  
Pleas may make  
rules for prevent-  
ing commissioners  
who are interested  
from taking ac-  
knowledgments.

This statute was passed in consequence of doubts being entertained whether the Court of Common Pleas had not power to quash the certificate where the acknowledgment had been taken before an interested person. It was not intended to justify the commissioners in acting irregularly : but merely that an innocent purchaser should not be prejudiced by the irregularity. Except in cases of reasonable necessity both the commissioners ought to be disinterested, and the acknowledgment should be taken before both. (*Ex parte Monhennett*, L. R., 5 C. P. 16.) See also Reg. Gen., Hil. T. 1834, II. (*post*).

### Examination.

80. Such judge, master in chancery, or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under

The judge, &c.  
before receiving  
such acknowledg-  
ment, to examine  
her apart from  
her husband.



3 & 4 Will. 4,  
c. 74, s. 80.

this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void (x).

Acknowledgment  
by deaf and dumb  
woman.

(x) See Reg. Gen. III. (Hil. T. 1834), p. 400, *post*, as to the examination of a married woman. No person connected with the husband ought to be present when a married woman's examination as to her consent is taken. (*Re Bendyshe*, 3 Jur., N. S. 727; 26 Law J., Chan. 814.) The court directed the officers to file an acknowledgment of a married woman who was deaf and dumb. The nature of the transaction having been duly explained to her by signs, and she in like manner signifying her assent, and these facts appearing upon affidavit and also upon the certificate. (*Re Harper*, 7 Scott, N. R. 481; 6 Man. & G. 732.) The form of the certificate of acknowledgment by a deaf and dumb woman, and the affidavit to verify the same, are given in Macqueen on Husband and Wife, App. pp. 31—34, 1st ed.

Court cannot  
order married  
woman to convey.

The Court of Chancery has no jurisdiction to compel a conveyance by a married woman pursuant to its decree. In *Jordan v. Jones*, (2 Phill. C. C. 170,) the plaintiff was equitable mortgagee of an estate by virtue of a deposit of title deeds made by Mrs. Jones when sole, she being at the time mortgagee in fee of the estates. The suit was for a foreclosure of the mortgage or a sale. By the decree it was ordered that the estate should be sold, and that all proper parties should join in the conveyance as the master should direct. The estate was accordingly sold, and the purchaser having paid his money into court was let into possession; but Mrs. Jones and her husband refused to execute the deed of conveyance; whereupon an order was made by *Wigram*, V.-C., that Mrs. Jones should execute a conveyance pursuant to the decree, and acknowledge it before a master or commissioner as required by this act. But, upon appeal, Lord *Cottenham*, C., reversed his Honor's order, being, after some hesitation, of opinion, "that the court had no authority to make such an order against a married woman."

But she may be  
declared a trustee.

Where a ward of court married without consent, and after she attained her majority executed, by the direction of the Court of Chancery, a settlement of real estate to which she was equitably entitled, and did not acknowledge the deed under this act: it was held, that the heir was not bound, as the court could not have compelled the wife to acknowledge the deed. (*Field v. Moore*, *Field v. Brown*, 7 De G., M. & G. 691.)

In such cases, however, the married woman may usually be established to be a trustee, and a vesting order obtained under the Trustee Act. (Daniell, Ch. Pr. 169; Dart, 1105.)

A married woman, a party to a creditor's suit for the administration of the estate of a person of whom she was heir at law, was, by the decree in the cause, ordered to convey. She accordingly executed the deed but refused to acknowledge it under this statute. The purchaser, by his petition, prayed a reference to the master under the stat. 1 Will. 4, c. 60, to inquire whether she was a trustee, and the court referred it to the master to inquire whether the conveyance executed by her was a proper one to be executed and acknowledged by her under the decree, and if not, to approve of a proper conveyance. (*Billing v. Webb*, 12 Jur. 247; 1 De G. & S. 716.)



### Appointment of perpetual Commissioners.

As to the appoint-  
ment of perpetual  
commissioners for  
each county or  
place, and the

81. For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court

of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke or place, for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their place of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same (y).

8 & 4 Will. 4,  
c. 74, s. 81.

making out and  
keeping of the  
lists of the com-  
missioners and  
the delivery of  
copies.

(y) By 23 & 24 Vict. c. 127, s. 30, every appointment made after 28th August, 1860, of any attorney or solicitor, under this section, to be a perpetual commissioner for taking acknowledgments of married women under this act shall, before any such authority or appointment is acted upon, be brought to the registrar by the person to whom the same is granted, or some person on his behalf, and the registrar shall, in books to be kept for that purpose, enter the particulars of every such authority or appointment on payment of one shilling, and the registrar shall mark such authority or appointment as having been entered, and with the date of the entry; and such book shall at all times be open to public inspection during office hours without fee or reward.

Appointment to  
be registered.

### *Power of perpetual Commissioners.*

82. Provided always, and be it further enacted, that any person appointed commissioner for any particular county, riding, division, soke or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be (z).

Power of per-  
petual commis-  
sioners not con-  
fined to any par-  
ticular place.

(z) The two commissioners who take the acknowledgment in England must both be appointed for the county in which the acknowledgment is taken. (*Webster to Carline*, 4 Man. & G. 27; 1 Dowl. P. C., N. S. 678.)

The commissioners for taking the acknowledgments of married women have a lien for their fees on the instruments in their joint possession, and if a deed were in the possession of one only, he might, if authorized by the other, detain the deed for that other's lien. (*Ex parte Grove*, 3 Bing. N. C. 364.)

3 & 4 Will. 4,  
c. 74, s. 83.

If, from being beyond seas, &c. a married woman be prevented from making the acknowledgment, special commissioners to be appointed.

### Special Commissioners.

83. In those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge or a master in chancery, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any person therein named to be commissioners to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid (a): provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

(a) The following is the form of a special commission issued under this section:—

Form of special  
commission.

"I [*name of judge*], one of the justices of her Majesty's Court of Common Pleas at Westminster, do, by virtue of the statute in that case made and provided, appoint A. B. and C. D. special commissioners, to take the acknowledgment of Ann —, the wife of E. F., now residing at —, in —, of any deed by which it is intended to pass the estate of her the said Ann [*or to bar the dower of her the said Ann*] as a married woman, pursuant to the statute 3 & 4 Will. 4, c. 74. And I do order and direct that this commission shall be executed and returned to the proper officer of the court on or before the — day of —, 187—.

"Dated this — day of —, 187—."

"Entered."

When time for returning commission will be enlarged.

The court will not enlarge the time for returning a special commission for taking an acknowledgment of a married woman abroad, where it has been executed after the return day named therein. (*Re Carter*, 9 C. B., N. S. 701. See, however, *Re Grierson*, L. R., 4 C. L. 232.) The court will enlarge the time for returning a special commission for taking the acknowledgment of a married woman abroad where it has been duly executed, but its return has been unavoidably delayed until after the return day therein named. (*Re Van Ufford*, 9 C. B., N. S. 789.) The court will enlarge the time for returning a commission for taking the acknowledgment of a married woman abroad under this act, where, by reason of the remoteness of the residences of the parties, the time has proved to be too short. (*Re Booth*, 5 C. B., N. S. 540.)

Variances between signatures of commissioners and names in commission.

The acknowledgment of a married woman taken abroad under this act must be taken by the persons mentioned in the commission; and therefore, where there were variances between the names of the persons designated in the commission as commissioners and the names in the signatures attached, the court required that there should be an identification by affidavits of persons on the spot bearing positive testimony to the fact. A commission was directed to William Bates, lawyer, John Howey, wholesale grocer, and Alexander Cummins, wholesale grocer, all of Debuque, in the state Iowa, in the United States of America. The certificate of acknowledgment was signed by Andrew Cummins and John Hoey. The affidavit of verification was made by Hoey, who described himself as one of the commissioners, and stated the certificate was signed by Andrew Cummins, "the other commissioner." An affidavit was produced made by the solicitor who prepared and sent out the commission, who stated that "he verily believed that Andrew Cummins and John Hoey, who signed the certificate of acknowledgment, and John Hoey, who made the affidavit of the due taking thereof, were the persons to whom the commission was intended to be directed. The court refused to allow the documents to be received and filed without an affidavit by some person acquainted with the place, who could more clearly identify the parties for those intended. (*Re Booth*,

5 C. B., N. S. 541; 4 Jur., N. S. 1301; 28 L. J., C. P. 138.) A commission to take the acknowledgment of a deed by a married woman at Poonah, in the East Indies, was addressed to commissioners, one of whom was described as "Edward C. Jones," a collector and magistrate at that place. The acknowledgment was duly taken by Mr. Jones and one of the other commissioners, but Jones signed the certificate and affidavit of verification, "Edmund C. Jones." The court allowed the document to be received and filed upon the production of affidavits showing that Edmund C. Jones was the person to whom the commission was intended to go, that he had always been described in the register at the India House as "Edward C. Jones," and that there was no other collector of that name in the Company's service. (*Re Price*, 17 C. B. 708.) A commission for taking the acknowledgment of a married woman abroad, under this act, was addressed to "Robert Roger Strong, registrar of the Supreme Court of Wellington, New Zealand;" and on its return the acknowledgment was found to have been taken by "Robert Rodger Strang, registrar of the Supreme Court of Wellington:" it was held, that the objection might be got over by a slight explanation on affidavit showing the identity of the party. (*Re Smith*, 10 C. B., N. S. 344; 9 W. R. 556.)

3 & 4 Will. 4,  
c. 74, s. 83.

The court allowed a commission for taking the acknowledgment of a deed by a married woman at Sydney, in New South Wales, to go out with a blank for her christian name, which was unknown (*In re Appleton*, 1 C. B. 477), but when the commission is returned, the court will require strict proof of her identity. (*In re Atherton*, 3 Dowl. & L. 26.) The court allowed a commission for taking the acknowledgment of a married woman in Australia, under this section, to go out with a blank for a christian name of the husband, which (the marriage having taken place there) was unknown here. (*In re Legge*, 15 C. B. 364.) Where the acknowledgment of a married woman had been taken in a remote part of India, under peculiar circumstances, in the absence of all the commissioners, before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein. (*Re Stubbs*, 4 Man. & G. 609.) It is not necessary to state in a certificate under this section the specific place at which the acknowledgment of a married woman has been taken; it is enough if the deed appear to have been executed within the terms of the commission. (*Ex parte Hutchinson*, 17 L. J., C. P. 111; 5 C. B. 499; 5 Dowl. & L. 523.)

As to *prima facie* evidence of the sealing of a deed acknowledged by a married woman before special commissioners appointed under this section, see *Re Sandilands*, L. R., 6 C. P. 411.

### *Memorandum of Acknowledgment.*

84. When a married woman shall acknowledge any such deed as aforesaid, the judge, master in chancery or commissioners taking such acknowledgment, shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed, which memorandum, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

'THIS deed, marked [*here add some letter or other mark for the purpose of identification*], was this day produced before me [*or us*] and acknowledged by \_\_\_\_\_ therein named to be her act and deed; previous to which acknowledgment the said \_\_\_\_\_ was examined by me [*or us*] separately and apart from her husband, touching her knowledge of the contents of the said deed and her consent thereto, and declared the same to be freely and voluntarily executed by her.'

When a married woman shall acknowledge a deed, the person taking the acknowledgment to sign a memorandum to the effect here mentioned:

3 & 4 Will. 4,  
c. 74, s. 84.

and also sign a  
certificate of the  
taking of such  
acknowledgment  
to the effect here  
mentioned.

### Certificate of Acknowledgment.

And the same judge, master in chancery or commissioners, shall also sign a certificate of the taking of such acknowledgment, to be written or ingrossed on a separate piece of parchment, which certificate, subject to any alteration which may from time to time be directed by the Court of Common Pleas, shall be to the following effect; *videlicet*,

' THESE are to certify that on the                      day of  
' in the year one thousand eight hundred and                      , before  
' me the undersigned Sir *Nicholas Conyngham Tindal*, Lord  
' Chief Justice of the Court of Common Pleas at *Westminster*,  
' [or before me Sir *James Parke*, knight, one of the justices of  
' the Court of King's Bench at *Westminster*; or before me the  
' undersigned *James William Farrer*, one of the masters in  
' ordinary of the Court of Chancery; or before us *A. B.*  
'                      and *C. D.*                      two of the perpetual com-  
' missioners appointed for the                      for taking the acknow-  
' ledgments of deeds by married women pursuant to an act  
' passed in the                      year of the reign of his Majesty King  
' *William* the Fourth, intituled *An Act* [insert the title of this  
' *Act*]; or before us the undersigned *A. B.*                      and *C. D.*  
'                      two of the commissioners specially appointed pursuant  
' to an act passed in the                      year of the reign of his Ma-  
' jesty King *William* the Fourth, intituled *An Act* [insert the  
' title of this *Act*], for taking the acknowledgment of any deed  
' by                      the wife of                      ] appeared personally  
' the wife of                      and produced a certain indenture, marked  
' [here add the mark], bearing date the                      day of  
' and made between [insert the names of the parties], and  
' acknowledged the same to be her act and deed (*g*): And I  
' [or we] do hereby certify that the said                      was, at the  
' time of her acknowledging the said deed, of full age and  
' competent understanding, and that she was examined by me  
' [or us] apart from her husband, touching her knowledge of  
' the contents of the said deed, and that she freely and volun-  
' tarily consented to the same' (*b*).

Form of certifi-  
cate.

(*b*) When the above form of certificate to be made by commissioners for taking the acknowledgments of married women will not suit the particular circumstances of the case, the Court of Common Pleas will make a special order for the alteration in that case. Thus where lands were vested in two infant females, one of whom was married, and a conveyance had been ordered to be made in pursuance of the stat. 11 Geo. 4 & 1 Will. 4, c. 60, ss. 6, 7, the commissioners for taking the acknowledgment having refused to take the acknowledgment, the court directed them to take it, and to omit the words "of full age" in the certificate. (*Re Luke*, 1 Scott, 80; *S. C.*, 1 Bing. N. R. 265.) In general the certificate will not be filed unless the affidavit state positively that the woman is of full age. A statement of belief is not sufficient. (*Re Coverley*, 8 Scott, 147.)

A certificate of acknowledgment of a deed by a married woman was allowed to be filed where, in lieu of the form given in this section, the commissioners merely certified that the lady was, as they believed, of full age. (*Ex parte Wallis*, 7 C. B., N. S. 303; 6 Jur., N. S. 201.) See Reg. Gen., Trin. T. 1884, I., p. 403, *post*.

The certificate of the acknowledgments of two married women, taken



under this act, stated them to have acknowledged the execution of indentures of lease and release; they were parties only to the indenture of release. The court, upon motion, refused to order the amendment of the certificate. (*Ex parte Witty and Salt*, 9 Dowl. P. C. 888; 3 Man. & G. 201; *Re White*, 3 Scott, N. R. 591.) The court refused to allow the amendment of the certificate of the acknowledgment by a married woman of a deed conveying an interest in land, where the commission issued in January, 1848, and the certificate erroneously stated the acknowledgment of the deed to have been taken in February, 1847. (*Re Millard*, 5 C. B. 753.)

3 & 4 Will. 4,  
c. 74, s. 84.

Where a certificate signed by a judge was lost before it was lodged with the officer to be filed, it was held that whether a fresh certificate, if given by the judge, would be valid or not, the court had no power to authorize him to give one. (*Re a Married Woman*, 1 L. R., 2 C. P. 510.) A fresh acknowledgment of this deed was afterwards made. (See *Sharpe v. Foy*, L. R., 4 Ch. 36.)

Loss of certificate.

### Filing of Certificate with Affidavit.

85. Every such certificate as aforesaid of the taking of an acknowledgment by a married woman of any such deed as aforesaid, together with an affidavit by some person verifying the same, and the signature thereof by the party by whom the same shall purport to be signed, shall be lodged with some officer of the Court of Common Pleas at Westminster, to be appointed as hereinafter mentioned; and such officer shall examine the certificate, and see that it is duly signed, either by some judge or master in chancery, or by two commissioners appointed pursuant to this act, and duly verified by affidavit as aforesaid, and shall also see that it contains such statement of particulars, as to the consent of the married woman, as shall from time to time be required in that behalf; and if all the requisites in this act in regard to the certificate shall have been complied with, then such officer shall cause the said certificate and the affidavit to be filed of record in the said Court of Common Pleas (c).

Certificate, with affidavit verifying the same, to be lodged with some officer of the Court of Common Pleas, who shall cause the same to be filed of record in the court.

(c) As to affidavits see Reg. Gen., Hil. T. 1834, IV.—VII. (p. 401, *post*); Reg. Gen., Trin. T. 1834 (p. 403, *post*); the general orders as to affidavits, 24 Nov. 1862, and 13 Jan. 1863 (p. 404, *post*), and the cases there quoted. See also the forms of affidavits given in the Appendix.

An affidavit, verifying the certificate of acknowledgment of a deed by a married woman before special commissioners, ought to show clearly that the persons, who purported to have taken the acknowledgment, were the commissioners named in the commission. The court allowed a defect in that respect to be supplied by affidavit. (*Re Vaughan*, 1 C. B., N. S. 314.)

Cases as to the verifying affidavit where acknowledgment taken before special commissioners.

Where an affidavit verifying the certificate of acknowledgment by a married woman, taken abroad by commissioners under a commission pursuant to this act, varied from the form given by Reg. Gen., H. T. 1834, in not stating where the acknowledgment was taken, but contained sufficient to satisfy the court that the commission had been *bonâ fide* acted on beyond the seas, the court allowed the certificate to be filed, as the rule of court is not a statutable rule. (*Re Partridge*, 17 C. B. 18; 1 Jur., N. S. 1140.) The affidavit verifying the certificate of the acknowledgment of a married woman, taken by commission under sect. 83 of the act, may be filed subsequently to the filing of the certificate. (*Anon.*, 1 Scott, 52, *sed qu.* Macqueen on Husband and Wife, App. I., p. 26, 1st ed.)

Where an acknowledgment is taken abroad, the affidavit verifying the certificate need not name the place where it is taken. In this country it is necessary that it should appear that the acknowledgment was taken before

3 & 4 Will. 4,  
c. 74, s. 85.

Cases as to the  
verifying aff-  
davit.

Erasures and in-  
terlineations.

commissioners duly authorized to act in the place where it is taken. But the same reasons do not apply in the case of an acknowledgment taken abroad. (*Re Shufflebottom*, 6 Scott, 898; *Re Partridge*, 17 C. B. 18.) The court allowed a certificate of an acknowledgment taken at Adelaide under this act to be filed, notwithstanding the affidavit of verification omitted to mention the place where the acknowledgment was taken, it appearing by affidavit that the acknowledgment was taken at that place. (*Re Sanderson*, 8 C. B., N. S. 93; 6 Jur., N. S. 1373; 29 Law J., C. P. 264; 8 W. R. 417.) A statement in the affidavit of verification of an acknowledgment under this statute, that it was taken "at Madeira," is sufficiently precise. (*Ex parte Hutchinson*, 5 C. B. 499; 5 Dowl. & L. 523.)

The court allowed a commission with the certificate of acknowledgment and affidavit to be received and filed, notwithstanding the omission of the month in the jurat of the affidavit. (*Re Van Ufford*, 9 C. B., N. S. 789.)

The certificate of acknowledgment of a deed by a married woman described her as Mary, the reputed wife of A. B., otherwise Mary S., spinster; she was similarly described in the affidavit of verification and in the deed itself. The court directed their officer to receive and file the certificate and affidavit. (*Ex parte Francis*, 5 C. B. 498; 17 L. J., C. P. 110.) The acknowledgment of a deed by a married woman, where the affidavit, verifying such acknowledgment, varied in its title and commencement from the form prescribed by the rule of H. T., 4 Will. 4, was allowed to pass; the affidavit being one upon which perjury could be assigned. (*Re Shan*, 3 Man. & G. 236.) The certificate of acknowledgment of a married woman to bar her dower, taken under a special commission, was verified by an affidavit written on paper, contrary to the usual practice of the court, by which such documents are required to be on parchment. It was held, that the affidavit and other documents might be received and filed. (*Ex parte Carr*, 17 L. J., C. P. 107; 5 C. B. 496; 5 Dowl. & L. 488.) An acknowledgment of a deed by a married woman under this act was taken in 1842, and the certificate and memorandum thereof duly signed by the commissioners, but by some inadvertence on the part of the solicitor employed in the transaction there was no affidavit of verification and the documents were not filed. After the lapse of thirteen years the court allowed the certificate to be received and filed upon an affidavit by the surviving commissioner, stating that it had always been his practice, and as he believed that of his co-commissioner, to make all inquiries of the married woman before taking her acknowledgment, and that from the circumstance of his having signed the certificate and memorandum, he verily believed that all proper inquiries had been made on this occasion, though, from the lapse of time, he was unable positively to state what the answers were. (*Re Warno*, 15 C. B. 767.)

The court directed an acknowledgment by a married woman to be filed, although it was doubtful whether there was not an *erasure* in the jurat of the affidavit of acknowledgment, it being certain that there was a *rasure* in it. (*Re Millard*, 6 Dowl. & L. 86, C. P.) The court refused to direct the officer to receive a certificate and affidavit of an acknowledgment, the affidavit having an interlineation in an important part, without anything to denote that the interlineation had been made before the affidavit was sworn. (*Re Worthington*, 5 C. B. 511; *Re Page*, 5 Dowl. & L. 475.) The court allowed a certificate of an acknowledgment and affidavit of verification (taken in New South Wales) to be received and filed, notwithstanding an erasure in a material part of the affidavit, there being satisfactory evidence (by affidavit) that the erasure was made before the acknowledgment and affidavit were taken and sworn. (*Re Bingle*, 15 C. B. 449.) It is no objection to the filing of a certificate of acknowledgment under this act, that the date of the certificate is written on an erasure. (*Anon.*, 16 C. B. 574.) The court permitted the affidavit verifying the notarial certificate of an acknowledgment under this act to be received, notwithstanding an erasure in the jurat, the court being satisfied that there had been a substantial compliance with the statute, and the erasure having arisen from circumstances over which the parties had no control. (*Re Denton*, 6 C. B., N. S. 287.) The jurat of an affidavit of the due taking of an acknowledgment at

Sydney had an interlineation in the body of it, and an erasure in the jurat. The court refused to allow it to be filed. (*Re Tierney*, 15 C. B. 761.) In the jurat of an affidavit of the due taking of an acknowledgment at Calcutta, the name of one of the deponents was interlined: it was held, that the affidavit could not be received. (*Re Fagan*, 5 C. B. 436.)

8 & 4 Will. 4,  
c. 74, s. 85.

The court permitted a certificate of acknowledgment under this act to be filed, although the affidavit to excuse the want of a notarial certificate (which was sworn by one of the commissioners taking the acknowledgment, and was in other respects sufficient), erroneously stated that the affidavit verifying the certificate was sworn by the *other* commissioner, when in fact it was sworn by the deponent himself. (*Re Taylor*, 4 Scott, N. R. 328; *Re Warburton*, 3 Man. & G. 633.)

In England and Wales the affidavit must be sworn before a judge or before a commissioner for taking affidavits in the Court of Common Pleas. (Chitty's Archbold's Pr. 1624, 12th ed.)

Before whom  
affidavits must be  
sworn.

In Scotland and Ireland the affidavit must be sworn before a commissioner for taking affidavits in the Court of Common Pleas at Westminster, appointed pursuant to the stat. 3 & 4 Will. 4, c. 42, s. 42.

England and  
Wales, Scotland  
and Ireland.

By stat. 3 & 4 Will. 4, c. 42, s. 42, the superior courts of common law and equity at Westminster have the same powers of granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the same courts respectively, as they then had in the counties in England and Wales, and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes then in force, (see 29 Car. 2, c. 5; 6 Geo. 3, c. 50, s. 2; 5 Geo. 4, c. 106, ss. 9, 10; 11 Geo. 4 & 1 Will. 4, c. 76, s. 18,) and persons falsely swearing before persons so authorized are liable to the penalties of perjury. In Scotland and Ireland it should therefore seem that the affidavit must be sworn as required by the Rules of Hilary Term, 1834, or before a person authorized, under the stat. 3 & 4 Will. 4, c. 42, s. 42, to take affidavits in those countries.

An affidavit sworn before a commissioner appointed by the Irish Court of Common Pleas under 55 Geo. 3, c. 157, will not be received. (*Re Anderson*, 2 Scott, 626; 2 Bing. N. C. 435.) Where an affidavit was sworn before a notary public in the Hebrides, it was received on its being shown that there was no commissioner of the court in the Hebrides or nearer than the mainland. (*Re Sarah Groom*, 17 W. R. 589.)

In France the affidavit may be sworn before the consul, vice-consul, or any attorney or attornies of either of the superior courts of Westminster. (Ord. C. P., Trin. T. 1834; *vide* Macqueen on Husband and Wife, App. I., p. 22, 1st ed.)

Where acknow-  
ledgment taken  
abroad.

In the case of an acknowledgment taken abroad, the court will not dispense with an affidavit of verification, sworn and authenticated according to the local law, unless it be distinctly shown that great inconvenience would result from a strict adherence to the ordinary rule. (*Re Crawford*, 4 C. B. 626.) The court refused to direct the proper officer under 3 & 4 Will. 4, c. 74, to receive and file an acknowledgment, where the affidavit of verification was sworn before the British minister at Florence, it not appearing that there was any difficulty in getting it sworn before some properly constituted authority at that place. (*Re Baroness Dunsany*, 7 C. B. 119.) The court refused to allow a certificate of acknowledgment taken in Ontario under this act to be filed, when the affidavit of verification purported to be sworn before J. S., an attorney of the supreme court. The affidavit must be sworn before a magistrate, and his authority to administer oaths certified by a notary public. (*Re Woodman*, 11 C. B., N. S. 630.) There being sufficient upon the documents reasonably to satisfy the court that the commission has been *bonâ fide* executed, the court permitted them to be received, though the notarial certificate did not in terms verify the signature of the justices of the peace before whom the affidavit of verification purported to be sworn. (*Re Foster*, 5 C. B., N. S. 544; 28 Law J., C. P. 138.) It is no objection that the notarial certificate is on paper instead of parchment. (*Re Cock*, 5 C. B., N. S. 548; 28 Law J., C. P. 138; *Ex parte Carr*, ante, p. 390.)

Affidavit may be  
sworn before  
magistrate whose  
authority is cer-  
tified by notary.

It was decided that a British consul at a foreign port has authority under Consuls.

3 & 4 Will. 4,  
c. 74, s. 85.

the statute 6 Geo. 4, c. 87, s. 20, (which authorizes the consul-general or consul to administer an oath whenever the same should be required, and to do all such notarial acts as a notary public may do,) to certify as to the handwriting an authority of the party before whom is sworn the affidavit verifying the certificate of taking an acknowledgment of a married woman (abroad), under this act. (*Re Barber*, 2 Scott, 436; 2 Bing. N. C. 268; 4 Dowl. P. C. 640.) Although a British consul in a foreign country has not power, *per se*, to administer oaths of verification of the proceedings before a commission under this act, yet if a notary public in the foreign country certify that by the laws of that country the British consul has power to administer an oath, an affidavit of verification made before the consul will be received. (*Ex parte Hutchinson*, 5 Dowl. & L. 523; 5 C. B. 499.) The court allowed an acknowledgment to be received and filed under this act, where the affidavit verifying the same was sworn before "the provisional British consul for the Society Islands," it appearing that there was no notary or any other official person before whom it could be sworn within many hundred miles. (*Re Darling*, 2 C. B. 347.) The court dispensed with the notarial certificate in the case of an acknowledgment taken at Corfu under this act, it being sworn that there was no English notary resident in the island. (*Re Hurst*, 15 C. B. 410.)

Ambassadors and  
consuls.  
18 & 19 Vict. c. 42.

By statute 18 & 19 Vict. c. 42, ss. 1, 2, 3, oaths may be administered by ambassadors and other officers exercising their functions in any foreign country, and by consuls exercising their functions in any foreign place. Affidavits taken before such ambassadors, &c., may be used in the courts in the United Kingdom. Documents are to be evidence without proof of seal or signature of ambassador or other official person. A notarial certificate is not required when the affidavit is sworn before any British diplomatic minister or consular agent authorized by the last act.

Prior to the passing of the last act, an affidavit sworn before the British consul at Paris, to obtain an order to dispense with the concurrence of the husband of a married woman under the 91st section of this act, was not admissible. (*Re Cooper*, 16 C. B. 225.)

See further as to affidavits sworn abroad, Chitty's Archbold's Pr. 1625, 12th ed.

Germany.

The court directed the officer to receive an affidavit verifying the certificate of an acknowledgment by a married woman, under this act, made by a notary public at Carlsruhe in Germany, the commissioner himself declining to make the affidavit. (*Re Pearsall*, 2 Scott, N. R. 188; 1 Man. & G. 973; 9 Dowl. P. C. 46.) An affidavit of a married woman's acknowledgment of a deed in foreign parts was admitted, on showing that affidavits are not usually signed at Hamburg. (*Ex parte Birch*, 4 Bing. N. C. 394.) *In re Eady*, (6 Dowl. 615,) it was held, that an affidavit made in Germany, verifying the certificate of acknowledgment of a married woman resident in that country, should be made, not before the British consul, but before a native court. It was also held to be no objection to the affidavit that it was originally in the German language, if it were translated, and the translation verified by a notary. The oath, too, might likewise be administered in German, if it were interpreted to the deponent.

Milan.

Where an acknowledgment of a married woman was taken at Milan, the court allowed a certified copy of an act of the Imperial Royal Civil Tribunal of that city to be received and filed in lieu of the affidavit verifying the certificate of the commissioners upon the production of an affidavit from a competent party, showing that by the law of that country depositions on oath are always deposited amongst the records of the court, and that office or certified copies only are delivered out to the parties. (*Re Clericetti*, 15 C. B. 762.)

Russia.

An affidavit verifying the due taking, in Russia, of the acknowledgment of a deed by a married woman, made before the British consul, was held sufficient; it having been stated in the notarial certificate, made in a former case, that the laws of Russia do not grant authority to any magistrate to administer oaths to any person whatever. (*Davy v. Maltwood*, 2 Man. & G. 424; *Ex parte Bayley or Daly*, 2 Scott, N. R. 823; 9 Dowl. P. C. 380; *Re Barber*, 4 Ib. 640; *Re Eady*, 6 Ib. 615.) The court directed

an acknowledgment under 3 & 4 Will. 4, c. 74, s. 79, to be received and filed under sect. 85, where the affidavit verifying the certificate of the commissioners was sworn before A. B., "minister of the British chapel at Moscow," it being deposed to in an affidavit by the secretary of the Russia company in London, that A. B. was in the habit of administering oaths to British subjects there, and certified by two merchants at Moscow that there was no English notary public or British consul or vice-consul within 400 miles of that city. (*Re Pickersgill*, 6 Man. & G. 250; 6 Scott, N. R. 831.)

3 & 4 Will. 4,  
c. 74, s. 85.

The affidavit verifying the acknowledgment of a married woman, taken in Philadelphia, commenced as follows:—"Be it remembered, that on the 10th December, 1840, came before me J. B., Esq., alderman of Philadelphia, &c., J. S., &c., and in due course of law deposed and swore, &c." It then proceeded in the form of an affidavit, was subscribed by the deponent, and was accompanied by the usual notarial certificate. The court directed the affidavit to be received, although it was not in exact compliance with the rule of H. T., 4 Will. 4. (*Ex parte Shaw*, 9 Dowl. P. C. 839.) The court refused to file the certificate of an acknowledgment by a married woman, resident in America, verified by an affidavit made before a notary public, without an affidavit that notaries public are the proper officers for taking affidavits in America; and also as to the identity of the commissioners. (*Anon.*, 3 Jur., 125; *S. C.*, nom. *Ex parte Mann*, 7 Scott, 142; 5 Bing. N. C. 226; *Re Price*, 17 C. B. 708.) But where there was a certificate of the secretary of state of Wisconsin to the effect that in that state a notary public is officially authorized to administer oaths, an affidavit made before a notary public was received. (*Re Cooper*, 18 C. B., N. S. 220; 13 W. R. 292.) Upon an acknowledgment of a conveyance by a married woman taken in a township of Pennsylvania, the court, in lieu of notarial certificate, received a certificate of an officer describing himself as "the prothonotary and clerk of the Court of Common Pleas in and for Centre County, Pennsylvania," it being sworn that there was no notary public within eighty miles of the place. (*Re Way*, 6 Man. & G. 1046; 7 Scott, N. R. 999.) The court allowed a special commission for taking the acknowledgment in America, the certificate of the taking thereof and the affidavit of verification to be filed pursuant to this section, notwithstanding that there was a slight defect in that part of the affidavit which negatived the interest of the commissioners, and that the jurat did not show where the affidavit was sworn. (*Re Chandler*, 1 C. B., N. S. 323.)

America.

An acknowledgment by a married woman was taken before commissioners in India, pursuant to the provisions of this act, and an affidavit to that effect was sworn before a magistrate having competent authority. A person, describing himself as major-general, certified that the affidavit had been so sworn, and that the authority was competent, and stated that there was no notary at the place. On affidavits of the general's handwriting and rank, the court held the certificate sufficient. (*Re Daly*, 17 L. J., C. P. 1; 5 C. B. 128; 5 Dowl. & L. 333.) The court, under very peculiar circumstances, dispensed with a notarial certificate, and received an affidavit sworn before a "political agent;" the place at which the acknowledgment was taken being a very remote part of India, and it appearing, though not by affidavit, that there was no notary public, nor any magistrate before whom an oath could be taken within several hundred miles. (*Re Stubbs*, 5 Scott, N. R. 327.)

British Colonies.  
India.

The court refused to allow an affidavit and notarial certificate of an acknowledgment to be filed, the affidavit purporting to be sworn before one G., a commissioner for taking affidavits in the Court of Queen's Bench, Canada West, and the notary certifying him to be a commissioner of that court, and as such qualified to administer oaths. (*Re Street*, 2 C. B. 364.) An objection that an affidavit was sworn before "J. K., a solicitor of the Supreme Court of Wellington, and a commissioner for taking affidavits there," was insurmountable. (*Re Smith*, 10 C. B., N. S. 344; 9 W. R. 556.)

Canada.

New Zealand.

As to affidavits verifying certificates of acknowledgments taken in any part of her Majesty's dominions, see now the General Order of the Court of C. P., 13 Jan. 1863, p. 404, *post*.



8 & 4 Will. 4,  
c. 74, s. 86.

On filing certificate, the deed, by relation, to take effect from time of acknowledgment.

*Effect of filing Certificate, relation back.*

86. When the certificate of the acknowledgment of a deed by a married woman shall be so filed of record as aforesaid, the deed so acknowledged shall, so far as regards the disposition, release, surrender or extinguishment thereby made by any married woman whose acknowledgment shall be so certified concerning any lands or money comprised in such deed, take effect from the time of its being acknowledged, and the subsequent filing of such certificate as aforesaid shall have relation to such acknowledgment (*d*).

(*d*) A deed executed by a married woman to pass real estate, and indorsed with a memorandum of acknowledgment before a judge, under the 84th section of this act, is not effectual unless a certificate of that acknowledgment be filed of record in the Court of Common Pleas as required by this section. (*Jolly v. Handcock*, 7 Exch. 820; 22 Law J., Exch. 88. See *Sharpe v. Foy*, L. R., 4 Ch. 35.)

The obvious meaning of this section is this: the certificate, when filed, is to have relation back to the date of the acknowledgment, when it shall itself take effect; but if the certificate be not filed, that then the acknowledgment shall not have any effect whatever. It is clear, that the legislature passed this statute for the purpose of enabling married women to perform certain acts which are to be considered as valid only when done in a certain prescribed manner; and further, that the fact of those acts having been done in the manner required is also to be recorded. (*Jolly v. Handcock*, 7 Exch. 824.)

*Index of Certificates.*

The officer with whom the certificates are lodged to make an index of the same.

87. The officer of the Court of Common Pleas, with whom such certificates as aforesaid shall be lodged, shall make and keep an index of the same, and such index shall contain the names of the married women and their husbands alphabetically arranged, and the dates of such certificates and of the deeds to which the same shall respectively relate, and such other particulars as shall be found convenient; and every such certificate shall be entered in the index as soon as may be after such certificate shall have been filed.

*Copies of Certificate—Evidence.*

Officer to deliver a copy of certificate filed, which shall be evidence.

88. After the filing of any such certificate as aforesaid, the officer with whom the certificate shall be lodged shall at any time deliver a copy, signed by him, of any such certificate to any person applying for such copy; and every such copy shall be received as evidence of the acknowledgment of the deed to which such certificate shall refer.

*Power of Court of Common Pleas defined.*

Chief Justice of Common Pleas to appoint the officer with whom the certificates shall be lodged; and the court to make orders touching the examination,

89. The Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint the person who shall be the officer with whom such certificates as aforesaid shall for the time being be lodged, and may remove him at pleasure; and the Court of Common Pleas at Westminster shall also from time to time make such orders and regulations

as the court shall think fit, touching the mode of examination to be pursued by the commissioners to be appointed under this act, and touching the particular matters to be mentioned in such memorandums and certificates as aforesaid, and the affidavits verifying the certificates, and the time within which any of the aforesaid proceedings shall take place, and touching the amount of the fees or charges to be paid for the copies to be delivered by the clerks of the peace or their deputies, or by the officer of the said court, as hereinbefore directed, and also of the fees or charges to be paid for taking acknowledgments of deeds and for examining married women, and for the proceedings, matters and things required by this act to be had, done, and executed for completing and giving effect to such acknowledgments and examinations.

3 & 4 Will. 4,  
c. 74, s. 89.

memorandums,  
certificates, affi-  
davits, &c.

The 25 & 26 Vict. c. 96, enacts, that the officer appointed under the last section and his successors, shall respectively from and after the 7th of August, 1862, hold such office and appointment during good behaviour.

25 & 26 Vict.  
c. 96.

2. Provided always, that the said officer and his successors shall hold the said office subject to any regulations which may be hereafter made by parliament concerning the same or the duties thereof; and in the event of such office being abolished, or of the duties thereof being transferred or altered by any act to be hereafter passed, or of any alteration being made by competent authority in the fees, emoluments, or remuneration to be allowed to such officer, the said officer and his successors shall not be entitled to make any claim to compensation which he or they would not have been entitled to make if this act had not passed.

Officer to hold  
office during good  
behaviour;

and subject to  
any regulations  
which may be  
hereafter made  
by Parliament.

### *Disposition of Equitable Interests in Copyholds.*

90. In every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of the manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid (e).

A married woman  
to be separately  
examined on the  
surrender of an  
equitable estate  
in copyholds, as  
if such estate  
were legal.

(e) A *feme covert* who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants. (*Driver v. Berry*, 4 Taunt. 293. See 1 Watk. on Cop. by Cov. 89.) A custom in a manor required that the consent of the husband to the surrender by his wife should be expressed in the surrender and admission. A surrender was made by the wife at a general court, and the husband was present at that court, but in the surrender his consent was not expressed; it was held, that the surrender was inoperative and that the court could not infer from circumstances that the husband's consent had been given. It seems that such a surrender would not be good

8 & 4 Will. 4,  
c. 74, s. 90.

even if the husband were divested of all property at the time. (*Doe d. Shelton v. Shelton*, 4 Nev. & M. 857; 3 Ad. & Ell. 265; 1 Harr. & Wol. 287.)

It seems that a special custom may authorize a surrender by the wife alone, with the assent of the husband. (*Taylor v. Phillips*, 1 Ves. sen. 229; 1 Watk. on Cop. 64.) But a custom for the wife to dispose of her copyhold estate by surrender without the husband's assent is bad. (*Stevens v. Tyrrell*, 2 Wils. 1. See *White v. Driver*, 4 Taunt. 294; *Doe d. Nethercote v. Bartle*, 5 B. & Ald. 492.)

It was held, that a surrender of a copyhold estate, to which a *feme covert* was entitled, after secret examination by the steward, to the use of her husband, in his presence and with his consent, testified by his immediate admittance, was valid. (*Scamon v. Man*, 8 Bing. 378; *S. C.*, 11 Moore, 243.)

A surrender by the wife of a copyholder with his consent, and after having been separately examined, to the use of a purchaser from the assignees of the husband, who had become bankrupt, was held effectual to bar her right of freebench, if any such existed by special custom, although at the time of such surrender, the purchase not having been completed, the purchaser had not any legal estate in the premises. (*Wood v. Lambirth*, 1 Phill. C. C. 8.) See, further, Scriven on Copyholds, 108, 5th ed. As to whether, previously to this act, a married woman could have conveyed an equitable interest in copyholds by fine, see Scriven, 55, 5th ed.



### Dispensation with Husband's Concurrence.

Court of Common Pleas, in the case of a husband being lunatic, &c. may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

91. Provided always, and be it further enacted, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred (*f*): provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, or his Majesty's High

Court of Chancery, shall be the protector of a settlement in lieu of her husband. 3 & 4 Will. 4,  
c. 74, s. 91.

(f) This section gives no authority to the court to grant an order dispensing with the concurrence of a husband in the sale or conveyance of the wife's land, unless the land is actually contracted to be sold or conveyed. (*Re Graham*, 13 W. R. 782 ; 19 C. B., N. S. 870.)

Upon a motion on the part of a married woman to convey her interest in property without the concurrence of her husband, on the ground that he is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic *at the time of the application*. (*Re Turner*, 3 C. B. 166.) The court refused to act upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed or other legal instrument, but required an affidavit showing an effectual application to him for the purpose. (*Re Murphy*, 5 Scott, N. R. 166; 4 Man. & G. 635.) Husband of un-  
sound mind.

Upon the affidavit of a married woman that her husband had absconded in 1831, after committing an act of bankruptcy, had never been heard of since, but was believed to be in America, leave was granted for her to pass her life interest in certain freehold property, pursuant to the 77th and 91st sections of this act. (*Ex parte Mary Gill*, 1 Bing. New Rep. 168. See Cruise's Dig. vol. vii. p. 1, 4th ed.) The Court of Common Pleas authorized a *feme covert* to convey her copyhold property, her husband having resided abroad for more than twenty years with another woman. (*Ex parte Shirley*, 5 Bing. N. S. 226; 7 Dowl. P. C. 258.) In support of an application for an order to dispense with the concurrence of the husband of a married woman to the deeds of conveyance of certain property, under this section, it was sworn that the husband had absconded from home, and had since sailed for Port Phillip; that since the departure of the ship, his wife had heard nothing of him, and that she believed him to be on his said voyage; that her husband had been made a bankrupt, and that her interest in the property in question passed to his assignees; and also, that, her husband having sold the property, she was desirous of completing the conveyance; held sufficient. (*Ex parte Stone*, 9 Dowl. P. C. 843.) The court granted leave to take the acknowledgment of a married woman without the concurrence of her husband, under sections 75 and 91 of this act, where it appeared that the parties lived together only seventeen weeks after marriage, in 1829, when the husband went away, and the wife after many inquiries was not able to find him. (*Anon.*, 2 Jurist, 945, C. P.) The court refused, in 1847, to dispense with the concurrence of a husband, upon an affidavit merely stating that he entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return. (*Ex parte Gilmore*, 3 Com. B. 967.) The court will not grant a rule to enable a married woman to execute a conveyance without her husband's concurrence, upon the mere statement that the husband, a seaman, has gone abroad, and has not been heard of for some years, and that the wife has been informed that he is dead. The affidavit must show some reasonable ground for presuming the statement to be true. (*Ex parte Taylor*, 7 C. B. 1.) Husband abroad.

To warrant the court to make an order, under this section, to dispense with the concurrence of the husband in the conveyance of the wife's property, on the ground of his being beyond the seas, it must be shown that he has absented himself under such circumstances as to induce the court to infer that he has no intention to return to this country. (*Re Squires*, 17 C. B. 176.) An order will not be granted when it appears that the husband is in correspondence with the wife, and remitting sums of money for her support, however small. (*Ib.*)

By a marriage settlement made in 1844, the freehold property of the intended wife was conveyed to trustees upon trust to permit the husband to receive the rents during coverture, or until the wife should by writing

8 & 4 Will. 4,  
c. 74, s. 91.

under her hand otherwise direct or appoint, and after such direction or appointment, upon trust for the separate use of the wife. The deed also contained a power of sale to be exercised by the trustees "at the request and by the direction of the husband and wife during their joint lives," in writing. The husband received the rents and profits down to 1851, when the wife exercised her power of appointment directing the trustees to receive the rents and profits, and to apply them to her separate use. In 1852, the husband went to Australia and had not been heard of since December, 1857, when he was at Geelong; and the wife deposed to her belief that he would never return to this country. The court refused to dispense with the concurrence of the husband in the conveyance of the property under this section, it also appearing that no application had been made to him to concur. (*Re Eden*, 5 C. B., N. S. 232; 28 Law J., C. P. 4.) The court made an order, under this section, upon an affidavit stating, that, having fallen into distressed circumstances, the husband, *about two months before*, left England for Australia, with the intention of never returning, and that he had ever since been living separate and apart from his said wife. (*Re Kelsey*, 16 C. B. 197.)

Husband and  
wife separated.

An order that a married woman might be at liberty to make, without the concurrence of her husband, a disposition of lands to which she was entitled as tenant in tail in possession, and tenant in fee simple, was made on affidavit that the wife was entitled to the property, that she and her husband lived separate from each other, and that he had been found a lunatic by inquisition in 1833. (*Ex parte Thomas*, 4 Moore & Scott, 331.) So an order for dispensing with the husband's concurrence was made on affidavit, stating the marriage in 1816; that, in 1820, the husband left his wife, and that she had never heard of or received any information respecting him since, and that his present residence was altogether unknown to her; that she was entitled in her own right to the entirety of certain copyhold premises, which she had been compelled to mortgage; and that, if the application were not granted, she would be liable to incur a forfeiture. (*Ex parte Shuttleworth*, 4 Moore & Scott, 832, n. (b).) An order having been made enabling a married woman to dispose of property without the concurrence of her husband, upon the usual affidavit by her that they were living apart by mutual consent, the court refused to rescind the order after it had been acted upon, and the rights of third parties had intervened, upon the application of the husband who swore that though he resided apart from his wife (upon an allowance made to him out of her separate estate) he occasionally visited and slept with her. (*Re Rogers*, L. R., 1 C. P. 47.)

Wife's separate  
property.

A husband being a minor the court granted a rule under this section to enable the wife to execute a conveyance of her separate property without his concurrence. (*Re Haigh*, 2 C. B., N. S. 198; 3 Jur., N. S. 371; 26 Law J., C. P. 209.) The court granted an order to dispense with the concurrence of the husband in a conveyance by the wife of her separate property under this section, upon an affidavit showing that he had absconded and had not been heard of since the year 1837, although it also appeared that she had in the meantime married again. (*Ex parte Yarnall*, 17 C. B. 189.) The court dispensed with the concurrence of the husband (who was living separate from his wife) in the conveyance of property in which the wife had a separate interest under the will of her deceased father, where the husband had refused to execute the deed. (*Re Perrin*, 14 C. B. 420.) The concurrence of the husband, in the conveyance by his wife of her separate property, will be dispensed with, where the parties are living apart by mutual consent, and the husband refuses to join in the execution unless part of the purchase-money is paid to him. (*Re Woodcock*, 1 Man. & G., N. S. 437.) As to conveyance of separate property by a married woman when living apart by a sentence of judicial separation without alimony, see *Ex parte Andrews*, 19 C. B., N. S. 371. The equitable interest in her separate property can be disposed of by a married woman without her husband's concurrence. (See *Taylor v. Meads*, 13 W. R. 394.)

Affidavits.

In support of an application for a married woman to be permitted to convey her interest in an estate, without the concurrence of her husband, an affidavit was produced, sworn by the sister of the married woman, who



stated that the person on whose behalf the application was made was speechless; the court refused to grant the application without an affidavit that the married woman herself had been examined. (*Re Williams*, 2 Scott, N. R. 120; 1 Man. & G. 881; 9 Dowl. P. C. 72.) The court will not dispense with the affidavit of the married woman herself. (*Ex parte Bruce*, 9 Dowl. P. C. 840.) The court refused to act upon an affidavit merely stating that the parties were living apart by mutual consent, but required an affidavit showing that an application had been made to the husband to execute the deed, and that he had refused to do so. (*Ex parte Trencery*, 1 C. B., N. S. 187.) The court will not permit a married woman to execute a conveyance under this section without the concurrence of her husband, where he had refused to concur, upon an affidavit merely stating that the wife had left her husband in consequence of his violence, and was living apart from him. (*Re Price*, 13 C. B., N. S. 286.) In addition to an affidavit that the parties were living apart by mutual consent, and that the husband had been applied to but had refused to execute the conveyance, the court required an affidavit negating the wife's receipt of any allowance from her husband. (*Ex parte Fish*, 9 C. B., N. S. 715; *Re Carburton*, 16 W. R. 84; *Re Fletcher*, 17 W. R. 319; *Ex parte Robinson*, L. R., 4 C. P. 205.)

3 & 4 Will. 4,  
c. 74, s. 91.

An order to enable a married woman to make a conveyance of her property without her husband's concurrence, cannot be made without an affidavit from her negating any communication from him. But where a delay until the following term would have caused great inconvenience to the parties, the court gave directions for the order to be drawn up in vacation, on the production of an affidavit. (*Re Horsfall*, 3 Man. & G. 132.)

The affidavit is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits. (*Re Schiff*, 1 Dowl. & L. 911.)

An affidavit describing the wife as "widow" is informal. (*In re Noy*, 7 Scott, N. R. 434.) The court declined to receive an affidavit in which she was described as "wife or widow." (*Re Anderson*, 2 C. B., N. S. 811.) The affidavit must describe the deponent "as the wife of, &c.," even though circumstances are disclosed, showing a well-grounded belief that the husband is dead. (*Ex parte Sparrow*, 12 C. B. 334.)

Where the affidavit referred to an order of protection which the wife had obtained from a magistrate, and the original probate of the will under which she claimed, both of which were made "annexes" instead of exhibits, the court held (on an application for leave to disannex them before filing the affidavit) that the documents must be filed with the affidavit, or a fresh affidavit made and the application renewed. (*Re Mary Firth*, W. N. 1872, p. 220.)

The affidavit must contain the addition or description of the husband. (*Re Gardner*, 1 C. B., N. S. 215.)

The following form of rule to dispense with the husband's concurrence in the conveyance of property, to which the wife alone was entitled, was made in *Ex parte Duffill*, 5 Man. & G. 378; 6 Scott, N. R. 30:—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or surrender, to dispose of, release, surrender or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce." (*Ib.*)

Form of rule to  
dispense with  
husband's con-  
currence.

## XVIII. IRELAND.

92. This act shall not extend to Ireland, except where the same is expressly mentioned (g).

(g) By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended

Ireland.

3 & 4 Will. 4,  
c. 74, s. 92.

to Ireland, with the omission of sections 4, 5 and 6 (*ante*, pp. 309, 310), relating to lands held by ancient demesne, and sections 50, 51, 52, 53, 54 (*ante*, pp. 350—353), 66, 76, 90, relating to copyholds (see *ante*, pp. 361, 368, 395). The other variations between the two statutes have been already noticed. (See *ante*, pp. 297, 320, 325, 341, 363, 364, 367, 369.)

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Irish Bankrupt and Insolvent Act, 1857, 20 & 21 Vict. c. 60, s. 340.

This act applies to lands locally situate in the town of Berwick-upon-Tweed. (6 & 7 Will. 4, c. 103, s. 6.)

### ORDERS OF THE COURT OF COMMON PLEAS, MADE IN PURSUANCE OF THE ABOVE ACT.

General Rules of  
Hilary Term,  
1834.

“WHEREAS it has been found expedient to make alterations in the General Rules made in Michaelmas term last by this Court, for the purpose of carrying into effect the statute passed in the 3rd and 4th years of the reign of his present Majesty, cap. 74, intituled ‘An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple modes of Assurance;’

“AND WHEREAS it is necessary to make Orders touching the amount of the reasonable Fees and Charges to be taken by the several persons appointed to carry the powers of the said act into execution; and it will be convenient that all the Orders and Regulations made by the Court under the said act should be contained in the same rule:

Rules of Michael-  
mas Term, 1833,  
revoked.

I. “NOW IT IS HEREBY ORDERED, that the said General Rules be and the same are hereby revoked; provided that this present Rule shall not be construed in any respect to invalidate any proceedings which, before the 1st day of March next ensuing, shall have been taken, pursuant to the direction of the said Rules of Michaelmas term last (*a*).

(*a*) For these rules, see 9 Bing. 443.

One commissioner  
at least must not  
be interested in  
the transaction.

II. “AND IT IS HEREBY FURTHER ORDERED, that, where any acknowledgment shall be made by any married woman of any deed under and by virtue of the said act, before commissioners appointed under the said act, one at least of the said commissioners shall be a person who is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent so interested or concerned (*b*).

(*b*) See the note to sect. 79, *ante*, p. 383.

Inquiry to be  
made of married  
woman separately  
as to the provision  
to be made for  
her.

III. “AND IT IS FURTHER ORDERED, that before the commissioners shall receive such acknowledgment, they, or in case one of them shall be interested or concerned as aforesaid, then such one of them as shall not be so interested or concerned, do inquire of every married woman separately and apart from her husband and from the attorney or solicitor concerned in the transaction, whether she intends to give up her interest in the estate to be passed by such deed, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such interest: and where such married woman in answer to such inquiry shall declare that she intends to give up such her interest without any provision, and the said commissioners shall have no reason to doubt the truth of such declaration, and shall verily believe the same to be true, then they shall proceed to receive the said acknowledgment; but if it shall appear to them or to such one of them as aforesaid, that it is intended that provision is to be made for any such married woman, then the commissioners shall not take her acknowledgment until they are satisfied that such provision has been actually made by some deed or writing produced to them, or if such provision shall not have been actually made before, then the commissioners shall require the terms of such intended provision to be shortly reduced into

writing, and shall verify the same by their signatures in the margin, at the foot or at the back thereof (c). 3 & 4 Will. 4,  
c. 74.

(c) Where property is sold under the compulsory provisions of an act of parliament, this rule is inapplicable. (*Re Foster*, 7 C. B. 120.) Where the amount of the consideration which forms the inducement for a married woman to give up her interest in an estate was too small (40*l.*) to form the subject of a settlement, and the arrangement was that the amount should be paid to the wife, the court allowed the acknowledgment to be registered. (*Ex parte Webber*, 5 C. B. 179.) Where the consideration money is to be paid into the hands of a married woman, the commissioner should distinctly ascertain from her that she wishes to pass her property without any provision being made for her. (*Re Dowling*, 18 C. B., N. S. 223.) The court refused to allow a certificate of acknowledgment by a *feme covert* to be filed, where it appeared from her answers to the inquiry of the commissioner as to whether she intended to give up her interest in the estate without any provision being made for her in lieu thereof, that the consideration for her consent was a provision made for her by her husband's will, although it was shown by another affidavit that she perfectly understood that to be no provision, inasmuch as the will was revocable. (*Re Dixon*, 4 C. B. 631.) The officer is justified in declining to receive and file an acknowledgment of a deed by a married woman, conveying her interest in property, where a provision is made for her in lieu of such her interest, and the commissioner merely certifies that the deed declaring the trusts of that provision "has been already engrossed, and was produced before him;" and the court will not make any order on the subject until they are satisfied that the deed has been duly executed. (*Re Dallas*, 10 C. B., N. S. 346; 30 L. J., C. P. 282.)

IV. "AND IT IS HEREBY FURTHER ORDERED, that the affidavit verifying the certificate to be made pursuant to the said act, and which certificate shall be in the form contained in the said act, shall (except in such cases where the acknowledgment shall be taken elsewhere than in England, Wales, or Berwick-upon-Tweed) be made by some practising attorney or solicitor of one of the courts at Westminster, or of one of the counties palatine of Lancaster or Durham: And that in all cases it shall be deposed, in addition to the verification of the said certificate, that the deponent (or, if more than one person join in the affidavit, that one or more of the deponents) knew the person or persons making such acknowledgment; and that, at the time of making such acknowledgment, the person or persons making the same was or were of full age and competent understanding; and that one at least of the commissioners taking such acknowledgment, to the best of his (deponent's) knowledge and belief, is not in any manner interested in the transaction giving occasion for the taking of such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned: And that the names and residences of the said commissioners, and also the place or places where such acknowledgment or acknowledgments shall be taken, shall be set forth in such affidavit: And that previously to such acknowledgment being taken, the deponent had inquired of such married woman (or if more than one, of each of such married women) whether she intended to give up her interest in the estate to be passed, and also the answer given thereto; and where any such married woman, in answer to such inquiry, shall declare that she intends to give up her interest without any provision, the deponent shall state that he has no reason to doubt the truth of such declaration, and he verily believes the same to be true. And where any provision has been agreed to be made, the deponent shall state that the same had been made by deed or writing, or, if not actually made before, that the terms of the intended provision have been reduced into writing, which deed or writing he verily believes has been produced to the said (judge, master, or) commissioners (d).

Contents of affidavit verifying the certificate.

(d) The affidavit must state that the acknowledgment was made before two duly appointed commissioners, one of whom was not interested in the transaction for which the acknowledgment was required. (*Re Kay*, 19 L. T., N. S. 856.) The affidavit may be made by one of the commissioners

3 & 4 Will. 4,  
c. 74.

who took the acknowledgment, if he be a practising attorney, and the other commissioner has no interest in the matter. (*Re Scholfield*, 3 Bing. N. C. 293.) Where, however, one of two commissioners was interested and had taken no part in the examination of a married woman, and the other commissioner died without having made the affidavit, the court refused to allow the certificate of acknowledgment to be filed. (*Ex parte Menhennett*, L. R., 5 C. P. 16.)

Where under the circumstances it was impossible to obtain affidavits in accordance with these rules, and the affidavits which had been obtained did comply with all the provisions of 3 & 4 Will. 4, c. 74, the court ordered the certificate of acknowledgment and the affidavits to be filed. (*Re Parker*, L. R., 5 C. P. 424.)

Affidavit must  
state parish, &c.

V. "AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall state the parish or several parishes, or place or several places, and the county or counties in which the several premises wherein any such married woman shall appear to be interested shall by deed be described to be situate.

Form of affidavit:  
Commissioner  
may make affi-  
davit.

VI. "AND IT IS HEREBY FURTHER ORDERED, that the affidavit shall be in the form hereunto annexed, subject to such variations as the circumstances of the case shall render necessary; or such affidavit may be made where it is found convenient by one of the said commissioners, with such variations in the form thereof as shall be necessary in that behalf (e).

(e) Forms of affidavits will be found in the Appendix. See General Rules, Trin. T. 1834, Rule I., and General Order, 24 Nov. 1862, pp. 403, 404, *post*.

Certificates and  
affidavits to be  
lodged with officer  
within one month.

VII. "AND IT IS HEREBY FURTHER ORDERED, that the certificates and affidavits verifying the same shall, within one month from the making the acknowledgment, be delivered to the proper officer appointed under the said act; and that the officer shall not after that time receive the same without the direction of the court or a judge (f).

(f) The court allowed a certificate and affidavit to be filed after a lapse of six years, where the failure to comply with this rule arose from inadvertency, and the property had been so dealt with in the interim that no one could be prejudiced thereby. (*Re Edge*, L. R., 1 C. P. 583; see also *Re Warne*, 15 C. B. 767, *ante*, p. 390.)

Fees.

VIII. "AND IT IS HEREBY FURTHER ORDERED, that the fees or charges to be paid for the copies to be delivered by the clerks of the peace, or their deputies, or by the officer of the said court, and for taking acknowledgments of deeds, and for examining married women, and for the proceedings, matters, and things required by the said act to be had, done, and executed, for completing and giving effect to such acknowledgments and examinations, shall be as follows (g).

	£	s.	d.
To a judge or master, for taking the acknowledgment of every married woman, of which 7s. 6d. will be paid, in the case of a judge, to his clerk, and the residue thereof will be paid over to the treasury; and in the case of a master, the whole will be paid over to the treasury, or the Fee Fund Account of the Court of Chancery .. .. .	1	6	8
To the two perpetual commissioners for taking the acknowledgment of every married woman, when not required to go further than a mile from their residence, being 13s. 4d. for each commissioner .. .. .	1	6	8
To each commissioner when required to go more than one mile, but not exceeding three miles, besides his reasonable travelling expenses .. .. .	1	1	0
To each commissioner where the distance required shall exceed three miles, besides his reasonable travelling expenses ..	2	2	0
To the clerk of the peace, or his deputy, for every search ..	0	1	0
To the same for every copy of a list of commissioners, provided such list shall not exceed the number of 100 names .. ..	0	5	0

To the same for every further complete number of 50 names, an additional .. .. .	£	s.	d.	3 & 4 Will. 4, c. 74.
To the officer for every search .. .. .	0	2	6	
To the same for every official copy of the certificate .. .. .	0	1	0	
To the same for every official copy of a list of commissioners, provided such list shall not exceed the number of 100 names	0	2	6	
To the same for every further complete number of 50 names additional .. .. .	0	5	0	
To the same for preparing every special commission, including a fee of 5s. to the clerk of the Chief Justice or other judge for the fiat .. .. .	0	2	6	
To the same for examining the certificate and affidavit, and filing and indexing the same, as required by the said act of the 3rd and 4th Will. 4, c. 74 .. .. .	0	15	0	
	0	5	0	

(g) See *ante*, s. 89. The office of Master in Chancery is now abolished. (15 & 16 Vict. c. 80, s. 1.) The fee of taking an acknowledgment by judge of a county court is one pound. By an order made in Michaelmas Term, 1852, in pursuance of the Common Law Procedure Act, 1852, among the fees to be taken at the judges' chambers in the superior courts of common law is the following (all other fees being thereby abolished):— Every acknowledgment by married women, 10s. (1 Ell. & Bl. 261, 265, 267.)

IX. "AND IT IS HEREBY FURTHER ORDERED, that the fees and charges to be paid for the entries of deeds, required by the said act to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of land held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders, by which dispositions shall be made under the said act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders, or the memorandums thereof, on the court rolls shall be as follows:—

	£	s.	d.	Fees as to copy-holds.
For the indorsements on the deed of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord, steward, or deputy steward, each indorsement of memorandum 5s. together .. .. .	0	10	0	
For the entries on the court rolls of deeds, and the indorsements thereon, at per folio of 72 words .. .. .	0	0	6	
For taking the consent of each protector of settlement of lands .. .. .	0	13	4	
For taking the surrender by each tenant in tail of lands .. .. .	0	13	4	
For entries of such surrenders, or the memorandums thereof, in the court rolls, at per folio of 72 words.. .. .	0	0	6"	

The following additional Rules were made in Trinity Term, 1834:—

I. "IT IS ORDERED, that from and after the last day of this term, where such parts of the affidavit, verifying the certificate of acknowledgment taken in pursuance of the late act of parliament respecting fines and recoveries, as state 'the deponent's knowledge of the party making the acknowledgment, and her being of full age,' cannot be deposed to by a commissioner, or by an attorney or solicitor, the same may be deposed to by some other person, whom the person before whom the affidavit shall be made shall consider competent so to do.

General Rules of  
Trinity Term,  
1834.

II. "AND IT IS FURTHER ORDERED, that where more than one married woman shall at the same time acknowledge the same deed, respecting the same property, the fees directed by the said rules to be taken shall be taken for the first acknowledgment only.

III. "And the fees to be taken for the other acknowledgment or acknowledgments, how many soever the same may be, shall be one-half of the original fees, and so also where the same married woman shall at the same time acknowledge more than one deed respecting the same property.



**3 & 4 Will. 4,  
c. 74.**

IV. "And where, in either of the above cases, there shall be more than one acknowledgment, all such acknowledgments may be included in one certificate and affidavit.

V. "In every case the acknowledgment of a lease and release shall be considered and paid for as one acknowledgment only."

#### GENERAL ORDER OF THE COURT OF COMMON PLEAS.

24 Nov. 1862. [13 C. B., N. S. 2.]

##### AFFIDAVITS of Verification of Certificates of Acknowledgments under 3 & 4 Will. 4, c. 74.

General Order,  
24 November,  
1862.

I. From and after the first day of Easter Term next inclusive, every affidavit of the verification of certificates of acknowledgments of deeds of married women, except as hereinafter provided, shall be drawn up in the first person and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject; provided that this rule shall not be applicable to any such affidavits where the acknowledgments have been taken out of England and Wales under special commissions issued prior to the said first day of Easter Term next (a).

(a) This rule as to the form of affidavits is directory only. (*Ex parte Hall*, 19 C. B., N. S. 369.)

II. The officer with whom all such certificates are filed is empowered in the interval between the date of this rule and the said first day of Easter Term next to receive and file any affidavits of verification, whether drawn up in the first or third person.

#### GENERAL ORDER OF THE COURT OF COMMON PLEAS.

13 JAN. 1863. [13 C. B., N. S. 405.]

##### AFFIDAVITS on Acknowledgments.

General Order,  
13 January, 1863.

With respect to acknowledgments of deeds by married women taken in any colony or foreign possession being part of the dominions of her Majesty, —It is ordered, that affidavits verifying the same made before any court or judge, magistrate, commissioner, notary public or other person authorized to administer an oath, and containing in the jurat a statement by such court or judge, magistrate, commissioner, notary public or other person of the name or title of the office or authority which he or they respectively hold and execute, shall be received as a sufficient compliance with the requirements of the 3 & 4 Will. 4, c. 74, s. 85, relating to affidavits of verification.

## ALIENATION OF THE INTERESTS OF MARRIED WOMEN IN PERSONAL ESTATE.

20 & 21 VICTORIA, c. 57.

*An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate.* [25th August, 1857.]

20 & 21 Vict.  
c. 57, s. 1.

Be it enacted as follows :

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of (*a*) every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (*b*) (except such a settlement as after mentioned), and also to release or extinguish any power (*c*) which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right or equity to a settlement (*d*) out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed : provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such estate in possession.

(*a*) For a married woman's power of disposition over reversionary interests in personalty settled to her separate use, see the note to 3 & 4 Will. 4, c. 74, s. 78, *ante*, p. 378. As regards her reversionary interests in personalty not settled to her separate use, it was well established before 20 & 21 Vict. c. 57, that a husband could not assign his wife's reversionary choses in action so as to bind her surviving, and the fact of her joining in the assignment made no difference. (*Purdew v. Jackson*, 1 Russ. 1; *Cresswell v. Dowell*, 4 Giff. 460; see *Winter v. Easum*, 2 D., J. & S. 272; *Bolitho v. Hillyar*, 34 Beav. 180.) Nor could a married woman by election part with her reversionary choses in action. (*Williams v. Mayne*, 1 R., 1 Eq. 519.) A husband and wife could not effectually dispose of the life interest of the wife in a fund not settled to her separate use beyond the duration of the coverture. (*Stiffe v. Everitt*, 1 M. & Cr. 87; *Re Godfrey's Trusts*, 1 R., 1 Eq. 533.)

Married woman unable to dispose of reversionary choses in action not settled to her separate use, except under 20 & 21 Vict. c. 57.

A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and

20 & 21 Vict.  
c. 57, s. 1.

Effect of hus-  
band's release.

son, by deed, surrendered and released their respective interests to the wife, for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for the payment of the fund to the son was refused, on the ground that the Court of Chancery will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. (*Whittle v. Henning*, 2 Phill. C. C. 731; 11 Beav. 222; 12 Jur. 1079; *Story v. Tonge*, 7 Beav. 91; *Hanchett v. Briscoe*, 22 Beav. 496.) *Shadwell*, V.-C., had, in several cases under similar circumstances, ordered the transfer of trust funds. (14 Sim. 592—599; see *Bishop v. Colebrooke*, 16 Sim. 39.)

Where a *feme covert* was entitled to a reversionary interest in a chose in action, the release of the husband was as inoperative as his assignment to bind his wife's right by survivorship. (*Rogers v. Acaster*, 14 Beav. 445.) Where a man gave a bond to secure an annuity to a single woman, and she afterwards married, it was once held that her husband might release the bond, and that if he released the security, there was an end to the annuity. (*Hore v. Becher*, 12 Sim. 465.) But this case has been disapproved. (*Fitzgerald v. Fitzgerald*, L. R., 2 P. C. 87.)

See further, as to the assignment of a married woman's reversionary choses in action, 2 White & Tudor, L. C., Eq. 783—794. Precedents of an assignment under this act by a married woman of a reversionary interest in personalty, and of a release under this act by a married woman of her equity to a settlement, are given, 1 Prideaux, Conv. 355, 6th ed.

As to whether the act applies to a married woman's choses in action, which are capable of being, but are not actually, reduced into possession during her husband's lifetime, see Lewin on Trusts, 23, 5th ed.

(b) B. had, under his marriage settlement, executed in 1839 a life interest in a fund vested in trustees, in trust (*inter alia*) to pay the same to the issue of the marriage in such shares as B. should appoint. In 1867 a daughter of B. married, and in 1868 B. appointed part of the fund to his daughter, to be held in trust for her, and assigned to her all his life interest in that part. Held, that the daughter was entitled under the settlement of 1839, and that the deed of 1868 was not, within the meaning of this section, an instrument made after the 31st December, 1857, so as to enable her to dispose of her interest in the sum appointed to her. (*Re Butler's Trusts*, L. R., 3 Eq. 138.)

Powers.

(c) As to the various kinds of powers, their suspension and extinction, see the note to 3 & 4 Will. 4, c. 74, s. 77; and as to the execution of powers by married women, see the note to 3 & 4 Will. 4, c. 74, s. 78.

Equity to settle-  
ment.

(d) As to a wife's equity to a settlement, see 1 White & Tudor, L. C., Eq. 445 *et seq.*; Daniell, Ch. Pr. 86 *et seq.*

Deeds to be ac-  
knowledged by  
married women  
in the manner re-  
quired by 3 & 4  
Will. 4, c. 74, for  
disposing of in-  
terests in or  
powers over land  
in England or  
Wales;

In Ireland, as by  
4 & 5 Will. 4,  
c. 92.

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner by the act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of the act shall be acknowledged by her and be otherwise perfected in the manner by the act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or

extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land (e). 20 & 21 Vict.  
c. 57, s. 3.

- (e) An order was made under this act, enabling a married woman, without the concurrence of her husband, to dispose of a reversionary interest in government stock. (*Re Alice Rogers*, L. R., 1 C. P. 47.)

3. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition. The powers of disposition given by this act not to interfere with any other powers.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage (f). Act not to extend to settlements of married women upon marriage.

(f) An agreement in contemplation of marriage was executed by the husband and wife to settle a money fund of the wife's for her separate use—to return to the husband if he should survive. The court considered the meaning to be that the fund was to be preserved during the coverture, and the wife was to have the absolute interest in the event of her surviving; and it was held that her reversionary interest was taken under the agreement, and not as a resulting use, and that, therefore, the case fell within the exception contained in this section. (*Clarke v. Green*, 2 H. & M. 474.)

5. This act shall not extend to Scotland.

Not to extend to Scotland.

## MARRIAGE SETTLEMENTS BY INFANTS.

18 & 19 VICTORIÆ, c. 43.

*An Act to enable Infants, with the Approbation of the Court of Chancery, to make binding Settlements of their Real and Personal Estate on Marriage (a).*

[2nd July, 1855.]

18 & 19 Vict.  
c. 43, s. 1.

Infants may, with the approbation of the Court of Chancery, make valid settlements or contracts for settlements of their real and personal estate upon marriage.

WHEREAS great inconveniences and disadvantages arise in consequence of persons who marry during minority being incapable of making binding settlements of their property: for remedy whereof it is enacted, as follows:

1. From and after the passing of this act it shall be lawful for every infant upon or in contemplation of his or her marriage, with the sanction of the Court of Chancery, to make a valid and binding settlement or contract for a settlement of all or any part of his or her property, or property over which he or she has any power of appointment, whether real or personal, and whether in possession, reversion, remainder, or expectancy; and every conveyance, appointment, and assignment of such real or personal estate, or contract to make a conveyance, appointment, or assignment thereof, executed by such infant, with the approbation of the said court, for the purpose of giving effect to such settlement, shall be as valid and effectual as if the person executing the same were of the full age of twenty-one years: provided always, that this enactment shall not extend to powers of which it is expressly declared that they shall not be exercised by an infant.

The words "Court of Chancery," in the above act, to include Court of Chancery in Ireland.

(a) By 23 & 24 Vict. c. 83, in the interpretation of the act 18 & 19 Vict. c. 43, and for all the objects and purposes thereof, the words "the Court of Chancery" shall include and be taken to include the Court of Chancery in Ireland, and all orders made and approbations already given by the Court of Chancery in Ireland in cases provided for and contemplated by the said act shall be as valid and binding in law as if the words "the Court of Chancery in Ireland" had been expressly contained in the said act in all the places where the words "the Court of Chancery" are mentioned therein.

Jurisdiction under this act.

The Court of Chancery has no jurisdiction under this act to approve a settlement of an infant's property originally made without its concurrence (per *Stuart, V.-C., Re Fuller's Settlement*, 10 Feb. 1860; *Morgan's Ch. Acts*, 234, 4th ed.); nor to settle the property of an infant, not being a ward of court, who marries after attaining the age at which she is capable of contracting marriage (*Re Potter*, L. R., 7 Eq. 484); but the court may, under this act, sanction a post-nuptial settlement of the property of a ward of court, which has been made with its approbation. (*Powell v. Oakley*, 34 Beav. 575; see *Re Hoare*, 11 W. R. 181.)

The act does not alter the legal status of an infant in respect of the alienation of property.

This act does not alter the legal status of an infant in respect of the alienation of property. Therefore, where, on the marriage of an infant, she executed a settlement of her personal property, with the sanction of the Court of Chancery in England, limiting funds in the Court of Chancery



in Ireland upon such trusts as the infant, notwithstanding her coverture, should either before or after attaining twenty-one, appoint; the latter court refused to transfer the funds to her appointee under a deed poll executed by her while still under the age of twenty-one. (*Re Armit's Trusts*, L. R., 5 Eq. 352.)

18 & 19 Vict.  
c. 43, s. 1.

As to the powers of infants previously to this act to make valid settlements on their marriage, see 3 Davidson, Conv. 728, note (a), 2nd ed.

2. Provided always, that in case any appointment under a power of appointment, or any disentailing assurance, shall have been executed by any infant tenant in tail under the provisions of this act, and such infant shall afterwards die under age, such appointment or disentailing assurance shall thereupon become absolutely void.

In case infant die under age, appointment, &c. to be void.

3. The sanction of the Court of Chancery to any such settlement or contract for a settlement may be given, upon petition presented by the infant or his or her guardian in a summary way, without the institution of a suit (b); and if there be no guardian, the court may require a guardian to be appointed or not, as it shall think fit (c); and the court also may, if it shall think fit, require that any persons interested or appearing to be interested in the property should be served with notice of such petition.

The sanction of the Court of Chancery to be given upon petition.

(b) A form of petition under this act is given, Dan. Ch. Forms, 1501. A petition is necessary although a suit has been instituted. (*Pearth v. Marriott*, W. N. 1866, p. 48.)

The ordinary course upon a petition is for the court, after hearing counsel, to adjourn the petition into chambers. (See *Re Olive*, 11 W. R. 819.) This proceeding does not make the infant a ward of court, and the court is not therefore called upon to sanction the marriage but only the settlement. (Judge's Regul. by Bloxam, p. 43; see *Re Strong*, 26 L. J., Ch. 64.) No order is drawn up, but a note signed by the registrar is left at chambers with the petition, and a summons to proceed on the petition is usually issued. Upon the return of this summons, or at an adjourned meeting, evidence is produced in conformity with the regulation. (1 Smith's Ch. Pr. 1149, 7th ed.; Dan. Ch. Pr. 1212.)

Practice under the act.

Upon applications to obtain the sanction of the court to infants making settlements on marriage under the act of 18 & 19 Vict. c. 43, evidence is to be produced to show—1. The age of the infant; 2. Whether the infant has any parents or guardians; 3. With whom or under whose care the infant is living, and if the infant has no parents or guardians, what near relations the infant has; 4. The rank and position in life of the infant and parents; 5. What the infant's property and fortune consist of; 6. The age, rank and position in life of the person to whom the infant is about to be married; 7. What property, fortune and income such person has; 8. The fitness of the proposed trustees and their consent to act. The proposals for the settlement of the property of the infant and of the person to whom such infant is proposed to be married are to be submitted to the judge. (20th Regulation as to business, August 8, 1857; Morgan's Ch. Acts and Orders, Appendix lv. 4th ed.)

On a petition by a female infant under this act, praying a reference to approve of a proper settlement, and stating that the intended marriage had the sanction and approbation of the infant's father, the Lord Chancellor made the order without directing any inquiry as to the propriety of the marriage. (*Re Dalton*, 6 De G., Mac. & G. 201; 2 Jur., N. S. 1077; 25 Law J., Chan. 75.) He considered that the provisions of the act do not impose on the court any other duty than that of looking to the propriety of the settlement, though what in each particular case might be a proper settlement must sometimes lead to an inquiry as to all the circumstances connected

Whether court will inquire into propriety of marriage.

18 & 19 Vict.  
c. 43, s. 3.

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with the marriage. (*Ib.*) It is still undecided, notwithstanding the above case, whether on the petition of an infant under this act, praying a reference to approve of a proper settlement of the infant's property, this statute has relieved the court from inquiring into the propriety of the proposed marriage. But the court will make the reference where there is proper evidence of the propriety of the proposed marriage. (*Re Strong*, 26 Law J., Ch. 64; 5 W. R. 107.)

The settlement.

The draft of the settlement, when not drawn by one of the conveyancing counsel, will be directed to be taken into chambers to be perused by the chief clerk and approved by the judge. (*Re Williams*, 8 W. R. 678; 6 Jur., N. S. 1064.) The court refused to sanction the insertion of a clause in a settlement to be made by a female infant on her marriage, providing that no person professing the Roman Catholic religion should take any interest under the settlement. The court, however, sanctioned the insertion of a clause making it compulsory on the successive owners, or their husbands, to assume the name and arms of the ancestor from whom the settlor derived the estates. (*Ib.*) In a settlement under this act there ought not to be any limitation to collaterals, or any benefit conferred upon the guardian of the minor whose property is put in settlement. (*Re M'Clintock*, 10 Ir. Ch. R., N. S. 469.) Forms of settlements sanctioned by the court under this act are given in 3 Davidson, Conv. 747, 754, 1062, 2nd ed.

The draft of such settlement is settled at chambers and then engrossed, and an affidavit verifying such engrossment is made and filed, and an office copy produced at chambers. The chief clerk thereupon signs the usual memorandum in the margin of the engrossment, and indorses on the original petition a minute of the order made, and from such minute a formal order is drawn up by the registrar, which is passed and entered in the usual way. The settlement is then executed by the necessary parties, and the marriage takes place. (1 Smith's Ch. Pr. 1149, 1150, 7th ed.)

(c) As to the appointment of guardians, see Dan. Ch. Pr. 1189 *et seq.*

Not to apply to  
males under  
twenty or females  
under seventeen  
years of age.

4. Provided always, that nothing in this act contained shall apply to any male infant under the age of twenty years, or to any female infant under the age of seventeen years.

## MARRIED WOMEN'S PROPERTY.

33 &amp; 34 VICT. c. 93.

*An Act to amend the Law relating to the Property of Married Women.*

[9th August, 1870.]

33 & 34 Vict.  
c. 93, s. 1.

WHEREAS it is desirable to amend the law of property and contract with respect to married women :

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

1. The wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property (a).

Earnings of  
married women  
to be deemed  
their own pro-  
perty.

(a) Under the old law a husband might in his own name recover his wife's wages (*Dengate v. Gardiner*, 4 M. & W. 7), or the profits of a business carried on by her. (*Savile v. Sweeny*, 4 B. & Ad. 524.) And payment to her of her own earnings was not good, unless she had her husband's authority to receive them. (*Offley v. Clay*, 2 M. & Gr. 172.)

As to a married woman's separate trading before this act under her husband's agreement, see 2 Bright's Husband and Wife, 292; and under the custom of the city of London, see 2 Bright, 76.

The question whether a trade is carried on by a married woman separately from her husband, becomes of importance under this section. The question is one of fact, to be determined on the circumstances of the case. (*Petty v. Anderson*, 3 Bing. 170; *Smallpiece v. Dames*, 7 C. & P. 40.) No power is given by this act of making a married woman a bankrupt. As to a married woman's bankruptcy, see *Regina v. Robinson*, L. R., 1 C. C. 80.

By 20 & 21 Vict. c. 85, s. 21, a wife deserted by her husband may apply to a police magistrate or justices in petty sessions for an order to protect any money or property she may acquire by her own lawful industry; and by virtue of the order such earnings and property will belong to her as if she were a feme sole.

As to a married woman's power of disposing of her separate property, see the note to 3 & 4 Will. 4, c. 74, s. 78, *ante*, p. 378. As to the nature of her separate estate generally, see 1 White & Tudor, L. C., Eq. 488 *et seq.*; and as to the relation of this act to the doctrine of separate use, see Griffith's Married Women's Property Act, 1870.

2. Notwithstanding any provision to the contrary in the act of the tenth year of George the Fourth, chapter twenty-four, enabling the Commissioners for the Reduction of the National

Deposits in  
savings banks by  
a married woman  
to be deemed her  
separate property.

33 & 34 Vict.  
c. 93, s. 2.

Proviso.

Debt to grant life annuities and annuities for terms of years, or in the acts relating to savings banks and post office savings banks, any deposit hereafter made and any annuity granted by the said commissioners under any of the said acts in the name of a married woman, or in the name of a woman who may marry after such deposit or grant, shall be deemed to be the separate property of such woman, and the same shall be accounted for and paid to her as if she were an unmarried woman; provided that if any such deposit is made by, or such annuity granted to, a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such deposit or annuity or any part thereof to be paid to the husband (b).

(b) The principal statutes relating to savings banks and the purchase of government annuities through the medium of savings banks are collected, 4 Chitty's Statutes, 117 *et seq.* By 26 & 27 Vict. c. 87, s. 31, the trustees and managers of any savings bank were empowered to pay any sum of money in respect of any deposit made by married women, or by women who might marry after such deposit, to any such woman, unless the husband of such woman should give to such trustee or managers notice in writing of his marriage with such woman, and require payment accordingly.

As to a married  
woman's property  
in the funds.

3. Any married woman, or any woman about to be married, may apply to the Governor and Company of the Bank of England, or to the Governor and Company of the Bank of Ireland, by a form to be provided by the governor of each of the said banks and company for that purpose, that any sum forming part of the public stocks and funds, and not being less than twenty pounds, to which the woman so applying is entitled, or which she is about to acquire, may be transferred to or made to stand in the books of the governor and company to whom such application is made in the name or intended name of the woman as a married woman entitled to her separate use, and on such sum being entered in the books of the said governor and company accordingly, the same shall be deemed to be the separate property of such woman, and shall be transferred and the dividends paid as if she were an unmarried woman; provided that if any such investment in the funds is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such investment and the dividends thereof, or any part thereof, to be transferred and paid to the husband (c).

(c) A fund in court was subject, during the life of a married woman, to the trusts of her settlement (under which she had a general power of appointment over her life interest), and belonged in remainder to her daughter. Upon a petition presented by the mother, the daughter, and the husband of the mother, the court under this section ordered a transfer into her name as a married woman entitled to her separate use. (*Re Bartholomew's Estate*, 23 L. T., N. S. 433.) A similar order was made where a married woman was entitled absolutely to a fund in court, the husband joining in the petition. (*Re Butlin's Trusts*, 23 L. T., N. S. 523.)

4. Any married woman, or any woman about to be married, may apply in writing to the directors or managers of any incorporated or joint stock company that any fully paid up shares, or any debenture or debenture stock, or any stock of such company, to the holding of which no liability is attached, and to which the woman so applying is entitled, may be registered in the books of the said company in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such directors or managers to register such shares or stock accordingly, and the same upon being so registered shall be deemed to be the separate property of such woman, and shall be transferred and the dividends and profits paid as if she were an unmarried woman; provided that if any such investment as last mentioned is made by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order such investment and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband (*d*).

33 & 34 Vict.  
c. 93, s. 4.

As to a married woman's property in a joint stock company.

(*d*) Before this act a married woman having separate estate could purchase shares in a joint stock company, and (if there was nothing in the company's deed to prevent it) she might stand as a shareholder on the register, so as to make her separate estate liable. (*Mattheman's case*, L. R., 3 Eq. 788; see *Butler v. Cumpston*, L. R., 7 Eq. 16.)

Where railway stock was registered in the name of a married woman, and she sued for dividends in her own name, it was held that the nonjoinder of her husband was only the subject of a plea in abatement. (*Dalton v. Midland Counties R. Co.*, 13 C. B. 474.)

5. Any married woman, or any woman about to be married, may apply in writing to the committee of management of any industrial and provident society, or to the trustees of any friendly society, benefit building society, or loan society, duly registered, certified, or enrolled under the acts relating to such societies respectively, that any share, benefit, debenture, right, or claim whatsoever in, to, or upon the funds of such society, to the holding of which share, benefit, or debenture no liability is attached, and to which the woman so applying is entitled, may be entered in the books of the society in the name or intended name of the woman as a married woman entitled to her separate use, and it shall be the duty of such committee or trustees to cause the same to be so entered, and thereupon such share, benefit, debenture, right, or claim shall be deemed to be the separate property of such woman, and shall be transferable and payable with all dividends and profits thereon as if she were an unmarried woman; provided that if any such share, benefit, debenture, right, or claim has been obtained by a married woman by means of moneys of her husband without his consent, the court may, upon an application under section nine of this act, order the same and the dividends and profits thereon, or any part thereof, to be transferred and paid to the husband.

As to a married woman's property in a society.

6. Nothing hereinbefore contained in reference to moneys deposited in or annuities granted by savings banks or moneys invested in the funds or in shares or stock of any company shall

Deposit of moneys in fraud of creditors invalid.



33 & 34 Vict.  
c. 93, s. 6.

as against creditors of the husband give validity to any deposit or investment of moneys of the husband made in fraud of such creditors, and any moneys so deposited or invested may be followed as if this act had not passed (e).

(e) As to transfers of property in fraud of creditors, see *Twynne's case*, 1 Smith, L. C. 10 *et seq.*; 3 Davidson, Conv. 832, note (f), 2nd ed.

Personal property  
not exceeding  
200*l.* coming to a  
married woman  
to be her own.

7. Where any woman married after the passing of this act shall, during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money (f) not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same (g).

(f) As to the kinds of property which will pass under a gift of money in a will, see Hawk. Wills, 49; *Ogle v. Knipe*, L. R., 8 Eq. 434; *Prichard v. Prichard*, L. R., 11 Eq. 232; *Collins v. Collins*, 19 W. R. 971.

(g) Before this act, a legacy left to a married woman in general terms must have been paid to her husband. (*Palmer v. Trevor*, 1 Vern. 261.) Where, however, she had obtained a protection order under 20 & 21 Vict. c. 85, s. 25, payment to herself was ordered. (*Re Kingsley's Trusts*, 6 W. R. 849; *Re Rainsdon's Trusts*, 4 Drew. 446.)

The inaccuracy of the marginal note to this section should be observed. The marginal note forms no part of the statute itself. (*Claydon v. Green*, L. R., 3 C. P. 511.)

Freehold property  
coming to a  
married woman,  
rents and profits  
only to be her  
own.

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use; and her receipts alone shall be a good discharge for the same.

How questions as  
to ownership of  
property to be  
settled.

9. In any question between husband and wife as to property declared by this act to be the separate property of the wife, either party may apply by summons or motion in a summary way, either to the Court of Chancery in England or Ireland, according as such property is in England or Ireland, or in England (irrespective of the value of the property) the judge of the county court of the district in which either party resides, and thereupon the judge may make such order, direct such inquiry, and award such costs, as he shall think fit; provided that any order made by such judge shall be subject to appeal in the same manner as the order of the same judge made in a pending suit or on an equitable plaint would have been, and the judge may, if either party so require, hear the application in his private room.

Married woman  
may effect policy  
of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid (*h*).

83 & 84 Vict.  
c. 93, s. 10.

As to insurance of  
a husband for  
benefit of his  
wife.

(*h*) A wife has an insurable interest in the life of her husband, but her husband has not such an interest in the life of his wife. (*Reed v. Royal Exchange Assurance Co.*, Peake's Additional Cases, 70.) For the previous law relating to policies of assurance effected by married women, see Bunyon on Life Insurance, 849, 2nd ed.

11. A married woman may maintain an action in her own name for the recovery of any wages, earnings, money, and property by this act declared to be her separate property, or of any property belonging to her before marriage, and which her husband shall, by writing under his hand, have agreed with her shall belong to her after marriage as her separate property, and she shall have in her own name the same remedies, both civil and criminal, against all persons whomsoever for the protection and security of such wages, earnings, money and property, and of any chattels or other property purchased or obtained by means thereof for her own use, as if such wages, earnings, money, chattels, and property belonged to her as an unmarried woman; and in any indictment or other proceeding it shall be sufficient to allege such wages, earnings, money, chattels, and property to be her property (*i*).

Married women  
may maintain an  
action.

(*i*) Under this section a married woman may sue at law in her own name for the recovery of the property above specified; and it appears that she may sue in equity without a next friend. Except in the cases provided for by sects. 12, 13 and 14, no power of suing her is expressly given by this act. Compare the language of 20 & 21 Vict. c. 85, ss. 21 and 26.

12. A husband shall not, by reason of any marriage which shall take place after this act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried (*k*).

Husband not to be  
liable on his  
wife's contracts  
before marriage.

(*k*) According to the old law a husband was liable at law for the debts of his wife contracted before marriage. (2 Bright, Husband and Wife, 2.)

83 & 84 Vict.  
c. 93, s. 12.

Married woman  
to be liable to the  
parish for the  
maintenance of  
her husband.

And in equity her separate property was liable to satisfy such debts. (*Biscoe v. Kennedy*, 1 Bro. C. C. 17, n.; *Chubb v. Stretch*, L. R., 9 Eq. 555.) Under this section her separate property is made liable at law to satisfy such debts; the section extends to property settled to her separate use without power of anticipation. (*Sanger v. Sanger*, L. R., 11 Eq. 470.) An order under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, may be made upon a married woman. (*Dillon v. Cunningham*, L. R., 8 Ex. 23.)

13. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband as by the thirty-third section of "The Poor Law Amendment Act, 1868," they may now make and enforce against a husband for the maintenance of his wife who becomes chargeable to any union or parish (*l*). Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a *feme sole* by such and the same actions and proceedings as money lent.

(*l*) It is provided by 31 & 32 Vict. c. 122, s. 33, that when a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish, in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to show cause why an order should not be made upon him to maintain his wife; and the justices may make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife as shall appear to them to be proper, and such order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money.

Married woman  
to be liable to the  
parish for the  
maintenance of  
her children.

14. A married woman having separate property shall be subject to all such liability for the maintenance of her children as a widow is now by law subject to for the maintenance of her children: provided always, that nothing in this act shall relieve her husband from any liability at present imposed upon him by law to maintain her children (*m*).

(*m*) Before this act, it was held that a married woman was not liable to maintain her children out of her separate property during the life of their father. (*Hodgens v. Hodgens*, 4 Cl. & Fin. 323.)

As to the liability of paupers and their relations in respect of relief, see 4 Burn's Justice of the Peace, 294, 30th ed.

Commencement  
of act.

15. This act shall come into operation at the time of the passing of this act.

Act not to extend  
to Scotland.

16. This act shall not extend to Scotland.

Short title.

17. This act may be cited as "The Married Women's Property Act, 1870" (*n*).

(*n*) This act was intended to protect married women in the enjoyment of the rights of property, and has not by a side wind given them political or municipal rights. (*Reg. v. Harrald*, L. R., 7 Q. B. 361.)

## LAW OF DOWER.

3 &amp; 4 WILL. IV. c. 105.

*An Act for the Amendment of the Law relating to Dower.*  
[29th August, 1833.]

## INTERPRETATION CLAUSE.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows ; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof ; and every word importing the singular number only shall extend and be applied to several persons and things as well as one person or thing.

3 & 4 Will. 4,  
c. 105, s. 1.

Meaning of the  
words in the act.

"Land."

Number.

The principal objects of this statute are,

1st. To make *equitable* estates in possession liable to dower, and to dispense with the necessity of the actual seisin of the husband.

2nd. To take away the right of dower out of lands disposed of by the husband in his lifetime or by his will, and to give partial charges created by the husband priority over the right of dower.

3rd. To enable the husband to bar the right of dower by a declaration in a deed or in a will. The act does not extend to widows married on or before the 1st of January, 1834.

"The effect of the act is evidently to deprive the wife of her dower, except as against her husband's heir at law. If the husband should die intestate and possessed of any lands, the wife's dower out of such lands is still left for her support, unless, indeed, the husband should have executed a declaration to the contrary." (Williams's Real Prop. 227, 9th ed.)

The nature of the old law of dower, the means by which the right of dower was defeated, and the alterations in the law which were effected by this statute, will appear from the following extract from the First Report of the R. P. Commissioners. Some decisions on these subjects have been added :—

"The present law of dower gives to a surviving wife a right to have assigned to her for her life one-third of all the lands and hereditaments, with a few exceptions such as common *sans nombre* and personal annuities (*a*), of which her husband was seised in law (that is, had the legal property by descent, there being at the same time no possession), or, in fact, for an estate of inheritance in possession at any time during the marriage, notwithstanding any alienation or disposition which the husband may have made of the estates, or any part of them (*b*).

"It does not give dower out of lands to which the husband had a right, but of which he had not seisin in law or in fact.

"The widow is not entitled to take possession of any land for her dower, the assignment is to be made by the heir ; and if he neglect it, or do it

The objects of  
this act.

Effect of the act.

Report of R. P.  
Commissioners as  
to dower.

Old law of dower.

3 & 4 Will. 4,  
c. 105, s. 1.

Bar of dower by  
jointures.

Equitable estates  
not subject to  
dower.

Protection by  
terms of years.

Statutable bar in-  
convenient.

Conveyance to  
uses to bar dower.

Provisions by will  
in lieu of dower.

Proposed altera-  
tions of the law of  
dower.

Provisions in case  
of wills,

and of deeds.

unfairly, she can compel a just assignment by legal process, and generally recover compensation for the detention.

"The legislature long since, by the statute of 27 Hen. 8, c. 10, provided a method of diminishing the evil to some extent, by making a jointure of a certain description given before marriage a bar of the right of dower, though such jointure may be of inadequate value, and made to the wife before she has arrived at the age at which she is enabled to assent to such provision (c). Courts of equity have enlarged the remedy by making some provisions not strictly within the terms of the statute bars of dower (d). Courts of equity have also obviated the inconveniences arising from dower, and also very materially restricted and impaired the right to dower, by holding that equitable estates, a modification of the ownership of real property, which has been introduced since the law of dower was established, and now exists to a very great extent, are not subject to dower (e); and further, by holding that a purchaser may protect himself against the dower of the vendor's wife in legal estates, by procuring the assignment to a trustee for himself of an outstanding legal term (f).

"It may be observed here, that the statutable bar by jointure depends at law, and in case of the marriage of a female under twenty-one years in equity also, on the validity of the title of the jointure; it is therefore troublesome in questions with purchasers (g).

"In order to defeat the right of dower in cases not within the statute, and to which the above decisions would not apply, purchasers have long had recourse to the contrivance of taking conveyances of estates in a very artificial form, called a conveyance to uses to bar dower, which, while it confers the whole beneficial ownership, and an absolute dominion over the legal estate, prevents the legal estate from so vesting in the purchaser as to make the property subject to his wife's dower (h).

"By all these means the law of dower is in most instances evaded; where husbands find their estates subject to dower, they very frequently make provision for their widows on the condition of their relinquishing their dower; and sometimes without knowing that the right to dower exists, or without expressly noticing it, they make provisions for their widows, and at the same time make dispositions of their fee simple estates inconsistent with the enjoyment of dower by the widow, or which, by clear implication, indicate that dower is not meant to be enjoyed by the widow (i).

"The distinction as to dower between the husband's seisin and his mere right, we think, in the present state of things, irrational.

"We propose that dower should attach upon all estates of inheritance in possession, excepting the species of property to which dower is not incident; and on property considered in equity as real estate of or to which any husband dies seised or entitled in fact or in law, whether legally and beneficially, or beneficially only, which, if belonging to the wife, would be subject to the husband's curtesy, but subject, like the interest of other persons having partial interests in the inheritance, to any estates, charges, or incumbrances which the husband may have lawfully created, or bound himself to create, and to his debts, so far as they attach on his freehold estates, and as to estates which he can affect by his will, to any disposition, direction, or declaration made by his will, executed so as to affect freehold estate, and that dower should not attach on any other estate.

"By this enactment the artificial distinction between legal and equitable estates will be taken away; on the other hand, the subtle contrivances to which we have referred will become unnecessary.

"We propose that a provision made by will for a widow out of personal estate shall not deprive her of dower, unless the will, expressly or by clear implication, shall so direct, but that any devise of freehold estate shall be held to be free from dower, unless the contrary be declared.

"And that as to estates which the husband might by his will dispose of against his wife's right to dower, he may by his will duly executed declare that such right should be discharged without making any further disposition. And we propose that the enactments shall not interfere with the rule of courts of equity, giving widows a preference over other legatees for legacies given to them in satisfaction of dower. And we propose that a



declaration in any deed or instrument giving or devising estates of inheritance, may make the estate of the donee or devisee not subject to his wife's dower; but these enactments are not to prevent courts from enforcing, on equitable principles, covenants or agreements of husbands not to bar the right of dower, nor to prevent the barring of dower by agreement or settlement, or its forfeiture by adultery (*k*).

3 & 4 Will. 4,  
c. 105, s. 1.

"We do not propose at present to extend the alterations of the law of dower to gavelkind lands or borough-English lands, or to copyhold or customary lands, as to all which the right to dower or freebench is regulated by a variety of peculiar customs (*l*). We deem it expedient to postpone the recommendation of any further alteration of the laws relating to those several tenures, until the whole subject shall come under our view." (1 Real Prop. Rep. 16—19. As to tenures, see 3 Real Prop. Rep. 3—22.)

New rules not to extend to copyholds, &c.

(*a*) See Co. Litt. 32 a. *Lyster v. Mahoney*, 1 Dru. & War. 236.

(*b*) The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower. (*Moody v. King*, 10 Moore, 223; *S. C.*, 2 Bing. 447; *Smith v. Spencer*, 4 W. R. 729.)

Out of what property a woman is entitled to dower.

Dower is due of mines wrought during coverture, whether by the husband or by lessees for years, whether paying pecuniary rents or rents in kind, and whether the mines are under the husband's own land, or have been absolutely granted to him to take the whole stratum in the lands of others. Such a grant is a grant of a real hereditament in fee simple. But dower is not due of mines or strata unopened, whether under the husband's soil or under the soil of others. If lands assigned for dower contain an open mine, tenant in dower may work it for her own benefit. (*Stoughton v. Lee*, 1 Taunt. 401; *Dickin v. Hamer*, 1 Dr. & Sm. 284.)

Mines.

A widow dowable out of the real estate of her husband, not having done any act to preclude her from doing so, may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease, but she is not entitled to one-third of the royalties as corpus. (*Dickin v. Hamer*, 1 Dr. & Sm. 284.)

The heir has no right to denude the estate of timber as against the dowress; therefore, where a testator died seised of certain estates, out of which his widow was entitled to dower, the heir of the testator entered into possession of the estates and cut down timber, the produce of which timber was paid into court: it was held, that the widow was entitled to a third of the produce for life. (*Bishop v. Bishop*, 5 Jur. 931; *Dickin v. Hamer*, 1 Dr. & Sm. 284.)

Timber.

Where land belonging to an infant, subject to his mother's right of dower, was taken by a railway company, and the purchase-money as determined by two valuers was paid into court under the Lands Clauses Act: held, that the dowress was entitled to have the value of her right of dower, as determined by the valuers, paid to her out of the fund in court. (*Re Hall's Estate*, L. R., 9 Eq. 179.)

See, further, as to the property out of which a woman is entitled to dower, and the requisites to dower, the note to sect. 2, *post*; Tudor's L. C., Conv. 55 et seq., 2nd ed.

(*c*) In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage. (*Vernon's case*, 4 Rep. 1; Co. Litt. 36 b.)

Legal jointures.

Before the passing of the Statute of Uses (27 Hen. 8, c. 10), the greater part of the lands in England having been conveyed to uses which were not liable to dower, (*Dyer*, 266, pl. 7; 4 Rep. 1 b,) it was usual to make a provision for the wife before marriage out of the husband's lands. (3 Rep. 58 b; 4 Rep. 1 b; *Wilmot's Notes*, 184, 185.) The Statute of Uses having transferred the legal estate to the *cestui que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that

3 & 4 Will. 4,  
c. 105, s. 1.

injustice, it is by the 6th section of the Statute of Uses declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower; and the 9th section reserves to the wife a right to refuse a jointure or to claim her dower. (See Wilmot's Notes, 184, &c.) It was decided that the species of estates enumerated are proposed only as examples, and the courts have in construction extended the operation of the statute to other instances within its principle, though not within its words. (4 Rep. 2 a.) By the effect of that statute, therefore, no widow can claim both jointure and dower. Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce. (1 Swanst. 429, n.) A jointure within that statute is defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture. (Co. Litt. 36 b, 37.)

According to Lord Coke (Co. Litt. 36 b), there are six requisites to a strict legal jointure, viz., 1st. The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death. (*Wood v. Shirley*, Cro. Jac. 488.) 2nd. It must be for the term of her own life, or greater estate. (Dyer, 97 b.) 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the whole, and not of part of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower. (See 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391.) And 6th. It may be made either before or after marriage. (4 Rep. 3.)

A *feme covert* is not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law. The consent of a married woman to release her jointure, and accept an allowance during the life of her husband, who was a lunatic, without prejudice to her right to dower, was held not to be binding upon her after his decease. (*Frank v. Frank*, 3 My. & Cr. 171.)

A jointure settled on a wife by articles, to which she was not a party, will not deprive her of dower; (*Earl Buckingham v. Drury*, 3 Br. P. C. 497; *S. P. Daly v. Lynch*, *Ib.* 48;) but an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10. (*Ib.*)

Equitable jointures.

(d) In equity, a trust estate, an agreement to settle lands as a jointure, or a covenant from the husband that his heirs, executors, or administrators would pay an annuity to his wife, for her life, in case she survived him, in full for her jointure and in bar of dower, without expressing that it should be charged on lands, or, in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure. (*Earl Buckingham v. Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; Wilmot's Notes, 177; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. jun. 545; *Tinney v. Tinney*, 3 Atk. 8; *Carruthers v. Carruthers*, 4 Br. C. C. 500; *Estcourt v. Estcourt*, 1 Cox, 20; *Simpson v. Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n. (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke v. Rendall*, 2 De G., M. & G. 209.) A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower. (*In re Herons*, 1 Flan. & K. 330. See *Power v. Sheil*, 1 Moll. 312; *Williams v. Chitty*, 3 Ves. 545; *Corbet v. Corbet*, 1 Sim. & St. 612; 5 Russ. 254.)

A wife had a jointure secured on her husband's estate X. In 1844, the husband contracted to purchase an estate Y., and to enable him to sell the estate X., the wife, in 1845, released her jointure, and he then covenanted to secure it out of "estates he should thereafter acquire." Before the estate Y. had been conveyed, the husband contracted to sell it: it was held, that in equity the estate Y. was charged with the jointure. (*Warde v. Ward*, 16 Beav. 103; *Wellesley v. Wellesley*, 4 My. & Cr. 554.)

By a settlement made on the marriage of an adult female, it was declared that in consideration of the intended marriage, and "for providing a competent jointure and provision of maintenance" for the wife and issue of the

marriage, the father of the husband had paid him 3,000*l.*, and that the husband had given a bond for the payment of 2,000*l.* six months after the marriage, to be settled on trusts for the benefit of himself, his wife and the issue of the marriage. During the coverture the husband bought certain lands which he subsequently sold to a purchaser from whose devisees the defendant purchased with notice of the settlement. The husband died without satisfying the bond. On a bill by the wife for dower out of the lands so sold :- it was held, that her right was barred by the settlement, and that she had no lien on or right to resort to the lands to the satisfaction of the amount due on the bond. (*Dyke v. Rendall*, 2 De G., M. & G. 209; 16 Jur. 939; 21 Law J., Chanc. 905.)

8 & 4 Will. 4,  
c. 105, s. 1.

Marriage articles were executed by a tenant in tail in remainder, and his intended wife, whereby he agreed to execute, when he should become entitled in possession, a legal post-nuptial settlement, to secure her a jointure of specified amount. He subsequently became entitled in possession, but died intestate without executing any such settlement. Held, that the articles were a bar in equity to the wife's right of dower. (*Pennefather v. Pennefather*, I. R., 6 Eq. 171.)

By marriage articles the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of what property, real or personal, he should die seised or possessed of; and that in preference to any creditor of his, or to any deed or will which he might make or execute in his lifetime, contrary to the true intent and meaning of the articles. There was no issue of the marriage; and the husband died, leaving his wife surviving: she is not entitled, in addition to the moiety of her husband's real and personal estate given to her by the articles, to dower out of the other moiety of his real estates of inheritance. (*Hamilton v. Jackson*, 2 Jones & Lat. 295.)

The wife's claim on the personal estate of her intestate husband was held to be barred by a settlement on her marriage of a certain sum that was in trust for her for life "as and for her jointure, in full lieu, bar and satisfaction of any dower or thirds which she could or might claim at common law, out of all or any of the estates, real, personal or freehold" of her intended husband. (*Gurly v. Gurly*, 8 Cl. & Finn. 743.)

Where widow  
barred of distribu-  
tive share in hus-  
band's personalty.

A marriage settlement contained a clause that the provision thereby made, and intended for a wife in the event of her viduity, should be accepted, deemed and taken in full lieu of dower or thirds, to which she might be entitled at common law or otherwise howsoever: it was held, that she was barred of her share of her husband's personal estate, under the Statute of Distributions. (*Re Burgess*, 11 Ir. Chanc. Rep., N. S. 164.)

The word "thirds" is not confined to real estate, but is a general expression which may signify, according to the context and scope of the instrument, the interest of a widow in any property, whether personal or real, of her deceased husband. In construing a stipulation in a marriage settlement, that the provision thereby made for the intended wife is "in lieu of dower or thirds," the court considers the fund out of which the provision was made. Where, therefore, by an ante-nuptial settlement the provision thereby made for the intended wife was partly charged on personalty of the intended husband, who had children by a former marriage: it was held, on his dying intestate, that the claim of his widow to a distributive share in his personal estate was barred by a stipulation in the above words. (*Thompson v. Watts*, 2 J. & H. 291. See *Sambourne v. Barry*, I. R., 6 Eq. 28.)

As to the law of jointures, see 1 Rep. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. VII.; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

(e) See note to sect. 2, *post*.

(f) The result of the cases as to the doctrine of attendant terms before the stat. 8 & 9 Vict. c. 112, was, that when there was an old term that was satisfied, the inheritance being the estate, the interest in the term attended upon it. If there were a first, second and third mortgagee, they were, according to their respective gradations, entitled to the benefit of the term. It was possible that some or all of them might not know of its existence;

Terms of years  
attending the  
inheritance.

3 & 4 Will. 4,  
c. 105, s. 1.

and according to the practice of conveyancers, sanctioned by and perhaps growing out of the doctrines of courts of equity, if a subsequent incumbrancer, without notice, got in the term, he gained a priority : if, at the time of advancing his money, he had notice of the previous incumbrances, he did not gain priority. (Per Lord Eldon in *Mole v. Smith*, Jac. R. 496. See *Radnor v. Vandebendy*, Show. P. C. 69 ; Pr. Ch. 65 ; *Swannock v. Lifford*, 2 Atk. 208 ; Ambl. 6 ; Co. Litt. 208 a, n. ; *Willoughby v. Willoughby*, 1 T. R. 763.)

An heir, though he could avail himself at law of a term attendant upon the inheritance, was not allowed in a court of equity to defeat the widow's claim of dower ; for, having a certain quantity of interest, equity considered her as having a corresponding interest in the term. When the husband conveyed to a purchaser, without the concurrence of the wife, nothing but the husband's estate passed subject to dower, which remained as it was. (*Maundrell v. Maundrell*, 7 Ves. 578 ; *S. C.*, 10 Ves. 246.) But a purchaser for valuable consideration, or a mortgagee, (*Wynn v. Williams*, 5 Ves. 130,) might protect himself from dower by taking an actual assignment of a term created before the right of dower attached, to a trustee for himself, or a declaration of trust from the trustee, or by obtaining possession of the deed creating the term, (7 Ves. 567 ; 10 Ves. 246,) notwithstanding he had notice of the right of dower. (10 Ves. 271 ; see Butl. Co. Litt. 290 b, n. 1, s. 13. See *In re Sleeman*, 4 Ir. Ch. R. 563 ; 8 & 9 Vict. c. 112, *post.*) A purchaser, in 1840, obtained possession of a deed creating an attendant term, but did not procure an assignment of the term : it was held, that he could not rely on this term as a bar to a claim for dower. (*Corry v. Cremorne*, 12 Ir. Ch. R. 136.)

In *Mole v. Smith*, (Jac. R. 490 ; *S. C.*, 1 Jac. & W. 665,) an attendant term having become vested in the wife of the owner of the inheritance, as the administratrix of the trustee of the term, and her husband having become a bankrupt, his assignees agreed to sell the estate, and filed a bill for a specific performance of the agreement, pending which suit the husband died : it was held, that the widow was not entitled to dower, that she must assign the term for the benefit of the purchaser, and that he was bound to accept the title. (See also *Anderson v. Pignet*, L. R., 8 Ch. 180, *post.*)

(g) See *Simpson v. Gutteridge*, 1 Mad. 609 ; *Corbet v. Corbet*, 1 Sim. & St. 612 ; 5 Russ. 254 ; Sugd. V. & P. 542, 11th ed.

Uses to bar  
dower.

(h) The form of limitation to uses to bar dower, which has been almost universally adopted, was in effect to such uses as the purchaser should by deed appoint : in default of and until appointment to the purchaser for life, remainder to a trustee and his heirs during the life of and in trust for the purchaser, remainder to the purchaser, his heirs and assigns. (See Gilb. on Uses, by Sugd. 321—325, n. ; Fearne, 347, n. by Butl. 7th ed. ; 2 Davidson Conv. 210.) As to the form of these uses, see 3 Davidson Conv. 249, note (o).

A vendor being entitled under a limitation to uses to bar dower without a power of appointment, the purchaser insisted on the concurrence of the dower trustee. The trustee being abroad, the vendor filed a bill to enforce specific performance without his being a party to the conveyance. The Vice-Chancellor held, that the objection was well founded, and made a decree for specific performance, with an order vesting the estate of the dower trustee in the purchaser, upon the execution of the conveyance by the vendor ; but considering the objection, though tenable, to be frivolous and vexatious, he gave no costs to either party : it was held, on appeal by the purchaser, that the objection was frivolous and vexatious, and ought not to have been insisted on, and that costs ought not to be given to the purchaser. (*Collard v. Roe*, 4 De G. & J. 525.)

A limitation to the old uses to bar dower will not deprive of her dower a woman married since the passing of the Act. (*Fry v. Noble*, 7 De G., M. & G. 687.)

(i) See notes to sect. 5 and sect. 9, *post.*

Forfeiture of  
dower by adul-  
tery.

(k) Under 13 Edw. 1. c. 34, a woman forfeits her dower by adultery, even though brought about by her husband's cruelty. (*Hetherington v. Graham*, 6 Bing. 139 ; *Woodward v. Downse*, 10 C. B., N. S. 722 ; *Bostock*

*v. Smith*, 34 Beav. 57.) The divorce of a wife *à mensâ-et thoro* by the Ecclesiastical Court before 20 & 21 Vict. c. 85 for adultery, without any renewal of cohabitation, does not preclude her from obtaining her distributive share in the personal estate of her intestate husband in an administration suit by his executors. (*Rolfe v. Perry*, 11 W. R. 357.)

8 & 4 Will. 4,  
c. 105, s. 1.

(l) This act extends to lands of gavelkind tenure. (*Farley v. Bonham*, 2 Johns. & H. 177; 7 Jur., N. S. 232.) But copyholds are not within this statute. (*Powell v. Jones*, 2 Sm. & G. 407.) As to freebench in copyholds, see further the note to sect. 5, *post*.

Gavelkind lands  
and copyholds.

In the assignment of dower, courts of equity have assumed a concurrent jurisdiction with courts of law. (Mitford, 120—123.) See further the note to 3 & 4 Will. 4, c. 27, s. 36, *ante*, p. 226. As to the remedy in equity, see Daniell's Ch. Pr. 1035, 5th ed.

Remedies for the  
recovery of dower.

A widow filed a bill for dower against alienees of her husband. In order to make out her title to dower she was obliged to give in evidence a deed, by which the estate had been conveyed to the person from whom her husband claimed. This deed contained a recital that the legal estate was outstanding in trustees. She also gave in evidence certain orders of the Court of Chancery, to show that such recital was mistaken: it was held, that she was entitled to a reference to ascertain the lands of which she was dowable. (*Kernaghan v. M'Nally*, 11 Ir. Ch. Rep., N. S. 52.)

Where a dower suit was not occasioned by any difficulty as to the assignment or mode of payment of the dower, but solely by the defendant not having admitted the title till he put in his answer to the bill of the widow, she was allowed her costs up to the hearing. (*Harris v. Harris*, 11 W. R. 62. See also as to costs, *Stormont v. Wickens*, 14 W. R. 192.)

Costs in equity.

It seems that purchase for value without notice is a good defence to a suit instituted to recover dower (see *ante*, p. 226). It has accordingly been held at law that a demandant in dower is not entitled, under 17 & 18 Vict. c. 125, s. 50, to inspection of the deed under which the property, out of which she claims to be endowed, was conveyed away by her husband as against a *bonâ fide* purchaser for value, without notice of the marriage, the balance of authorities being assumed to be in favour of the position, that a bill for discovery could not be sustained in such a case. (*Gomm*, dem., *Parrott*, ten., 3 C. B., N. S. 47; 3 Jur., N. S. 1150; 26 Law J., C. P. 279.)

Plea of purchase  
for value without  
notice.

As to the period in which the right to sue for dower is barred, see *Marshall v. Smith*, 5 Giff. 37, *ante*, p. 145. As to the arrears of dower which may be recovered, see *ante*, p. 249.

## DOWER OF EQUITABLE ESTATES.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal or partly equitable (*m*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession, (other than an estate in joint tenancy,) (*n*) then his widow shall be entitled in equity to dower out of the same land.

Widows to be en-  
titled to dower  
out of equitable  
estates.

(*m*) The general principle on which courts of equity have proceeded in cases of dower is, that dower is to be considered as a mere legal right; and that equity ought not to create the right, where it does not subsist at law.

According to old  
law, dower not  
allowed out of  
equitable estates.

Nothing can be more striking than the inconsistency of the doctrine which subjected trust estates to the right by curtesy, while it exempted them from the claim of dower. Courts of equity had assumed as a principle, in acting upon trusts, to follow the law; and, according to that principle, they ought, in all cases where rights attached on legal estates, to have attached the same rights upon trusts, and consequently to have given dower of an equitable estate. It was found, however, that in cases of dower, that principle, if



3 & 4 Will. 4,  
c. 105, s. 2.

pursued to the utmost, would have affected the titles to a large proportion of the estates in the country, as parties had been acting on the footing of dower upon a contrary principle, and had supposed that by the creation of a trust, the right of dower would be prevented from attaching. Many persons had purchased under this idea; and the country would have been thrown into the utmost confusion, if courts of equity had followed their general rule with respect to trusts in the cases of dower. But the same objection did not apply to a tenancy by the curtesy, for no person would purchase an estate subject to such right, without the concurrence of the person in whom it was vested. (*D'Arcy v. Blake*, 2 Sch. & Lef. 388.) Before the Dower Act a widow was not entitled to freebench of a trust estate in copyholds. (*Forder v. Wade*, 4 Br. C. C. 520.) And the act, which does not apply to copyholds, has made no difference in this respect. (*Smith v. Adams*, 5 De G., M. & G. 712.)

#### Mortgages.

Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower, as at law the whole legal inheritance was vested in the mortgagee; and the right of redemption was merely an *equitable* title, insufficient to create a claim of dower. (*Dixon v. Saville*, 1 Br. C. C. 326.) A party died in 1830, having vested in him a mortgage in fee, and the lapse of time and circumstances were such as to render it very improbable that any party could now establish any right to the equity of redemption: it was held, nevertheless, that the widow was not entitled to dower. Though the husband might have considered the property as his own at his death, and though the court might not then consider it subject to any redemption, yet the quality of the estate in the consideration of the court was not such as to give a right of dower. (*Flack v. Longmate*, 8 Beav. 420.) Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to; but a court of equity would interfere to prevent a widow from taking advantage of her legal right. (*Hinton v. Hinton*, 2 Ves. sen. 634; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a, n. (1), 11th ed.; *Lyster v. Mahony*, 1 Dru. & War. 242.) The legal estate in certain freeholds was vested in K. as mortgagee in fee, subject to the equity of redemption of F.; K. also claimed to be entitled to an undivided moiety in these freeholds, which claim was disputed by F., but was established by a decree at the Rolls: after K.'s death it was held, that the legal and equitable interest had not been so united in K. as to entitle his widow to dower out of his undivided moiety. (*Knight v. Frampton*, 10 Law J., N. S., Chanc. 247; 4 Beav. 10.)

#### Reversions and remainders.

So a woman is not entitled to dower of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture. (*D'Arcy v. Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 333, 348; *Forder v. Wade*, 4 Br. C. C. 520.) If a man before marriage entered into a contract for the sale of his fee simple estate, his subsequent marriage would not under the old law create any right of dower; the husband being a trustee for the purchaser, the court would not allow the wife to assert her right of dower. It was the same in the case of a contract made after marriage, but before the legal estate was vested in the husband. So if the husband conveyed a legal estate in remainder, not subject to dower at the time of the conveyance, dower would not afterwards attach on that estate in favour of the wife, merely because, if he had not conveyed the estate, it would have fallen into possession, and become liable to dower. (*Lloyd v. Lloyd*, 4 Dru. & War. 370.) On the surrender in deed or in law of the life estate to the husband the right of dower will attach. (1 Roll. Abr. 676, pl. 40.) But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cesset executio* during the term. (Prec. Ch. 250.) And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowable after payment of them. (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404.) A husband was seised in fee subject to a trust

term to secure life annuities and to pay himself half the surplus rents. It was held, that his widow was entitled to have her dower set out at once. (*Sheaf v. Cave*, 24 Beav. 259.)

3 & 4 Will. 4,  
c. 105, s. 2.

Where a husband was entitled to an equitable estate in fee simple in certain land determinable in the event which took place, of his dying without leaving issue living at his decease: it was held, that, notwithstanding the operation of the executory devise over, his widow was under this section entitled to dower out of the land. (*Smith v. Spencer*, 4 W. R. 729.)

(n) See *Fry v. Noble*, 24 Law J., Ch. 591. The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion. (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a.) And if a joint tenant aliens his share, his wife shall not be endowed. (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615.)

Joint tenants.

A widow concurred in a partition of her husband's estate, and released a moiety allotted to the other tenant in common from her dower; the other moiety was conveyed to the trustees of her husband's will: it was held, that she was entitled to dower out of the entirety of the latter moiety. (*Reynard v. Spence*, 4 Beav. 103.)

### SEISIN OF HUSBAND.

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof; provided that such dower be sued for or obtained within the period during which such right of entry or action might be enforced (o).

Seisin shall not be necessary to give title to dower.

(o) A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover the possession. (See Rosc. on Real Actions, 79, &c.; 1 Real Prop. Rep. 493.) We have already seen (*ante*, p. 228), that no descent cast or discontinuance made after the 31st December, 1833, is to bar a right of entry, and that continual claim will not preserve it. (*Ante*, p. 180.) The time within which a right of entry must be prosecuted is now prescribed by statute 3 & 4 Will. 4, c. 27. (See *ante*, p. 144 *et seq.*)

Right of entry.

Seisin is a technical term, to denote the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass. (1 Burr. 107.) One of the circumstances required to give a title of dower before this act was, that the husband should be seised during the coverture of the estate whereof the wife is to be endowed. A seisin in law was sufficient, without a seisin in deed.

Seisin.

A seisin in law, in its usual acceptation, is where the inheritance in lands and hereditaments, of which a man died seised or possessed, descends upon his heir, who dies before entry or possession. (Litt. s. 448.) In such a case, if the heir leave a widow, she will be entitled to dower. (Litt. s. 681.)

On conveyances under the Statute of Uses, the bargainee or *cestui que use* is seised in law immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him, or other act done to acquire an actual seisin. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed; (2 And. 161; Gilb. Uses, by Sugd. 213; see Cro. Jac. 604;) but if the husband had died before inrolment, she would not have been endowed. (Gilb. Uses, 213.)

But wherever an actual entry was necessary to give effect to a convey-

3 & 4 Will. 4,  
c. 105, s. 3.

ance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered. (Perk. s. 368; Park on Dower, 34.)

### ALIENATION, &C. BY HUSBAND.

No dower out of  
estate disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

Priority to partial  
estates, charges  
and specialty  
debts.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower (*p*).

By old law the  
husband alone  
could not defeat  
dower.

(*p*) Before this act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge. (3 Lev. 386; Co. Litt. 32.) It was a right attaching by implication of law, which, although it might never take effect (as if the wife died in the husband's lifetime), yet from the moment that the facts of *marriage* and *seisin* had concurred, was so fixed, as to become a title paramount to that of any person claiming under the husband by subsequent act. (Co. Litt. 32 a; F. N. B. 147 (E).) The alienation of the husband, therefore, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee, against whom dower might be recovered in the same way as against the heir of the husband dying seised. The consequence of the above rule was, that all charges or derivative interests created by the husband after the title of dower had attached were voidable as to that part of the land which was recovered in dower. (Shep. T. 275; *Stoughton v. Leigh*, 1 Taunt. 410; Co. Litt. 46 a; 7 Rep. 8, 72; Jenk. Cent. p. 36: see Park on Dower, 237, 238.)

Old rule that a  
devise of lands  
liable to dower  
was *prima facie* a  
devise of them  
subject to the  
right to dower.

Where a benefit was given by the will to the testator's widow, a question was often raised whether she was not thereby precluded from claiming dower out of lands devised by that will. The rule was that a devise of lands liable to dower was *prima facie* a devise of them subject to the right to dower; and a widow was accordingly entitled to claim both her dower and the benefit given by the will. (*Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Ellis v. Lewis*, 3 Hare, 313; *Gibson v. Gibson*, 1 Drew. 42.) But certain provisions were considered as inconsistent with the right to dower, and where a will contained such provisions, the widow was put to her election.

Widow put to her  
election where  
will contained  
provisions incon-  
sistent with right  
to dower.

Thus, where a testator provided that his daughter should have the personal use, occupation and enjoyment of a house, it was held that the testator intended that the devisees of the estate (of which the house formed a part) should take the whole estate free from dower, and the widow was put to her election. (*Miall v. Brain*, 4 Mad. 119. See *Butcher v. Kemp*, 5 Mad. 61; *Roadley v. Dixon*, 3 Russ. 192.)

Gift of personal  
use of part of pro-  
perty.

Power to lease  
and powers of  
management.

A testator bequeathed to his wife an annuity, payable out of part of his real estate, and he devised other real estate to trustees upon trust, on the youngest of his nephews and nieces coming of age, to sell and to divide the proceeds among them; the testator gave to the trustees an express power to lease, and also the general power to manage and to cut timber for the purpose of repairs at their discretion: it was held, that the widow was bound to elect between the annuity and her dower, and that, in order to raise a case of election against the widow, it must be shown from the will that the husband intended to dispose of the property subject to dower in a manner inconsistent with the right to dower, and that the power to lease, given to the trustees, was a sufficient evidence of such intention; further, that the powers to manage and to cut timber were inconsistent with the

right to dower. (*Parker v. Somerby*, 4 De G., M. & G. 321; 18 Jur. 523; 23 Law J., Ch. 623; overruling *Warbuton v. Warbuton*, 2 Sm. & G. 163; see *Linley v. Taylor*, 1 Giff. 67.) 3 & 4 Will. 4, c. 105, s. 5.

Powers of, or trusts for sale created by will over real estate are not (as leasing powers have been held) inconsistent with a widow's right to dower. Nor is her claim affected by any direction as to the distribution of the proceeds. There is no such rule as that where a testator's widow is entitled under his will to what would exceed her dower; she is thereby put to her election. Where a testator, by his will, directed his trustees to sell all his freehold and copyhold estates wheresoever situate, and gave his widow half of the proceeds, and also half of all his personal property (except articles specifically bequeathed to her): it was held, that she was not bound to elect between her dower and the benefits given her by the will. (*Bending v. Bending*, 3 K. & J. 57; 3 Jur., N. S. 535; 26 L. J., Ch. 469.) See further 1 Jarm. Wills, 431 *et seq.*; Hawk. Wills, 275; 1 L. C., Eq. 323 *et seq.*

Powers of or trusts for sale.

By the above sections all dispositions by the husband are made effectual as against the right of his widow to dower. Where a testator, after directing his debts to be paid by his executors, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of the widow, it was doubted by Lord Romilly, M. R., whether she was deprived of her right to dower by sect. 4. (*Romland v. Cuthbertson*, L. R., 8 Eq. 466.)

New law.

Notwithstanding the statute 3 & 4 Will. 4, c. 104 (see *post*), and the fifth section of this act, the widow's right to dower or freebench has still priority over mere creditors of a deceased husband. (*Spyer v. Hyatt*, 20 Beav. 621.)

A widow has no right against the heir at law of her deceased husband to be indemnified in respect of a mortgage created by the husband. Therefore where, in a case of that description, the mortgaged property had been sold by order of the court in a suit for administration of an intestate's estate: it was held, as between his widow and his heir, that the right of the widow to dower was limited to one-third of the income of the clear surplus of the proceeds of the sale, after deducting what was due upon the mortgage. (*Jones v. Jones*, 4 K. & J. 361.)

The Dower Act does not apply to freebench. (*Smith v. Adams*, 5 De G., M. & G. 712.) Freebench, in the absence of any custom to the contrary, does not attach even in right until the husband's death (Carth. 275; 12 Mod. 49; 3 Lev. 385; 2 Ves. sen. 633; 2 Atk. 526; 2 T. R. 580; 3 Ves. jun. 256); and therefore any alienation by him *alone*, even by contract (2 Ves. sen. 621), to take effect in his lifetime, will defeat the widow's claim. (*Benson v. Scott*, 3 Lev. 385; *Goodwin v. Windmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; Moor. 758; *Dagworth v. Radford*, Sir W. Jones, 462; 1 Freem. 516; Gilb. Ten. 321; see 2 Watk. on Cop. 73—79. See Shelford on Copyholds, pp. 68—72.)

Freebench.

Copyhold land purchased by the husband was surrendered to the use of him and his assigns for life, and after his decease to the use of such person, for such estate and upon such trust as he by any surrender or by will should surrender or devise, and in default of such surrender or devise and so far as the same if incomplete should not extend, to the use of the husband, his heirs and assigns for ever, at the will of the lord, &c. The husband was admitted in fee, and by will devised the land to a trustee on trust for sale. By the custom of the manor the title of the wife could only be destroyed by her voluntary surrender: it was held, that she was entitled to her freebench. (*Powdrell v. Jones*, 2 Sm. & G. 407; 18 Jur. 1111; 24 L. J., Ch. 123.)

The purchaser of a copyhold held of a manor, the custom of which entitled widows of the copyholders to freebench in one moiety of the lands of which their husbands died seised, took a surrender, but died before admittance: held, that his widow was not entitled to freebench at law or in equity. (*Smith v. Adams*, 5 De G., M. & G. 712.) A widow was held not entitled to freebench out of a moiety of copyholds to which her husband was entitled in remainder after a life estate. (*Smith v. Adams*, 18 Beav. 499.)

3 & 4 Will. 4,  
c. 105, s. 5.

By the custom of the manor of Cheltenham, as settled by statute 1 Car. 1, the widow of a copyholder is entitled to dower out of customary lands of which her husband was tenant during the coverture, although such lands had been aliened during the coverture by the husband alone, without the wife having been examined in court or joined in the surrender. (*Riddell v. Jenner*, 10 Bing. 29; 3 M. & Scott, 673.) Where lands held of that manor, between the time of alienation by the husband and of his death, have been improved in value by buildings, the widow is entitled to dower, according to the value at the time of his death, although one-third remain not built upon. And if the lands so aliened are, at the death of the husband, in the possession of several persons, whether by the immediate act of the husband or the act of his alienee, dower must be assigned as to one-third of the lands of each such possessor. *Doe d. Riddell v. Gwinnell*, 1 Gale & D. 180; 1 Q. B. 682.)

The widow of a tenant in tail of copyhold is entitled to freebench, though there is no custom as to the freebench of widows of tenants in tail, but only as to the freebench of widows of tenants in fee. (*Doe d. Duke of Norfolk v. Sanders*, 3 Dougl. 303.)

A marriage settlement, "in order to make some provision for" the intended wife in case she should survive her husband, settled some of the husband's copyholds, after his death, on her for life: held, that she was not thereby barred of her freebench in other copyholds, as to which the husband died intestate. (*Willis v. Willis*, 34 Beav. 340.)

See further Scriven on Copyholds, 56 *et seq.*, 5th ed.

By the custom of gavelkind, the wife, after the death of her husband, shall have for her dower a moiety of all lands of her husband so long as she continues chaste. (Rob. on Gav. by Wilson, pp. 205—236.)

Dower may be  
barred by a de-  
claration in a  
deed;

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land (*q*).

(*q*) In order to prevent a widow from having dower out of lands purchased by her husband, a declaration contained in the deed of conveyance that she shall not be dowable is sufficient under this section, although the deed was not executed by the husband. (*Fairley v. Tuck*, 27 L. J., Ch. 28; 6 W. R. 9.)

A conveyance of real estate, prior to this act, made to a married man to the usual uses to bar dower, with a declaration that it was to the intent "that the present or any future wife should not be entitled to dower," will not, as against the heir at law, deprive a second wife, married after the passing of this act, of her dower. (*Fry v. Noble*, 20 Beav. 598; 7 De G., M. & G. 687; *Clarke v. Franklin*, 4 Kay & J. 266.)

or by a declara-  
tion in the hus-  
band's will.

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be  
subject to restric-  
tions.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real  
estate to the  
widow shall bar  
her dower.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or



in any land of her said husband, unless a contrary intention shall be declared by his will (r).

§ 4 Will. 4,  
c. 106, s. 9.

(r) In *Marston v. Roe* (2 Nev. & P. 504; 3 Ad. & Ell. 14), a question was raised, but not decided, whether a will made by a testator in contemplation of marriage, in which he devised certain real estates to his future wife for life, would operate to bar her right of dower under this act.

Old rule as to  
when widow was  
put to election.

A devise by a husband for the benefit of his wife, who was entitled to dower, did not operate as a satisfaction of such right, unless an intention was expressed, or could be inferred, that the gift by the husband was in lieu of dower, in which case the wife could not claim both, but was put to her election. Several cases occurred upon this subject, which are collected in *Rep. on Husband and Wife*, by Bright, c. 11, s. 3; and see 1 Jarman on Wills, 434 *et seq.* It was decided by the House of Lords, that a devise to the widow of a part of the land, out of which she was dowable, did not exclude her from her right of dower; the sole possession of a part of the lands, out of which the dower is to issue, not being deemed inconsistent with the assertion of a legal right to the third of the whole estate. (*Lawrence v. Lawrence*, 2 Vern. 365; *Frum* 244; 3 Br. P. C. 484; 1 Swanst. 398, n.; 1 Br. C. C. 292, n. by Belt. see *Hell v. Hill*, 1 Con. & L. 120; 1 Dru. & War 102, where Sir E. Sugden said that it was impossible to reconcile all the cases on this subject. (*Holdich v. Holdich*, 3 Y. & C. C. C. 18; *Goodfellow v. Goodfellow*, 18 Beav. 356.)

Where the terms of the devise expressly or clearly imply that it was the testator's intention that the devise of part of the lands, though *only for the life* of the widow, should be in satisfaction of dower out of the remainder, she will be put to her election. (*Chalmers v. Skerit*, 2 Ven. & B. 224; *Dickson v. Robinson*, Jac. R. 503; *Roberts v. Smith*, 1 Sim. & St. 519.)

A testator devised all and singular the rents, issues and profits of his copyhold lands, to be applied to the maintenance of his children, until the youngest should have attained twenty-one, subject in the meantime and charged with an annuity to his wife, so long as she should continue his widow, and upon his youngest child attaining twenty-one, he devised all and singular his said copyhold lands among all his children equally; and he devised all and singular his freehold tithes and land upon the same trusts as he had declared respecting his copyhold estates, subject to the annuity to his wife; and he bequeathed the use of all his household goods and furniture to his wife, so long as she should continue his widow: it was held, that the widow was entitled both to the benefit given by the will and to her dower. (*Dowson v. Bell*, 1 Keen, 761; see *Harrison v. Harrison*, 1 Keen, 765.)

A bequeathed to his widow an annuity for life; and if she made and persisted in any claim upon the residue of his property after his decease he bequeathed to her no part of his property, and the annuity should not be paid. It was held, that she was not by the direction precluded from claiming her dower, nor was she put to her election. (*Wetherell v. Wetherell*, 7 L. T., N. S. 89; 10 W. R. 318.)

A widow is not bound by receiving an annuity given in lieu of dower, until she has an opportunity of knowing that the assets are sufficient for payment of the annuity. (*Eland v. Eland*, 2 Jur. 852.) A widow, in a case in which she was bound to elect between her dower and an annuity given by her husband's will, received the annuity for five years: it was held, under the circumstances, that she had not elected. (*Reynard v. Spence*, 4 Beav. 103.) As to the right of election in such a case possessed by the next of kin of a widow who had not elected, see *Fyfe v. Fyfe*, L. R., 7 Eq. 494. A testator made a provision for his widow expressly in lieu and satisfaction of any estate or interest to which she might be entitled as his widow out of his real and personal estate. The widow enjoyed this provision, but in ignorance of her right to dower: it was held, sixteen years after the testator's death, that she was entitled to elect. (*Soprith v. Maughan*, 30 Beav. 235.) The widow's acquiescence in payments made to her for several years of one-third of the dividends arising from the proceeds of the sale of an estate subject to her dower, may amount to an

Effect of receiving  
provision given in  
lieu of dower.

3 & 4 Will. 4,  
c. 105, s. 9.

election to take her dower in preference to the devised estate. (*Parker v. Downing*, 2 Jur. 28.) A testator charged his estates with payment of his debts and of an annuity to his wife, in lieu of dower. The real estates having been sold to pay the debts, and the income of the remaining proceeds being insufficient to pay the annuity: it was held, that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund; and it was also held (the annuity being wholly in arrear), that the arrears were to be computed from the testator's death. (*Stamper v. Pickering*, 9 Sim. 176.)

In an action for the recovery of dower, a plea by the tenant in May, 1833, that the demandant had elected to receive an annuity in satisfaction of dower, was not supported by showing the demandant's receipt of dividends of the stock for securing the annuity in September, 1833; for the latest time in respect of which evidence of satisfaction would have been admissible was at the time of plea pleaded. It seems that a court of law cannot properly take cognizance of an election of a widow to take something in lieu of dower, such a question being for a court of equity. (*Slatter v. Slatter*, 1 Bing. N. C. 259; 5 Moore & Scott, 82.)

New law.

It will be observed that this act has given the husband complete power to defeat the right of dower, either by deed or will; and where any interest in the land liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared, although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will.

Where a testator, after directing his debts to be paid by his executor, devised his real and personal estate, subject as aforesaid, to trustees upon certain trusts, being partly for the benefit of the widow: it was held, that she was deprived of her right to dower by sect. 9. (*Rowland v. Cuthbertson*, L. R., 8 Eq. 466.)

Bequest of personal estate to the widow shall not bar her dower.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will (s).

(s) A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared. (*Ayres v. Willis*, 1 Ves. sen. 230.)

#### AGREEMENT NOT TO BAR DOWER.

Agreement not to bar dower may be enforced.

11. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them (t).

(t) In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower. (Sugd. V. & P. 548, pl. 24, 11th ed.)

#### PRIORITY OF LEGACIES IN LIEU OF DOWER.

Legacies in bar of dower still entitled to preference.

12. Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies

bequeathed to widows in satisfaction of dower are entitled to priority over other legacies (*u*). 3 & 4 Will. 4, c. 105, s. 12.

(*u*) When a general legacy is given in consideration of a debt owing to the legatee, or of his relinquishing any right or interest, since the bequest is not made as a bounty, like other general bequests, but as purchase-money for the collateral right or interest, it will be entitled to a preference of payment to the other general legacies, which are merely voluntary. (See 1 Rep. on Leg. 372, 2nd ed.; Wms. on Executors, 1265; 1 Fonbl. on Eq. 372.) Upon this principle, when a legacy is given to a wife in lieu or satisfaction of dower, she is not, in case the assets should prove deficient, to abate in proportion to the other legatees. (*Burridge v. Bradyl*, 1 P. Wms. 127; *Blower v. Morrett*, 2 Ves. sen. 420; *Davenhill v. Fletcher*, Ambl. 244.) Therefore where a testator, who had by a post-nuptial settlement made certain provisions for his wife, which were expressed to be in bar of dower, bequeathed to her specific legacies and a sum of money, adding, that what he had so given her, together with the provision made for her by the settlement, should be in lieu of any dower which she might claim; the assets having proved insufficient for the payment of the legacies in full: it was held that the wife was entitled to priority over the other legatees, and that the legacy given to her ought not to abate proportionally with the other legatees. (*Heath v. Dendy*, 1 Russ. 545.) It seems that the principle of these cases applies only where at the death of the testator the widow is entitled to dower. (*Id.* 545.)

Preference of legacies in lieu of dower.

A widow, dowable out of her husband's lands, having elected to take an annuity given by his will in lieu of dower, was held to be entitled to priority over the other legacies, the testator's estate being insufficient to pay the legacies in full. (*Stahlschmidt v. Lett*, 1 Sm. & G. 421.)

#### DOWER AD OSTIUM, &C. ABOLISHED.

13. No widow shall hereafter be entitled to dower ad ostium ecclesiæ, or dower ex assensu patris (*x*). Certain dowers abolished.

(*x*) An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34 a; 2 Bl. Comm. 132, 133.

#### SAVING AND RESTRAINING CLAUSE.

14. This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower (*y*). Act not to take effect before the 1st January, 1834.

(*y*) See *Fry v. Noble*, 20 Beav. 598; 7 De G., M. & G. 687; and *Clarke v. Franklin*, 4 K. & J. 266.

It may become a question whether or not widows who were married on or before the 1st January, 1834, will be entitled to dower out of *equitable* estates under the second section of this act. (*Ante*, p. 437.)

#### TENANT BY THE CURTESY.

Tenant by the curtesy of England is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case the husband shall, on the death of his

3 & 4 Will. 4,  
c. 105, s. 14.

Requisites of a  
tenancy by the  
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wife, hold the lands for his life, as tenant by the curtesy of England. (Litt. ss. 35, 52; 2 Bl. Comm. 126.) And it seems that a husband may become tenant by the curtesy to an estate which his wife has inherited. (Williams Real Prop., App. D., 452, 7th ed.)

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be *voidable* only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of *both* parties. (*Hicks v. Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182. See 2 Ves. sen. 245; 7 Rep. 43 b.)

2nd. The wife must have a seisin in deed of *corporeal* hereditaments (Co. Litt. 29 a), either before or after issue born. (*Id.* 30 a.) The receipt of rent reserved on a lease for years, amounts to an actual seisin; (*De Grey v. Richardson*, 3 Atk. 469;) but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage as will entitle him to be tenant by the curtesy, unless the lease determine during the coverture. (Co. Litt. 29 a, 32 a.)

A husband will not be tenant by the curtesy of an estate tail of which the wife was not seised during the coverture. (Co. Litt. 29 a.) Therefore, where tenant in tail by lease and release conveyed to trustees to the use of herself till marriage, then to the husband for life, then to herself for life, then to the first and other sons of the marriage, and the wife died first: it was held, that the husband was not entitled to a life estate under the settlement, nor as tenant by the curtesy, a base fee only having passed by the settlement, voidable by the entry of the issue in tail. (*Doe d. Neville v. Rivers*, 7 T. R. 276.)

Where a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge: it was held that, though there had been issue of the marriage, the husband had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees. (*Gibbins v. Eyden*, L. R., 7 Eq. 371.)

As to *incorporeal* hereditaments, a seisin in law is sufficient. Thus, if a man seised of an advowson or rent in fee has issue a daughter, who is married, and dies leaving issue before the advowson was void or the rent became due, the husband will be tenant by the curtesy, although his wife had only a seisin in law. (Co. Litt. 29 a, and notes by Harg.)

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. until she attained twenty-one or married, and then to the use of her and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. married, had a child which died, and then the mother died under twenty-one; and as the wife, during her life, continued seised of a fee simple to which her issue might by possibility inherit, it was held, that her husband was entitled to be tenant by the curtesy. (*Buckworth v. Thirkel*, 10 Moore, 235, n.; 2 Bing. 447; 3 Bos. & P. 652, n.; 4 Dougl. 323. See 2 Sim. 251; 2 Rep. on Husband and Wife, Jac. ed. Addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby v. Vernon*, 9 Mod. 147.)

But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue: it was held, that her husband was not entitled to be tenant by the curtesy, because the estate, which the wife had, determined on her death, leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her. (*Barker v. Barker*, 2 Sim. 249.)

An estate by the curtesy must arise out of an inheritance, and no such estate can issue out of an estate *pur autre vis*. (*Stead v. Platt*, 18 Beav. 54.)

If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger. (*Jones v. Davies*, 7 H. & N. 507; 8 Jur., N. S. 592; 31 Law J., Exch. 116; 10 W. R. 464.)

3rd. The wife must have issue born alive in her lifetime, and capable of inheriting the estate. (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b.) The evidence of a father claiming an estate for life as tenant by the curtesy will be considered sufficient proof that his child was born alive, when it was acquiesced in and acted upon by the father of the wife who was residing in the house. (*Jones v. Ricketts*, 31 Law J., Chan. 753; 10 W. R. 576.)

3 & 4 Will. 4,  
c. 105, s. 14.

4th. The last circumstance required to consummate the right of the husband is the death of the wife. (Co. Litt. 20 a.)

Copyholds are not subject to curtesy, except by custom, (4 Rep. 22 a, 30 b; *Paulter v. Cornhill*, Cro. Eliz. 361,) to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not. (Co. Litt. 30 a, 111 a; 2 Sid. 153; Rob. on Gav. by Wilson, pp. 177—204; 1 Scriven on Cop. pp. 46, 79, 80, 4th ed.; Shelford on Copyholds, pp. 72—74.)

Copyholds.

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy wherever the wife, during the coverture, is in possession of an equitable estate of inheritance, and has issue by such husband capable of inheriting such estate. The wife may have an equitable inheritance, notwithstanding a direction to pay the rents to her separate use; and if the wife be in receipt of the rents during the coverture, and there be issue capable of inheriting, the husband will be entitled to be tenant by the curtesy. (*Morgan v. Morgan*, 5 Madd. 408; *Herle v. Greenbank*, 3 Atk. 715; *Pitt v. Jackson*, 2 Br. C. C. 51.) By a marriage settlement the wife's freehold estates were vested in a trustee, in trust for her separate use during her life, remainder for such persons as she should appoint by deed or will, and in default of appointment, in trust for her right heirs. The wife died without having made any appointment, leaving her husband and a son surviving. After her death the trustees sold the estate under a power in the settlement, which directed the proceeds to be invested in the purchase of other lands, or on mortgage, or in the funds, and the securities to be held on the trusts aforesaid. It was held that, on the wife's death, the husband became equitable tenant by the curtesy of the estates, and, therefore, was entitled to the interest of the purchase-money during his life. (*Follett v. Tyrer*, 14 Sim. 125.)

Equitable estates.

Where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use; and she died leaving a child; it was held that her husband was entitled to the property by the curtesy. (*Appleton v. Rowley*, L. R., 8 Eq. 139; see *contra*, *Moore v. Webster*, L. R., 3 Eq. 267.)

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with. (*Smith v. Matthews*, 3 De G., F. & J. 139.)

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may, perhaps, be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement during the whole period of coverture, yet the possession of the estate, in conformity with the equitable interests of the *cestui que trusts*, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. (*Parker v. Carter*, 4 Hare, 400.) If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or if both the trustee and *cestui que trust* are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. (*Parker v. Carter*, 4 Hare, 416.)



8 & 4 Will. 4,  
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Where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use; and she died leaving a child; it was held that her husband was entitled to the property by the curtesy. (*Appleton v. Rowley*, L. R., 8 Eq. 139; see *contra*, *Moore v. Webster*, L. R., 3 Eq. 267.)

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with. (*Smith v. Matthers*, 3 De G., F. & J. 139.)

Although the right of the husband as tenant by the curtesy of an equitable estate of the wife may, perhaps, be excluded by a possession of the estate strictly adverse to the husband and wife, and to all other parties interested under the settlement during the whole period of coverture, yet the possession of the estate, in conformity with the equitable interests of the *cestui que trusts*, for however short a time during the coverture, and after the interest of the wife has become vested in possession, will support the title of the husband as tenant by the curtesy. (*Parker v. Carter*, 4 Hare, 400.) If the coverture begins after an adverse possession has commenced, and terminates during the continuance of such adverse possession, or if both the trustee and *cestui que trust* are disseised before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, the husband would not acquire any title as tenant by the curtesy. (*Parker v. Carter*, 4 Hare, 416.)

3 & 4 Will. 4,  
c. 105, s. 14.

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be tenant by the curtesy. (*Bennett v. Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property will not have that effect. (5 Madd. 412.)

The Real Property Commissioners suggested some alterations in the law of Curtesy, and a bill for carrying them into effect was brought into parliament, but did not pass. (See 1 Real Prop. Rep., pp. 19, 20, 70, 71.)

By stat. 3 & 4 Will. 4, c. 74, s. 22 (*ante*, p. 331), an estate by the curtesy qualifies a person to be protector of a settlement.

In dealing with property which has descended from a married woman, it is necessary to inquire whether she has left a husband who is entitled to be tenant by the curtesy.

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## LAW OF INHERITANCE.

3 &amp; 4 WILLIAM IV. c. 106.

*An Act for the Amendment of the Law of Inheritance (a).*  
 [29th August, 1833.]

## INTERPRETATION CLAUSE.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to

3 & 4 Will. 4,  
c. 106, s. 1.

Meaning of words  
in the act.

"Land."

"The purchaser."

"Descent."

"Descendants."

"Persons last  
entitled."

"Assurance."

3 & 4 Will. 4,  
c. 106, s. 1.

Number and  
gender.

The objects of the  
act.

Report of R. P.  
Commissioners.

State of the law  
of descents before  
the new act.

Exclusion of the  
ascending line.

several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

(a) The leading objects of this act are :

1st. To alter the root of descent by tracing the descent from the person last entitled, unless it be proved that he took by descent, thus superseding the rule that the descent should be traced from the person who last died actually seised.

2nd. To declare that the heir of a testator taking under his will shall be considered as taking as *devisee*, and that under a limitation to a grantor or his heirs, such person shall be considered as a *purchaser*.

3rd. To declare that brothers and sisters shall not inherit immediately from each other, but that every descent from them shall be traced through the parent.

4th. To enable the lineal ancestor to inherit from his issue in preference to collateral relations. Thus, on failure of lineal descendants of the last owner, inquiry is to be made for the father, and not for the brother or sister, nephew or niece; for the grandfather, and not for the uncle, aunt, or cousin, ascending in the first instance to the immediate parent, and then again descending to his issue, as in a course of transmission from him; and so, as to every more remote lineal ancestor and his issue, in each degree. But preference is given to the male ancestral line throughout.

5th. To make the half-blood capable of inheriting next after any relation in the same degree of the whole blood and his issue.

6th. To allow descents to be traced through persons who have been attainted.

The report of the Commissioners of Real Property will explain the general object of the alterations made by this act, and for further information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248.

"The rules which govern the transmission of freehold estates of inheritance at common law, on the decease of an absolute proprietor, in the absence of express disposition by him, are (for the most part) well understood, and appear to be well suited to the habits and feelings of the people.

"By these rules an estate descends to the eldest or only son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living.

"When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

"In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language was a purchaser.

"In the former case the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case the law gives the preference to the relations on the paternal side, but if there be none such, then it directs the inheritance to go to the relations on the maternal side.

"Here occurs a rule, drawn from feudal principles, which is at variance

with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden, that is, in most cases, to the crown. [By the 6th section of the act 3 & 4 Will. 4, c. 106, *post*, the lineal ancestors are admitted.]

3 & 4 Will. 4,  
c. 106, s. 1.

"In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants: and if none such, to sisters of the whole blood and their descendants in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

Preference of the  
paternal line.

"If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

"Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

"According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice *Blackstone* in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

Question with  
respect to female  
stocks on the  
paternal side.

"On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal and then on the maternal side, as before. It is to be observed, that on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side.

Heirs must be of  
the blood of the  
first purchaser.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim.

Exclusion of the  
half-blood.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation.

"We think that both these rules may be taken away, without introducing any uncertainty into the law of inheritance, or materially impairing its symmetry."

And, 1st, *As to the Ascending Line.*

"It appears desirable, that the lineal ancestor should be let into the succession in such order as to infringe as little as possible on the present rules,

Ancestor to come  
in when his issue

3 & 4 Will. 4,  
c. 106, s. 1.

would have in-  
herited by the old  
law.

Descent between  
brothers and  
sisters not to be  
immediate.

Ancestor not to be  
restricted to a life  
estate.

Whole blood of  
first purchaser to  
be preferred only  
between kindred  
in equal degree.

Reasons for re-  
stricting the pre-  
ference of whole  
blood.

and to found the new rule upon some principle already established, making it agreeable, so far as may be, to the feelings of the people, and to the general policy of the law of inheritance. This we think may be best done by introducing the ancestor wherever the descendants of such ancestor would be entitled according to the present rules; the ascending line would thus come in immediately after the descending. If the purchaser of an estate died without issue, and intestate, leaving a father, that father would take before the brothers or sisters, or their descendants; and if there were neither father nor brothers or sisters, or their descendants, a surviving grandfather would take before uncles or aunts. Conformity in the laws regulating different species of property is desirable, with a view to the better general understanding of the law. Accordingly one recommendation of this rule is, that it would make the transmission of real property, in one case, conformable to the law now long established for the transmission of personal property, which, in case of the intestacy of a person dying unmarried and without issue, goes exclusively to the father as next of kin—a law which it is believed has not been found inconvenient, nor considered unfair or objectionable. The father, too, as the general dispenser of the family property, seems the fittest person to have the control over whatever is to devolve by law upon some part of his family.

“By a technical rule of pleading, the descent from one brother or sister to another has been hitherto considered immediate, and in the opinion of some persons it would be better to consider that as a substantial rule, and to prefer brothers and sisters to the fathers: this, however, would be introducing an anomaly, especially if the principle were not followed up by postponing generally the ancestor to his descendants, the grandfather, for instance, to the uncle. [Sect. 5 of act 3 & 4. Will. 4, c. 106, *post.*]

“It may be argued in support of such proposal, that the ancestor, who is likely to be advanced in life, may be expected to be less capable of making a discreet disposition of his property, that he may be tempted unfairly to divert it to his issue by a different marriage, or even to make some disposition altogether capricious and unreasonable; but the dependence of children on their parents is acknowledged to be salutary, and when it is considered that the proposed change of the law will only come into operation in the absence of express disposition, and therefore it may be presumed, for the most part, where no strong reason was felt by the deceased proprietor for making a disposition, the general good of the family seems likely to be best consulted by vesting the property in its head, rather than in any of the younger members, and, as already observed, less violence will thus be done to the general system of the law of inheritance.

“The same reason we consider should prevail against a plan which has been proposed, of giving to the ancestor an interest during his life only.”

#### 2nd. As to the Half-Blood.

“We think it advisable that no distinction should exist between the whole and the half-blood, except that preference should be given to the whole blood of the first purchaser, as between his kindred in equal degree or their descendants, with the exception of a single case afterwards mentioned.

“The following reasons seem to us sufficient for putting the whole blood and the half-blood on an equal footing, with the above exception.

“1st. One ancestor only of any couple of ancestors being the person from or through whom the inheritance descends, it seems needless to have any regard to the other ancestor. Thus if land descend from the father to the eldest son, there seems no reason why it should not pass from him to the second son, whether born of the same or another mother.

“2nd. The rule is recommended by the principle of conformity already suggested, as in the transmission of personal estate, the whole blood and half-blood standing on an equal footing, and so in case of descent of a title of nobility, or of an estate tail.

“3rd. The difference between the whole and the half-blood, however well understood by lawyers, is, it is believed, not familiar to the public; lands are therefore liable to be left to descend contrary to the intention of the owner, and they are liable to be claimed and to be possessed contrary to

the law without an evil intention; and further, in deducing the title on sales of estates, the circumstance of the half-blood, being not of very frequent occurrence, is liable to be overlooked by those who prepare the abstract of title, and by those who know nothing of the pedigree but what is laid before them, and thus a bad title may be approved of by the advisers of a purchaser for valuable consideration and accepted by him; whatever leads to insecurity of titles is of course, independently of other considerations, greatly objectionable.

3 & 4 Will. 4,  
c. 106, s. 1.

“Some of the above reasons apply with equal force to the case in which a person who died seised was himself the purchaser.

“The reason which has inclined us to give a limited preference to the whole blood in this case is, that when one parent has issue by another marriage, the connection between the members of the two families is felt to be much less than between the members of each family. If a brother leave a whole brother or sister, or the issue of either of these, and also an elder brother by a different marriage, it would be repugnant to common feelings and notions, to direct his estate to descend to the half brother, although if he left a brother or sister of the half-blood, or the issue of such, and only a more remote relation of the whole blood, the proximity of kindred would seem to give a reasonable preference to the former. It would be desirable if, with reference to the half-blood, a distinction could be drawn between the case of a purchaser by his own act, according to the familiar use of the word purchaser, and that of a purchaser in the mere technical sense of the word, that is, a person who may have succeeded perhaps to the family estate, but is considered as a purchaser, because it comes to him through some deed or will, and not by inheritance, and in the latter case to put the whole and the half-blood on an equal footing; it is considered, however, impracticable to frame a law founded on this distinction, which should be clear and simple, except, indeed, that a power may be given to the person from whom the property comes, of directing that it shall be taken as if it descended from a particular line of ancestors, as hereafter explained, in which case we think the distinction of the whole and half-blood may also be taken away.

Reason for giving  
the restricted preference.

“It is proposed, therefore, that the whole blood of the first purchaser, who took without reference to any ancestor, shall be preferred, as between persons claiming through the same ancestor of the first purchaser to the half-blood, and that, subject to this preference, the distinction between the whole and the half-blood shall be abolished.”

[The half-blood are now capable of inheriting under the 9th section of 3 & 4 Will. 4, c. 106, *post.*]

### *3rd. As to the Female Ancestor.*

“With respect to the question as to the preference of the nearer or more remote female ancestor on the paternal side, the case having, it is understood, occurred more than once since the Commentaries were published, it seems expedient to settle it, and the symmetry of the rules of inheritance appears most consulted by adopting the rule laid down by Mr. Justice *Blackstone*. It is proposed to declare this to be the law, and to extend it of course to the case of direct ascent, so that the mother of the paternal grandfather would be preferred to the mother of the father.” [Four tables are subjoined to the First Real Property Report, one showing the order of inheritance as laid down by Mr. Justice *Blackstone*, the others showing the order of inheritance according to the proposed alterations.]

Blackstone's rule  
as to female an-  
cestor to be  
adopted.

### *4th. Limitation to Special Heirs.*

“The rule above mentioned, which directs that where the inheritance passes to collateral relations of the last proprietor, those only are admitted to take who are of the blood of the first purchaser, occasioning an estate to pass sometimes in a different channel where the deceased owner had inherited the estate, and where he had acquired it by what the law denominates purchase, although the distinction is often, as has already been

Inconvenience of  
the law regarding  
the blood of the  
first purchaser.



3 & 4 Will. 4,  
c. 106, s. 1.

observed, only technical, introduces complexity, and sometimes causes anomalous diversities in the transmission of estates.

"Thus, if a person acquired an estate immediately under a will or settlement made by his maternal ancestor, that estate would descend to his relations on the father's side, and would not return to the family from which it came, until the father's line were exhausted. On the other hand, if it came from a maternal ancestor by descent, strictly so called, all the relations on the paternal side would be excluded; and rather than pass to them, the estate would escheat. In consequence again of a principle of courts of equity, that a man cannot be a trustee for himself, and that where a beneficial estate is in the same party with the legal estate, it is absorbed by the latter, cases have occurred where the course of descent of an inherited estate, the title to which was equitable, has been changed by the accident of the mere legal estate (that is, what may be called the *fictitious* estate of the trustee) descending from the other line of ancestors, and absorbing the equitable estate. An additional inconvenience arises from the occasional nicety of the distinction between strict descent and purchase, according to the technical sense of the latter word—a circumstance which sometimes makes the channel of descent a matter of question.

Reason against  
abrogating the  
law.

"It has been proposed to remedy these inconveniences by considering every person who dies owner of an estate of fee simple as the stock from whom alone the inheritance is to be traced as if he had been first purchaser.

Estates may be  
limited to descend  
to heirs on the  
part of a specified  
ancestor.

"It is apprehended, however, that such a rule would occasionally produce very objectionable consequences. Thus, if an heiress died under age, leaving a child who should also die under age and without issue, the estate would necessarily be carried from her family to the family of her husband.

"This proposal, therefore, is not recommended as a general rule.

"It has, however, occurred to us, that a person devising or settling an estate in fee-simple might be allowed to direct that the donee or devisee should take the estate as if it had come to him from a particular ancestor; that an estate, for instance, might be given to a man and his heirs on the part of his mother. The attempt to create limitations of this nature has been frequently made; the law now forbids such limitations in grants of estates in fee-simple, although it allows them on the creation of estates tail. We incline to the opinion that allowing them in the former case would be a reasonable enlargement of the power of absolute proprietors, and would diminish the inconveniences produced by the technical distinction between inheritance and purchase. This is the case in which we think the distinction between the whole blood and the half-blood of the purchaser may be abolished.

Heir of first pur-  
chaser let in in a  
certain case.

"We think that especial regard should be paid to the blood of the first purchaser, in a case which will be liable to occur in consequence of the admission of the half-blood to inherit. If an estate should descend from a purchaser to his half brother, it might happen that the heirs of the second brother would be strangers in blood to the first, and the heirs of the first brother (at the death of the second) strangers in blood to the second; this would be the case if the common parent were illegitimate, and the second brother should die without issue, and there were no other brother or sister, or the issue of such; and it might be the case under other circumstances. We propose to provide for the case by directing the inheritance to pass to the heir of the first purchaser, when the heir of the last proprietor shall not be also heir of the first purchaser.

Last proprietor  
considered as first  
purchaser on  
failure of blood of  
first purchaser.

"We further think that the last proprietor may be treated as if he had been first purchaser, in the rare case in which the line from which the estate descended to the last proprietor has failed, for the purpose of admitting to the inheritance his other relations, rather than let it escheat.

"It may seem superfluous to legislate for cases like these, which may appear very unlikely to occur in practice; they are found, however, to occur in consequence of the acquisition of estates by persons of illegitimate birth, who have in law no relations but their own descendants, or by the descendants of such, and in consequence of the loss of evidence of pedigree in families of mean condition or origin."

5th. *Seisin of Ancestor.*

8 & 4 Will. 4,  
c. 106, s. 1.

"A rule of law, founded on feudal principles, and expressed in the legal maxim, *seisina facit stipitem*, directs, that inheritance is to be traced from the person who last died actually seised; that is, who was in possession by himself, or a tenant for years, or had received some rent (in the case of a freehold lease), or had exercised some act of ownership; thus, if the right to an estate descended to a person who himself died without having taken possession, or having had it by construction of law, the inheritance is to be traced not from such person, but from the person who died possessed. This law produces many anomalous consequences: it makes it sometimes a matter of chance whether a whole sister or a half brother of the person who last died entitled, or whether a father, or an uncle, or more remote relation of the person who last actually enjoyed the property, shall inherit; and it may happen that one part of the family estate, having been in the occupation of a tenant, shall go one way, another part, as to which the possession may have remained vacant during the time of the person last entitled, shall go another way.

Inconvenience of  
old law.

"Owing to the circumstances that some species of property, as reversions and advowsons, do not admit of taking actual possession, though an act of ownership has the effect of taking possession, and that on the other hand, in most cases which admit of possession, and as to equitable estates, the law creates constructive possession, these anomalies are sometimes inevitable; moreover, occasionally nice and doubtful questions arise as to the fact of actual or constructive possession.

Doubtful ques-  
tions as to fact of  
seisin.

"The rule itself appears not to be grounded on any solid principle, and though the inconveniences arising from it will be lessened by admitting the half-blood and the lineal ancestor to inherit, it is proposed to abolish it, *and to enact that estates shall pass to the heirs of the person who last died entitled, although he may not have had seisin.*

[It will be observed that this proposal has not been adopted, and that the descent is to be traced from the purchaser. See sect. 2 of act, and note.]

"It appears expedient to extend all the above proposed rules to the inheritance of lands held by tenures or customs, different from the general tenure of free and common socage, as copyhold lands and customary freeholds, and lands held in ancient demesne, and borough-English and gavelkind lands, and also to descendible freeholds." (1 Real Property Rep. 10—16.)

New laws of in-  
heritance to be  
applied to copy-  
hold lands, &c.

*Equitable estates are subject to the same rules of descent as legal.* (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden, 258; 1 Sand. Uses, 217, 3rd ed.; *Trash v. Wood*, 4 My. & Cr. 324.)

ROOT OF DESCENT.

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same (b.)

Descent shall  
always be traced  
from the pur-  
chaser, but the  
last owner shall  
be considered to  
be the purchaser,  
unless the con-  
trary be proved.

3 & 4 Will. 4,  
c. 106, s. 2.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof. (22 & 23 Vict. c. 35, s. 19.) (c.)

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106. (*Ib.* s. 20.)

Effect of this  
section.

(b) The law was different in those cases in which there was a seisin of property and in those cases in which there was no seisin. The new statute has endeavoured to assimilate the law both with regard to matters capable of seisin and the law as applied to matters incapable of seisin. Accordingly it enacts that if an estate in possession descend on the heir of a purchaser, and he does not deal with it in any manner whatsoever, and then dies intestate, it will descend not upon his heir, but upon the heir of the purchaser. The old rule was *seisina facit stipitem*; but that is put an end to by the statute, because in all cases, whether there is seisin or not, it makes it go to the heir at law of the last purchaser. (Per Sir J. Romilly, M. R. *Ingilby v. Amcotts*, 21 Beav. 593.) For the old law as to the seisin of the ancestor, see *ante*, p. 441, and the cases quoted, *post*, p. 455.

Effect of this section in the case of purchase from an heir.

A vendor making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption contained in this section until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase. (*Dorling v. Claydon*, 1 H. & M. 402.)

Seisin of purchaser.

The explanations in the first section have rendered actual seisin unnecessary in the purchaser or the person to be deemed such; but every estate, right and interest, whether in possession, reversion, remainder or contingency (*ante*, p. 435), and whether the last person who had a right to the land did or did not obtain the possession or receipt of the rents and profits thereof, are now the foundation of a right in the first purchaser, from whom the descent is accordingly to be traced. The second section renders it necessary to prove a descent at every step, in order to exclude the last possessor's title as a purchaser; but it does not exclude such proof, and therefore when it can be obtained the descent will be traced as it has actually taken place, subject to the provisions of the act. (See Sugd. V. & P. 550, 11th ed.)

Purchaser dying before seisin.

A. being seised in fee of copyhold property, devised the same to B. for life, remainder to her issue as tenants in common; and if but one child, then to such one, his or her heirs, &c., absolutely; and in default of such issue to his own right heirs. On the death of A., B. was admitted, and afterwards married the defendant. B. subsequently died, leaving, by the defendant, one child, C., an infant, who afterwards died, aged eight months. Immediately on the death of B., the defendant entered into the receipt of the rents and profits, and so continued from that time till the time of the action. The defendant's sisters were C.'s heirs at law and by custom. In ejectment by the heir at law of A., it was held, that as C. took by purchase, actual seisin by her was not necessary in order to transmit the estate to her right heir, and that the lessor of the plaintiff was not entitled to recover. *Tindal*, C. J., said, "the devisee in fee has, without an actual entry, such a seisin of the premises devised as will enable his heir to take from him by descent, and consequently to bar the heir at law of the devisor. It is the clear result of all the authorities, that wherever a party has succeeded to an estate by descent, he must obtain an actual seisin or possession, as contradistinguished from a seisin in law, in order to make himself the root or stock from which

the future inheritance by right of blood must be derived ; that is, in other words, in order to make the estate transmissible to heirs. It will be quite sufficient to refer to the maxim in Fleta, *seisina facit stipitem*, (2 Bl. Comm. 209 ; Co. Litt. 15 a,) and to the well-known doctrine of *possessio fratris*, without citing any express authorities on this point. But the case now under consideration does not arise upon the right of the heir claiming from an ancestor who himself took by descent, and died before actual seisin, but upon the right of one who claims *as heir at law of a devisee*, that is, of a purchaser, who dies before the actual seisin ; and the question is, whether such heir can maintain his possession against the heir of the testator. We think the right to the inheritance is in the defendant, and that he can retain the possession." (*Doe d. Parker v. Thomas*, 4 Scott, N. R. 449 ; 3 Man. & G. 815 ; see *Doe d. Winder v. Laves*, 7 Ad. & Ell. 213.)

3 & 4 Will. 4,  
c. 106, s. 2.

The descent of an estate in remainder or reversion, or by executory devise, will be analogous to the descent of an estate taken by descent from a purchasing ancestor. It will therefore descend to the heirs of the original remainderman or reversioner, in a course of devolution corresponding to that in which the latter descends to the heirs of the purchasing ancestor, and with a corresponding difference from the manner and principles of a descent of such an estate at common law ; that is to say, it is the fact of purchase that constitutes the person the stock of descent under the new law, and not the fact of seisin, or what may be equivalent to seisin as under the old law. Any partial disposition, therefore, of the remainder or reversion, or other act of ownership exercised by the mesne owner, which under the old law would, in such a case, be considered as equivalent to seisin, and sufficient to turn the descent, will not of itself have that effect under the new law. But if the conveyance by which the disposition is made should contain an express limitation of the fee to the mesne owner himself or his heirs, he would then, under the 3rd section of the act, acquire, by means of the conveyance, a new estate by purchase in the remainder or reversion, which would thenceforth be descendible to his own heirs, and not to the heir of the original remainderman or reversioner, or of the last purchaser of the remainder or reversion.

Estates in remainder or reversion, or by executory devise.

Estate X. was devised to A. in fee, with an executory shifting limitation to B. and her heirs in the event of A. becoming entitled to another estate, Y. B. died first, and her estate descended on C. her heir, who by his will in 1851, made a general devise of his real estate. Some months after his death the event took place on which the X. estate was to shift from A. to B. Held, that the estate X. passed by C.'s will, and did not descend either to the heir of B. or of C. (*Ingilby v. Amcotts*, 21 Beav. 585.)

By the second section the descent is to be traced from the purchaser whether that purchaser is the person upon whose death the descent takes place, or an ancestor of that person. In every case, therefore, of the death of a person entitled to an estate by descent, the heir of such person is passed over, and the heir of the original purchaser must be sought for. To illustrate the effect of this rule in the case of a descent in coparcenary,—a case of constant occurrence where the custom of gavelkind prevails, and not unfrequent in descents of land held by the ordinary tenure,—suppose A. to have purchased an estate, and to have died intestate, leaving three daughters, B., C., D., who each take a third by descent ; B. then dies, leaving two daughters ; under the old law, if B. or either of her two sisters had acquired seisin, her two daughters would have taken her third between them ; and if neither B. nor her sister had acquired seisin, the descent of the entire estate would, it seems, have been looked upon as remaining open (though this point is by no means clear), and B.'s two daughters would have been entitled to a third as before. But under the present law it has been contended B.'s share alone is the subject of descent, and it descends to the heir of the purchaser, A. ; that is, it descends to B.'s daughters, as her representatives *in coparcenary with C. and D.* ; so that B.'s daughters, instead of taking each a sixth, take each an *eighteenth* only. If one of B.'s daughters were then to die, without doing any act to turn the descent (and until her majority she could do no such act), her share would be again subdivided, and her own issue would only be entitled to a *one hundred and eighth*

Coparceners.

3 & 4 Will. 4,  
c. 106, s. 2.

Whole share of  
coparcener dying  
intestate, leaving  
a son, descends on  
the son.

share of the original estate; if, under these circumstances, the adult daughters of the original purchaser had settled or sold their shares, the representatives of B. would have lost all chance of receiving any equivalent by descent from them. (See 5 Jur. 641, 763; 28 Law. Mag. 279; 1 Hayes's Convey. 314, 5th ed.; 1 Jarm. & Byth. Convey. by Sweet, 189, 140.) The subject of descent amongst coparceners is much discussed in 10 Jur. 71—75, 112, 132, 160, 173.

It is now decided (in accordance with the contention of Mr. J. Williams, Real Prop., Appendix B., p. 449, 9th ed.), that where a coparcener dies intestate leaving a son, the whole of her share descends on her son. T., tenant in fee of certain hereditaments, died in 1826, intestate, leaving two daughters, E. and S. his co-heiresses at law. E. continued seised of her moiety till 1st of June, 1835, when she died intestate, leaving G. her eldest son and heir at law. S. continued seised of her moiety till 16th January, 1839, when she died intestate, leaving B. her eldest son and heir at law. The devisees of G., in a suit for a partition against B., claimed five-eighths of the hereditaments, contending that under this section on the death of E. her moiety descended in moieties on S. and G. as co-heirs of T., who was assumed to be the purchaser; therefore S. obtained three-fourths or six-eighths, and G. one-fourth or two-eighths, and that on the death of S. her six-eighths descended in moieties on B. and G., therefore B. took three-eighths and G. five-eighths. *Shadwell, V.-C.*, said, "I cannot bring myself to entertain the least doubt that E.'s four-eighths descended on her son G. I do not see how any one acquainted with the principles of law can doubt. Can you suppose that an act of parliament, by any portion of it, meant to introduce doubt into a case that was so plain before the act passed? Was it not the meaning of the act to leave the law of inheritance, in such parts as were plain, absolutely as it was found, and only to alter it where it was doubtful? Just observe what is the purview, 'to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require;' that is the general object stated in distinct words, 'the person last entitled to the land shall, for the purposes of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same.' There the act is speaking of what ought to be the rule in cases where the thing is doubtful, but where the thing is so plain that nobody could doubt you must make it consistent, and if you see an act was passed to make the thing clear, do not say that the act was to make it doubtful. On looking through the act that portion of the second section appears to me so plain that I shall not send the case to law." It was declared, that on the death of E. her moiety descended upon G., and that on the death of S. her moiety descended upon B. (*Cooper v. France*, 14 Jur. 215; 19 L. J., Ch. 315.)

Real estate stood limited to A. B. for life, with remainder to C. D. in fee simple. C. D. died, living A. B., leaving two aunts, a cousin, the son and heir of another aunt, and two cousins, the daughters and co-heiresses of another aunt, her co-heirs at law. The property became thus divisible into eighths, two to one aunt, two to another, two to the son of another, and one eighth to each daughter of the other aunt. One of the daughters, E. F., died in 1824, living A. B., the tenant for life, leaving I. K. her son and heir at law. The other, G. H., died in 1832, living A. B., the tenant for life, leaving I. K. her nephew and heir. None of these persons had in any way dealt with the property. In 1839, A. B., the tenant for life, died: it was held, that as to the one-eighth which had belonged to the mother of J. K., it was not necessary to trace the descent afresh from C. D., to whom the remainder in fee was limited, but that J. K. ought to be considered as standing in his mother's place in respect of that share. (*Paterson v. Mills*, 15 Jur. 1; 19 L. J., Ch. 310.)

Customs.

In ejectment for copyhold premises, the plaintiff claimed as customary heir in borough-English of M., who purchased the premises in 1772. Upon the death of M., in 1812, the premises descended to his two infant granddaughters as coparceners. One of them died unmarried, and was succeeded in her moiety by her sister, who, in 1836, married the defendant. She died



in 1838, leaving one son, to whom the premises descended, and who died in 1854 without issue, and was the person last seised. It was proved that lands in the manor descended lineally to the youngest son of the person last seised *ad infinitum*, and if no son, to the daughters as coparceners: if no lineal heirs, to the youngest brother of the person last seised, and to the youngest son of such youngest brother; and if the youngest brother died without issue, to the next youngest brother; and if no brother, then among the sisters as parceners. There was also an entry of descent and admission of the youngest son of an uncle, and of the youngest sons respectively of two sisters, heirs of the person last seised. The plaintiff was the youngest son of the youngest brother of M., the purchaser: it was held, in the Exchequer Chamber (affirming the judgment of Exchequer), that the custom did not extend to so remote a collateral relation as the plaintiff. (*Per Coleridge, Wightman, Cresswell and Crompton, Js. (Cockburn, C. J., Erle and Williams, Js., dissentientibus), Muggleton v. Barnett*, 2 H. & N. 653; 4 Jur., N. S. 139; 27 L. J., Exch. 125, Exch. Cham.) It was held, also, that this act did not affect the custom of descent in the manor. (*Ib.* See 4 Jur., N. S., Part. II. pp. 56, 74, 85, 120; and Williams' Real Prop., Appendix A., p. 443, 9th ed.)

8 & 4 Will. 4,  
c. 106, s. 2.

According to the custom of descent in the manor of Taunton Deane, a surviving sister is not entitled to inherit in preference to a son of a deceased brother's son. (*Locke v. Colman*, 2 My. & Cr. 635.)

When the custom of a manor was stated in a presentment of the homage to be that copyholds for the first descent after a surrender descend to the eldest son, and if no surrender to the youngest son, it was held, that the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy." Where, therefore, the last surrender had been made to A., who devised to B. his heir, according to the custom of the manor, and B. died intestate, leaving two sons, it was held that B.'s youngest son was entitled to succeed. (*Bickley v. Bickley*, L. R., 4 Eq. 216.)

The custom of gavelkind being, that the lands of an intestate dying without issue are partible amongst his brothers equally, the court will apply all the incidents of descent to that custom, and the descendants of a deceased brother will stand in the same position *jure representationis* as their respective parents would have occupied; nor does the right of representation stop at the children of a brother by analogy to the Statute of Distributions. Therefore, where a man died intestate and without issue, seised of gavelkind lands, leaving a nephew and two sons of a deceased nephew: it was held, that the latter were entitled *jure representationis* to the share which their father, if living, would have taken. (*Hook v. Hook*, 82 L. J., Ch. 14; 11 W. R. 105.) Wood, V.-C., said, "the canon of descent applicable to the point is laid down in *Clements v. Scudamore* (1 P. Wms. 63), where Chief Justice Holt said, 'the custom alters the descent by the common law to the eldest son, and carries it to the youngest son generally, and must have all the consequences of a descent.' Accordingly, the right of representation was admitted as a general incident of descent to operate upon the customary rule of preferring the younger son, exactly as it operated in the common law rule, preferring the eldest. The same principle must be applied whether the custom be that of gavelkind or borough-English. You must ascertain what the custom is, and then apply all the rules of descent to the custom so ascertained." (*Hook v. Hook*, 1 Hem. & M. 43; 32 L. J., Ch. 15, 16.)

Devise in 1822 of freehold and leasehold lands in Kent in strict settlement, with an ultimate limitation to the testator's own right heir, the will also containing a similar disposition of other leaseholds in Kent not the subject of the suit: held, that the common law heir was entitled. (*Sladen v. Sladen*, 2 J. & H. 369.)

Devise to heir as  
persona designata.

Testator seised of lands in common socage and of other lands in gavelkind, in 1841 devised his real estate to his then male heir, and his heirs in strict tail male: held, that all the lands passed to the testator's heir at common law. (*Thorp v. Owen*, 2 Sm. & Giff. 90.)

Devise in 1820, after a tenancy for life, of borough-English lands for

**3 & 4 Will. 4,  
c. 106, s. 2.**

Right of posthumous heir.

sale, and to divide the moneys among all the testator's sons and daughters which might then be living, and to the heir and heirs of them which might be deceased, share and share alike. Held, that under the gift to the heirs, the common law, and not the heirs in borough-English took. (*Polley v. Polley*, 31 Beav. 363.)

Although lands have actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir is afterwards born, property will shift to the nearest heir who subsequently comes into being. (See *Rider v. Wood*, 1 Kay & J. 644; Cru. Dig. Descent, Ch. III. s. 14.) A. being seised of real estate died, leaving his sisters his presumptive co-heirs, his wife being *enceinte* of a son, who was born subsequently. The rents from the ancestor's death having remained unreceived by the co-heirs: it was held, that their seisin being gone on the birth of the posthumous child, they were not entitled to so much of the intermediate rents as they had not received before the birth of the heir. (*Goodale v. Gamthorne*, 2 Sm. & G. 375; 18 Jur. 927; 23 L. J., Ch. 878.) But if during the period of the qualified heirship and seisin in the sisters they had entered and received the rents, as they might have done, they would have been entitled to retain such rents. (*Ib.*; *Doe v. Clarke*, 2 H. Bl. 399.) It has been decided by *Wood*, V.-C., that a posthumous heir is entitled to the rents of a descended estate only from the date of his birth, whether the prior rents have been actually received or not, the principle being that the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not. (*Richards v. Richards*, 1 Johns. 754; 6 Jur., N. S. 1145.)

Total failure of purchaser's heirs:  
Old law.

(c) Where an illegitimate child became the purchaser of lands which descended to his son, who died without issue and intestate, it was held, that the heirs of the party last seised were not entitled; but that, notwithstanding the 3 & 4 Will. 4, c. 106, s. 2, the lands escheated to the crown. Thus, in 1808, G. N., a foundling, purchased the property in dispute, having previously married M. J., a widow, whose maiden name had been B., and by whom he had one son, G. N. the younger; he died in 1815 intestate, leaving his wife and his son G. N. the younger his survivors. His widow died shortly afterwards, and his son entered into the possession of the property as his father's heir at law. The son never married, and died seised in March, 1834, intestate. Upon his death the defendant took possession of the property, and continued in possession up to the trial. The lessor of the plaintiff claimed as heir at law of the younger N., viz., as grandson of one J. B., who was the eldest brother of M., the wife of the foundling and mother of the younger N. It was held, that the property escheated, the 2nd section having provided that in future descents shall be traced from the purchaser, and not from the person last seised. (*Doe d. Blackburn v. Blackburn*, 1 Mood. & Rob. 547, *Parke*, B.) The Real Property Commissioners intended to provide for this very case, in order to prevent an escheat, by making the last proprietor (the son in this case) the purchaser, in order to let in his other relations (1 Real Prop. Rep. 15); and they introduced a clause in the bill for that purpose, which was struck out. (See Sugd. Vend. & Purch. 551, 11th ed.) This has now been supplied by the 22 & 23 Vict. c. 35, ss. 19, 20, above stated.

Present law.

### DEVISE TO HEIR—LIMITATION TO GRANTOR.

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (d); and when any land shall have been limited, by any

assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof (e).

3 & 4 Will. 4,  
c. 106, s. 8.

(d) This section of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement. (Co. Litt. 18 b; 2 Bl. Comm. 200, 201.) The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or consins, but by his own deed." Lord Coke states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel aliâ quâvis fortunâ*, or freely by gift. (Co. Litt. 18 a.) The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2nd. An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent. (Cruise's Dig., tit. XXX., s. 4.)

Descent and purchase.

It was a positive rule of law, that a man could not make his right heirs take by purchase, neither by conveyance at common law, nor by a limitation to uses, nor by devise. (*Counden and Clerk's Case*, Hob. 30; *Pybus v. Mitford*, 1 Ventr. 372; Co. Litt. 22 b.) The same rule applies to equitable as legal estates (Watk. Desc. 169), and to copyholds as to freeholds. (*Roe d. Noden v. Griffith*, 4 Burr. 1952; *Thrustout d. Gomer v. Cunningham*, 2 Bl. R. 1048; Fearne, 68.)

Devise to heir.  
Law before this act.

Before the passing of this act it was a rule of law, that where a testator made the same disposition of his estate as the law would have done if he had been silent, the will being unnecessary was void. (See 4 Real Prop. Rep. 74, 75.) Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title; so where a man, seised of land in fee on the part of his mother, devised it to the heir on the part of his mother in fee, the heir was in by descent. (*Reading v. Royston*, 1 Salk. 242; *S. C.*, Prec. Ch. 222; 2 Ld. Raym. 829; Com. R. 123; *S. P.*, 2 Leon. 11; Dyer, 124 a; Plowd. 545; 2 Ves. & B. 190.) Where a devise of lands to the heir at law made no alteration in the nature or limitation of the estate, the heir took not by purchase under the will, but by his preferable title by descent, notwithstanding the will imposed some pecuniary charges on the estate. (*Clarke v. Smith*, Com. 72; *Allen v. Heber*, 1 Bl. R. 22; *Emerson v. Inchbird*, 1 Ld. Raym. 728; *Plunket v. Penson*, 2 Atk. 292.) Where a man, seised in fee on the part of his mother, devised to his executors for sixteen years for payment of his debts, remainder to his heir on the part of his mother, it was held that the heir took by descent. (*Hedger v. Rowe*, 3 Lev. 127; see Wms. Saund. 8 d.) And an heir at law was held to take by descent under a devise to him after the death of his mother, charged with the payment of sums of money. (*Chaplin v. Leroux*, 5 Maule & S. 14.) So under a devise to one for life, or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will. (Hob. 80; 10 Rep. 41; Ventr. 372.) So a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, was held not to alter the quality of the estate, which he would otherwise have taken as heir; and that he therefore took by descent, and not by purchase. (*Doe d. Pratt v. Timins*, 1 B. & Ald. 530; see 1 Jarman on

3 & 4 Will. 4,  
c. 106, s. 3.

Wills, 67, 68; *Langley v. Sneyd*, 7 Moore, 165; *S. C.*, 3 B. & B. 243; *Manbridge v. Plummer*, 2 M. & Keen, 93.) A testator, by his will dated in 1809, devised his real estates to trustees, in trust to pay an annuity, and out of the residue of the rents to maintain S. M. (who was his heir) until he attained twenty-one; and on his attaining twenty-one, to convey the estates to him in fee; but if he died under twenty-one, then to J. S. in fee. S. M. having attained twenty-one, it was held that he took the estate by descent. (*Wood v. Skelton*, 6 Sim. 176.) So a devise after limitations in strict settlement, in default of such issue then to the devisor's next heir at law, was held a limitation of the reversion, and not a contingent remainder to the heir as a purchaser at the time of the failure of such issue. (*O'Keefe v. Jones*, 13 Ves. 413.)

But where a different estate was devised than would have descended to the heir, the disposition by will prevailed, as where the estate was devised to the heir in tail. (Plowd. 545.) So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants. (Cro. Eliz. 451; Com. R. 123; 2 Ld. Raym. 829; *Scott v. Scott*, 1 Eden, 461, 462, n.; *S. C. Ambl.* 388; see 6 Sim. 185; *Swaine v. Burton*, 15 Ves. 371.)

Under a devise before this act to trustees, one being the testator's heir at law, upon trust (subject to certain prior estates) for conversion, the trust for conversion being void for remoteness, the equitable reversionary interest thus left undisposed of, results as part of the old use, and descends to the heir in his character of heir, and does not so merge in his legal interest under the devise to him as a trustee, as to break the descent, and constitute him a fresh stock, from which, on his decease intestate, the descent is to be traced. Consequently, upon his decease intestate, before the expiration of the particular estate, the reversionary interest descends on his brother of the half-blood, in preference to his sister of the whole blood, as heir to their common father. (*Buchanan v. Harrison*, 1. J. & H. 662.) But there may be *possessio fratris* of a trust as well as of a legal estate, and notwithstanding the heir was merely equitable tenant in fee of the reversion, he may by some act or conveyance in his lifetime, have so dealt with his equitable interest, as to constitute himself a fresh stock of descent, and to entitle his sister to claim as his heir, upon the principle that *possessio fratris facit sororem esse heredem*. (*Ib.*)

Effect of this section upon devise to heir.

Under this section an heir to whom lands are devised by the ancestor takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him. (*Strickland v. Strickland*, 10 Sim. 374.) And where real estates are devised to the heir, although for certain purposes he takes by descent, yet, as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter. Though the creditors of a testator have a right to resort to the estate devised to the heir in priority to the other devised estates, yet the heir is entitled to contribution from the other devisees to the extent to which his estate may be exhausted by debts. (*Biederman v. Seymour*, 3 Beav. 368.)

It does not seem certain whether this section applies to the case of a devise of copyholds to an heir who disclaims all interest under the will, and enters as heir of the testator. (*Bickley v. Bickley*, L. R., 4 Eq. 216.)

As to a devise of gavelkind lands to an heir as a *persona designata*, see *Thorp v. Owen*, and *Sladen v. Sladen*, ante, p. 445.

Limitation to heirs in an assurance.

Rule in *Shelley's case*.

(c) By a well-known rule, called the rule in *Shelley's case* (1 Rep. 93; see *Parker v. Clarke*, 3 Sm. & G. 161, 165), it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate inter-

venes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of the preceding mesne estate. (1 Barn. & C. 243.) There is a long series of decisions on this rule. (See Fearn, Cont. Rem., 10th ed., pp. 28—201.)

3 & 4 Will. 4,  
c. 106, s. 8.

In order to understand this section of the act, it is necessary to observe that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor. (Com. Dig. Estate (B. 10, 11, 12, 31); 2 Bl. Com. 175; Co. Litt. 22 b; Plowd. 151; Watk. on Conv. 120.) An estate in *reversion* is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him (Co. Litt. 22), or the returning of the land to the grantor or his heirs after the grant is over. (*Ib.* 142.) A reversion is never created by deed or writing, but arises from construction of law, whereas a remainder can only be limited by deed or some other assurance. It is a rule that a grantor cannot enable his heir general to take a remainder as purchaser, under a limitation to his *heirs*, but where the limitation is to the right heirs of the grantor, the use so limited is construed to be the old use, and will be executed in him as the *reversion in fee*, and not as a remainder. (1 Rep. 129 b, 130; *Godolphin v. Abingdon*, 2 Atk. 57.) As where a man granted to A. B. with remainder to his own heirs male, such heirs took by descent. (*Wills v. Palmer*, Bl. R. 687; 5 Burr. 2615.) Before the above act it was a general rule, that where a party seised in fee conveyed lands to the use of himself for life, with remainder to others for particular estates for life or in tail, with an ultimate limitation to the *right heirs* of the *grantor*, such limitation was inoperative, as he continued seised of the reversion as part of his former estate, which was consequently descendible in the same line as it would have been if no such conveyance had been made. (*Read v. Morpeth*, Cro. Eliz. 321; Moore, 284; 2 Rep. 91 b.) So where a man seised in fee levied a fine to the use of himself and his wife for life, remainder to the use of the right heirs of the settlor, the ultimate limitation did not create a remainder, but the interest undisposed of remained in the grantor as part of the reversion, as if that limitation had been omitted. (*Bingham's case*, 2 Rep. 91.) This doctrine is exemplified by the case of *The Marquis of Cholmondeley v. Clinton*, (2 Mer. 173; S. C., 2 B. & Ald. 625; 2 Jac. & Walk. 1; 1 Dowl. N. S. 299; 4 Bligh, N. S. 1), where the Earl of Orford, in a conveyance to uses, reciting that he was desirous that certain estates derived from his mother's family should remain in the family and blood of Samuel Rolle, his maternal grandfather, in consideration of natural love and affection to his relations, the heirs of S. Rolle, and to the intent that the said estates might continue in the family and blood of his late mother, on the side of her father, settled them to the use of himself for life, remainder to the heirs of his body, for default of such issue as he should appoint, and for default of appointment to the use of the *right heirs* of S. Rolle; and at the time of the settlement, the Earl of Orford was himself the right heir of S. Rolle: it was held, that this ultimate limitation did not give an estate by purchase to the heir of S. Rolle, but that the estate, on the death of the settlor without issue, descended on his heirs general. (See *Locke v. Southwood*, 1 My. & Cr. 411.)

Limitation to  
heirs of grantor  
formerly con-  
strued as a rever-  
sion.

If a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use, being a thing in confidence, would have followed the nature of the lands, and would have descended to the heir on the part of the mother. (Co. Litt. 13 a; *Godbold v. Freestone*, 3 Lev. 406.) And it was the same if the limitation had been by fine and recovery; it was still the ancient use; and there was no difference whether upon the conveyance of an estate any part of the use resulted by implication of law, or whether it was reserved by express declaration to the party from whom the estate moved. (*Abbot v. Burton*, Salk. 590. See *Stringer v. New*, 9 Mod. 363.) But that rule held only where lands came by *descent*, and not where a person took by *purchase*. But as by a common recovery suffered of an estate tail, the recoveror acquired an absolute estate in fee simple, derived out of the estate tail; if a tenant in tail by *purchase* under a

Alteration of line  
of descent.



8 § 4 Will. 4,  
c. 106, s. 3.

marriage settlement, made by his ancestor *ex parte maternâ*, with the reversion in fee by descent *ex parte maternâ*, suffered a common recovery to the use of himself in fee, such estate would have descended to his heirs general *ex parte paternâ*; for the recovery did not let in the reversion in fee, but a new estate was thereby acquired by *purchase*, totally different from the old estate. (*Martin v. Strachan*, Str. 1179, Nolan's ed., S. C., Willes, Rep. 444; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104.) The last rule was held to be applicable to copyholds. (*Roe d. Crow v. Baldwin*, 5 Term Rep. 104.) But if a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs; (*Simmonds v. Cudmore*, Salk. 338; 1 Show. 370;) for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line. One of two parceners aliened his moiety in fee, whereby the alienee and the remaining parcener became tenants in common; afterwards, by deed of partition between the alienee and the remaining parcener, the land was divided by metes and bounds, and each of them took a moiety in severalty. The question was, whether by that deed the parcener took anything as purchaser, so as to break the descent *ex parte maternâ* and to let in the heir *ex parte paternâ*, on the death of the parcener. It was admitted, that if the deed of partition had been between the parceners themselves, the descent would not be broken. (Com. Dig. Parcener, C. 15.) It was held, that the line of descent through the second parcener was not broken by the conveyance, but that his moiety passed to the heirs *ex parte maternâ*. (*Doe d. Crosthwaite v. Dixon*, 5 Ad. & Ell. 834; 1 Nev. & P. 255.)

Where a man has an *equitable* estate *ex parte paternâ* or *ex parte maternâ*, and afterwards, by descent or otherwise, acquires the *legal* estate, the equitable estate will merge in the legal, and the descent will be according to the legal title. (*Goodright v. Wells*, Dougl. 771, 2nd ed.; *Wade v. Paget*, 1 Br. C. C. 863; *Selby v. Alston*, 3 Ves. 339; *Lyster v. Mahony*, 1 Drury & Warren, 243; and see *Goodright v. Scarle*, 2 Wils. 29; *Goodtitle v. White*, 1 New Rep. 383; 15 East, 174; 3 Prest. Conv. 325, 340.)

But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, his incapacity to call for a conveyance of the legal estate, (by which the course of the descent might have been broken,) was held not a sufficient reason to induce the court to consider the case as if such a conveyance had actually been made; it not being, according to the terms of the trust, any part of the express duty of the trustees to execute such a conveyance. (*Langley v. Sneyd*, 1 Sim. & Stu. 45.)

A devise of all the testator's residuary real estate to trustees in fee upon trust to pay the rents to A. for life, and after his death upon trust to convey the same residuary real estate to such person as should answer the description of the testator's heir at law breaks the descent of the real estate which had descended to the testator *ex parte maternâ*, and vests it in his heir at law according to the common law as equitable devisee.

Wood, V.-C., said, "the whole estate is devised away from the heir at law, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of the testator's heir at law. The expression 'heir at law' is somewhat strong, but independently of that, the fact of the testator having divested the inheritable quality of the estate by breaking the descent entirely and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir at law of the testator. I think that there is not any authority precisely in point, but the principle must be, that when once the descent is broken by a devise of the whole fee simple to trustees upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law." (*Davis v. Kirk*, 2 Kay & J. 391, see pp. 393, 394.)

A lady entitled to realty as heir of her maternal grandfather, by settlement, conveyed it to the use of trustees upon trust for herself and her heirs until marriage, and then upon trust for herself for life with subsequent

trusts for the issue, and in default of issue upon trust, in case she died in her husband's lifetime, for the person or persons who would on her death have become entitled in case she had died intestate and without having been married. She died before her husband without issue: held, that the settlement did not break the previous line of descent, and that under the ultimate limitation the heirs *ex parte maternâ* took, and not the heirs general. (*Heywood v. Heywood*, 18 W. R. 514.)

3 & 4 Will. 4,  
c. 106, s. 3.

A. conveyed customary freeholds which he had inherited from his mother to B. absolutely, and B., after surrender and admittance, executed on the same day a deed of declaration of trust for such person as A. should by deed or will appoint, and in default for A. and his heirs, this process being necessary, according to the custom, to give A. the power of devising. A. died intestate: held, that the descent had not been broken, and that the heir *ex parte maternâ* was entitled. (*Nanson v. Barnes*, L. R., 7 Eq. 250.)

#### LIMITATION TO HEIRS AS PURCHASERS.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land (*f*).

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

(*f*) When the words "heirs male of the body," &c., operate as words of purchase, that is, when they do not attach in the ancestor, but vest in the person answering the description of such special heir, they appear to have a sort of equivocal or mixed effect. For though they give the estates to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor, as to pursue the same course of succession, in the same extent of duration or continuance through the same persons, as if it had attached in and descended from the ancestor. (*Fearne*, Cont. Rem. 80.) Thus, under a limitation to the heirs male of the body of B. (where no estate is in or given to B. himself), though it originally attaches in his heir male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate in tail male, without any express words of limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B. in the same course as if the estate tail had descended from B. himself. (*Mandeville's case*, Co. Litt. 26. See *Vernon v. Wright*, 4 Jur., N. S. 1118; 2 Drew. 439; *Southcot v. Stowell*, 1 Mod. 226, 287; 2 Mod. 207, 211; *Wills v. Palmer*, 5 Burr. 2615; S. C., 2 Bl. R. 687; *Wrightson v. Macauley*, 14 Mees. & W. 214; *Winter v. Perrott*, 9 Cl. & Fin. 606.)

#### BROTHERS AND SISTERS.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent (*g*).

Brothers, &c. shall trace descent through their parent.

8 & 4 Will. 4,  
c. 106, s. 5.

(g.) Before this act the descent between brothers and sisters was considered as *immediate*; and in making out their title *to each other*, the common father need not have been named, although living, but the descent between them was exactly the same as if he had been dead. (Watk. Desc. 111, n.; H. Chitty on Desc. 64, 854; *Collingwood v. Pace*, 1 Ventr. 418; Bridg. by Bann. 410.)

Where A., having been attainted of treason, escaped to a foreign country, and there married and had children, and was afterwards executed on the same attainder: it was held, under the old law, that the descent of property between brothers is immediate, and not through their father, and that the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder. (*Kynnaird v. Leslie*, L. R., 1 C. P. 389.)

### LINEAL ANCESTORS ADMITTED.

Lineal ancestor  
may be heir in  
preference to col-  
lateral persons  
claiming through  
him.

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue (*h*).

(*h*) A son legitimate in Scotland by the subsequent marriage of his parents, both natives of and domiciled and married in Scotland, died intestate as to lands in England of which he was seised in fee and without issue: it was held, that the father did not inherit under this section. (*Re Don's Estate*, 4 Drew. 194. See *Birtwhistle v. Vardill*, 7 Cl. & F. 895, and *Shaw v. Gould*, L. R., 3 H. L. 55.)

Under this section, if a son purchase an estate and die *without issue*, leaving a father, brothers and sisters, the brothers and sisters will now be postponed to the father. (First Real Prop. Rep. 12. See Sugd. V. & P. 11th ed.)

Old rule excluding  
the ascending  
line.

It was an old maxim of law, that an inheritance might lineally descend but not ascend. (3 Rep. 40 a.) The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated. (*Comper v. Comper*, 2 P. Wms. 666.) Though a father or mother could not inherit as such from their child who died without issue, or brother or sister, yet a father or mother before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother or sister, but leaving two cousins his heirs at law, one of whom was his own mother, it was held, that she might take as heir to her son in the capacity of his cousin. (*Eastwood v. Vincke*, 2 P. Wms. 613.) So if a son purchased lands and died without issue, his uncle would have had the land as heir, and not the father, though the father was nearer of blood; (Litt. s. 3;) but if in that case the uncle acquired actual seisin and died without issue, while the father was alive, the latter might then by that circuitry have had the land as heir to the uncle, though not as heir to the son, because he came to the land by collateral descent, and not by lineal ascent. (Craig. de Jur. Feud. 234; Wright's Ten. 182, n. (z).) So the father might have taken by *purchase* as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee, the father was capable of taking such remainder by *purchase*, though he could not have taken it by descent from his son. (Co. Litt. 10 b; 3 Rep. 40 a.)

MALE LINE.

3 & 4 Will. 4,  
c. 106, s. 7.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The male line to be preferred.

MOTHER OF MALE PATERNAL ANCESTOR.

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male paternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants (i).

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

(i) This statute has declared the law to be in accordance with the position laid down by Mr. J. Blackstone (2 Comm. 238). We hold the law to have established that where the consanguinity has to be made out on the paternal side of the ancestors of the party, the more remote branch must be exhausted before recourse is had to the less remote. The point, though formerly much doubted, has been considered settled ever since the time of Sir W. Blackstone. (Per *Tindal*, C. J., in *Davies*, dem., *Lowndes*, ten., 7 Scott, 56; 5 Bing. N. C. 169.) It was decided, that where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ*. (*Hawkins v. Shewen*, 1 Sim & Stu. 257. See Hale's Hist. C. L. by Runn. 2nd vol. 120.)

Where the title which was made out was one said to be derived from the heir *ex parte maternâ* to the mother of the person last seised, it appeared that certain issues had been tried in which the jury had found that the heir had no heirs *ex parte paternâ*, and that the person under whom the defendant claimed was his heir at law *ex parte maternâ*, and it further appeared that statutory declarations had been made to the effect that the party last seised had been heard to say that he never had any heirs on his father's side. The majority of the court was of opinion that the title by heirship was the weakest possible title of that description, that as the issues so found by the jury were tried between two heirs *ex parte maternâ*, both of them had an interest in keeping out of the view of the jury any heir *ex parte paternâ* who might exist, and that the statement of the person last seised that he had no heirs on his father's side was entitled to very little weight, as the expression is ambiguous, for it may mean either that he had no heirs of the same name on its father's side, or it may mean and indeed could not well

3 & 4 Will. 4,  
c. 106, s. 8.

seem to mean more than that there were no heirs on his father's side with whom he was acquainted, or that he was not aware that any such heir existed. It certainly could not mean that he had no heirs at all on his own, his grandmother's, or his great grandmother's side. (*Jeakes v. White*, 6 Exch. 880.)

### ADMISSION OF HALF BLOOD.

Half blood, if on the part of a male ancestor, to inherit after the whole blood of the same degree; if on the part of a female ancestor, after her.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother (*k*).

Exceptions to the rule excluding the half blood.

(*k*) The old rule of law, which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other. (Harg. Co. Litt. 14 a, n. (5).) Thus, Lord *Hale* says, all the daughters, whether by the same or divers venters, do inherit together to the father. (Hale's C. L. c. 11.) Therefore, if A. marries B., who dies leaving issue a daughter, and A. afterwards has issue one or more daughters by C. his second wife, and dies; all these daughters shall take his estate in equal shares as coparceners. So all the daughters by different wives succeed to the inheritance of which their father was either seised in his own right, or to which their father would have been heir had he survived the person last seised. And the daughters by several husbands succeed in the same manner to the inheritance of their mother. (See *Watk. on Desc.* 159, n. (b); *H. Chitty on Desc.* 78, 79.) So, also, in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee. (*Plowd.* 57; 3 Rep. 42; *Goodtitle v. Newman*, 8 Wils. 526.) In *titles of honour*, also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent. (Co. Litt. 15 b; 3 Rep. 42 a; *Cruise's Dig.* tit. XXVI. c. 3, ss. 8—11.)

A brother or sister of the half blood is entitled to share personal estate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate. (2 Wms. Exors. 1897, 6th ed.) By stat. 1 Jac. 2, c. 17, s. 7, it is provided, "that if after the death of a father, any of his children shall die intestate without wife or children, in the lifetime of the mother, every brother and sister, and the representatives of them, shall have an equal share with her." Under that act, the brothers and sisters of the half blood of an intestate are equally entitled with brothers and sisters of the whole blood to share with their mother, after the death of the intestate's father, in the personal property of the intestate dying without wife or children. (*Jessopp v. Watson*, 1 Mylne & Keen, 665.) So a *posthumous* brother of the half blood will take, under the Statute of Distribution, a share of the intestate brother's personal estate. (*Burnet v. Mann*, 1 Ves. sen. 156.)

Effect of this section.

If a man takes through his father by devise, which is now made to invest him with the character of purchaser (sect. 3), the estate on his death, intes-



tate and without issue, will go to his sisters of the whole blood, in exclusion of the brothers of the half blood, and so in the ascending scale to his aunt of the whole blood, in preference to his uncle of the half blood; whereas, if the estate had descended to him from his father, who was the purchaser (which, but for this statute, it would have done, although devised to him), the brother of the half blood would, under the act, have been preferred to the sisters of the whole blood, whilst the father's sisters of the whole blood would have taken before his brother of the half blood. (Sugd. V. & P. 555, 556, 11th edit.)

3 & 4 Will. 4,  
c. 106, s. 9.

Before the above act, a man, in order to qualify himself to take by descent, must have shown that he was heir of the person last seised of the actual freehold and inheritance. (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648; *Jenkins v. Pritchard*, 2 Wils. 45.) Thus if A. dies, leaving a son and daughter by one venter, and a son by another, and the son by the first venter becomes actually seised and dies, his sister shall be heir to him; but if he had died without having acquired the seisin, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister. (Co. Litt. 15; Sir W. Jones, 561.) The entry of the heir upon any part of the estate will give him actual seisin of all the lands in the same county. But where the lands lie in different counties, there must be an entry in each. The entry of the heir, in order to acquire seisin, is only necessary where the lands are in the actual occupation of the ancestor at the time of his death. For if the lands are held under a lease for *years*, and the lessee has entered under the lease, the heir will be considered as having actual seisin, before entry or receipt of rent, because the possession of the lessee is his possession. (Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 398, 399; *Id.* 213. See *Bushby v. Dixon*, 3 B. & C. 304.) But where *freehold* leases are outstanding, the elder brother must obtain possession by the receipt of rent or other acknowledgment in order to acquire seisin, for otherwise the descent would have been to the younger brother of the half blood, in preference to the sister of the whole blood. (8 T. R. 211; 7 T. R. 386; Co. Litt. 15 a; Jenk. 242.)

Seisin of ancestor.

Effect of rule requiring seisin of ancestor upon descent to half blood.

Where a posthumous son was born, and his mother was in possession of the lands whereof his father died seised, she became his guardian in socage; and the infant son having died very young, was considered to be actually seised of the inheritance, so as to exclude his sisters of the half blood. (*Goodtitle d. Newman v. Newman*, 3 Wils. 516.) Where A. died, leaving two infant daughters by different venters: it was held, that an entry by the mother of the youngest daughter as her guardian in socage, constituted a sufficient seisin in the eldest infant daughter to carry the descent of her moiety on her death to her heirs, the possession of one parcener being the possession of the other, so as to create a seisin in the other, and carry her share and descent to her heirs. (*Doe v. Keen*, 7 T. R. 386.) We have already seen, that by stat. 3 & 4 Will. 4, c. 27, s. 12 (*ante*, p. 180), the possession of one coparcener is not to be that of the other for the purposes of the Statute of Limitation; which it is presumed will be applicable to cases of descent.

In *Cunningham v. Moody* (1 Ves. sen. 174), where the limitation was to husband and wife for their joint lives, remainder to the children of the marriage in tail, and for default of such issue to the right heir of the husband in fee; the husband had one daughter of the marriage mentioned in the settlement, and another daughter of a second marriage; and upon the death of the first daughter without issue, the question was, whether her sister of the half blood was entitled to the reversion in fee. Lord *Hardwicke* held, that as the reversion which descended upon the eldest sister was never clothed with possession, it was governed by the rule *possessio fratris de feodo simplici facit sororem esse hæredem*, and would descend to the sister of the half blood. (See *Buchanan v. Harrison*, 1 J. & H. 662, *ante*, p. 448.) Where a testator devised all his lands to S. A. (his son by his first wife) when he should come to the age of twenty-one years, but if he should die before twenty-one years, and D. A. (the testator's daughter by his second wife) should be then living, he gave the same to her when she should attain twenty-one years. The testator died, and then S. A. died

3 & 4 Will. 4, said first day of January, one thousand eight hundred and  
c. 106, s. 12. thirty-four (*m*).

(*m*) Dates must be attended to; for an heir to take by descent from a person who died before the 1st January, 1834, and an heir to take by *purchase* under a deed executed before the 1st January, 1834, or the will of a testator who died before that day (whether, as to the heir taking by purchase, the ancestor was living on or after the same day or not), must be traced according to the old law. (1 Hayes' Conv. 320, 5th ed.)

## LEGITIMACY DECLARATION.

21 &amp; 22 VICT. c. 93.

*An Act to enable Persons to establish Legitimacy and the Validity of Marriages, and the right to be deemed Natural-born Subjects.*  
[2nd August, 1858.]

WHEREAS it is expedient to enable persons to establish their legitimacy, and the marriage of their parents and others from whom they may be descended, and also to enable persons to establish their right to be deemed natural-born subjects: Be it therefore enacted as follows:

21 & 22 Vict.  
c. 93, s. 1.

1. Any natural-born subject of the Queen, or any person whose right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of a marriage, being domiciled in England or Ireland, or claiming any real or personal estate situate in England, may apply by petition to the Court for Divorce and Matrimonial Causes (*a*), praying the court for a decree declaring that the petitioner is the legitimate child of his parents, and that the marriage of his father and mother, or of his grandfather and grandmother was, a valid marriage, or for a decree declaring either of the matters aforesaid; and any such subject or person, being so domiciled or claiming as aforesaid, may in like manner apply to such court for a decree declaring that his marriage was or is a valid marriage, and such court shall have jurisdiction to hear and determine such application, and to make such decree declaratory of the legitimacy or illegitimacy of such person, or of the validity or invalidity of such marriage, as to the court may seem just; and such decree, except as hereinafter mentioned, shall be binding to all intents and purposes on her Majesty, and on all persons whomsoever.

Application to  
Court for Divorce  
and Matrimonial  
Causes for decla-  
ration of legiti-  
macy or validity  
or invalidity of  
marriage.

(*a*) The Divorce Acts are 20 & 21 Vict. c. 85, 21 & 22 Vict. c. 108, 22 & 23 Vict. c. 61, 23 & 24 Vict. c. 144. By the 7th section of the act 22 & 23 Vict. c. 61, the right of appeal to the House of Lords, given by the 56th sect. of 20 & 21 Vict. c. 85, is extended to all sentences and final judgments on petitions under the act 21 & 22 Vict. c. 93.

Divorce Acts.

Provisions substantially the same as those in 21 & 22 Vict. c. 93, have been applied to Ireland by 31 & 32 Vict. c. 20.

Irish Act.

An inquiry into the parentage of the petitioner is within the terms of the act. (*A. B. v. Att.-Gen.*, L. R., 4 Eq. 56.)

Scope of the act.

The object of the act is to enable persons to prove their legitimacy; therefore, where a person proposed to sue as the guardian *ad litem* of an infant, ostensibly for the purpose of establishing the infant's legitimacy, but really for the purpose of establishing his illegitimacy, with a view to

21 & 22 Vict.  
c. 93, s. 1.

his own interest as heir at law in case the infant should be declared illegitimate, the court refused to permit a suit to be instituted on behalf of the infant on the application of the proposed guardian *ad litem*. (*Re Chaplin*, 15 W. R. 1048.)

Declaration of  
illegitimacy by  
Court of Chan-  
cery.

Mr. Macqueen considers that the serious defect of this act is its want of a clause authorizing a declaration of bastardy. (Macqueen on the Law of Marriage, 356, 2nd ed.)

Where a settlement was made, and a suit for the execution of the trusts thereof instituted, to raise the question of a child's legitimacy, the Court of Chancery in one case entertained the suit, and made a declaration of illegitimacy. (*Gurney v. Gurney*, 1 H. & M. 413.) But in another case, where the father and mother of the child were living and had not concurred in the settlement or the suit, and where the guardian of the child (who was an infant), disclaimed at the bar, the court refused to entertain the suit. (*Anon.*, 2 H. & M. 124.) This last decision was affirmed by the Lord Chancellor, who expressed his disapproval of *Gurney v. Gurney*. (*Cooke v. Cooke*, 13 W. R. 697.)

On a petition under this act, the court held, that a foreign divorce had not, under the circumstances, any legal effect upon an English marriage. (*Shaw v. Att.-Gen.*, L. R., 2 P. & M. 156.) As to the effect of a foreign divorce upon an English marriage, see also *Shaw v. Gould*, L. R., 3 H. L. 55, affirming the decision of V.-C. Kindersley, *Re Wilson's Trusts*, L. R., 1 Eq. 247. And as to the general law of marriage, see Fisher's Digest, 4359 *et seq.*; Pritchard's Law and Practice of the Divorce Court, 2nd ed.; Browning on the Laws of Marriage and Divorce.

Practice under  
this act.

A petition under this act, presented on behalf of an infant to establish his legitimacy, can only be so by a guardian assigned to him by the court. (*Re Upton*, 6 Jur., N. S. 404.) The court refused to appoint a guardian to an infant for the purpose of presenting a petition on his behalf for a declaration of legitimacy, until the matter had been referred to the registrar to ascertain whether the institution of the suit was likely to be of benefit to the infant. (*Re Chaplin*, L. R., 1 P. & M. 328; and see 15 W. R. 1048.)

When a party applying to the Court of Divorce to declare the validity of a marriage under the act 21 & 22 Vict. c. 93, has filed a petition, he should ask permission to cite individuals to see proceedings, and show sufficient reason why they should be selected. (*Re Shedden*, 5 Jur., N. S. 151.)

Application to  
court for declara-  
tion of right to be  
deemed a natural-  
born subject.

2. Any person, being so domiciled or claiming as aforesaid, may apply by petition to the said court for a decree declaratory of his right to be deemed a natural-born subject of her Majesty, and the said court shall have jurisdiction to hear and determine such application, and to make such decree thereon as to the court may seem just, and where such application as last aforesaid is made by the person making such application as herein mentioned for a decree declaring his legitimacy or the validity of a marriage, both applications may be included in the same petition; and every decree made by the said court shall, except as hereinafter mentioned, be valid and binding to all intents and purposes upon her Majesty and all persons whomsoever.

Petition to be ac-  
companied by affi-  
davit.

3. Every petition under this act shall be accompanied by such affidavit verifying the same, and of the absence of collusion as the court may by any general rule direct.

20 & 21 Vict.  
c. 85, to apply to  
proceedings under  
this act.

4. All the provisions of the act of the last session, chapter eighty-five, so far as the same may be applicable, and the powers and provisions therein contained in relation to the making and laying before parliament of rules and regulations concerning the practice and procedure under that act, and fixing the fees payable upon proceedings before the court, shall extend

to applications and proceedings in the said court under this act, as if the same had been authorized by the said act of the last session (b). 21 & 22 Vict.  
c. 93, s. 4.

(b) The 45th Divorce Rule, which directs that every application, in respect of causes tried before a jury, is to be lodged in the registry within one month from the day on which the cause was tried, does not apply to a motion for the new trial of issues in a suit for a declaration of legitimacy which have been tried at the assizes. (*Watson v. Att.-Gen.*, L. R., 1 P. & M. 27.)

5. In all proceedings under this act the court shall have full power to award and enforce payment of costs to any persons cited, whether such persons shall or shall not oppose the declaration applied for, in case the said court shall deem it reasonable that such costs shall be paid (c). Power to award  
and enforce pay-  
ment of costs.

(c) It has been held, that the English act does not give the court power to award costs to the attorney-general where the petition is unsuccessful. And accordingly the court refused on the application of the attorney-general to order the petitioner to give security for costs. (*Shedden v. Att.-Gen.*, 15 W. R. 1098.) It has been held, under the Irish act, that the court has power to award costs to the attorney-general where the petition is unsuccessful, but not where the petition is successful. (*King v. Att.-Gen.*, I. R., 4 Eq. 464.)

6. A copy of every petition under this act, and of the affidavit accompanying the same, shall, one month at least previously to the presentation or filing of such petition, be delivered to her Majesty's attorney-general, who shall be a respondent upon the hearing of such petition and upon every subsequent proceedings relating thereto (d). Attorney-general  
to have a copy of  
petition one  
month before it is  
filed, and to be  
respondent.

(d) No answer by the attorney-general is necessary in a petition under the act. (*A. B. v. Att.-Gen.*, I. R., 4 Eq. 56.)

7. Where any application is made under this act to the said court, such person or persons (if any) besides the said attorney-general as the court shall think fit, shall, subject to the rules made under this act, be cited to see proceedings or otherwise summoned in such manner as the court shall direct, and may be permitted to become parties to the proceedings, and oppose the application (e). Court may require  
persons to be cited.

(e) The court will generally, at the request of either party to a petition under this act, direct issues raised to be tried by a jury, as where it is a simple question of fact; e. g., legitimate or not, access by the husband or not. (*Re Bouverie*, 2 Sw. & Tr. 548; 31 L. J., Mat. Cas. 79; 10 W. R. 811.) But there must be some issue for the jury; and where the attorney-general had filed an answer to such a petition which did not traverse the allegations contained in it, and no other answer to it had been filed, the court refused to order it to be tried by a jury until the attorney-general had amended his answer by inserting a traverse and issue had been joined. (*Ryres v. Att.-Gen.*, L. R., 1 P. & M. 23.) It seems that it is within the discretion of the judge ordinary whether the trial of the petition shall be by a jury or before himself, either alone or with other judges of the court. (*Shedden v. Patrick*, L. R., 1 H. L., Sc. 470.) Trial by jury.

To a petition under this act the attorney-general is the necessary respondent, the petitioners have a right to have their case heard as between themselves and him, and the parties cited *pro interesse suo* cannot sustain a plea of *res judicata* as between themselves and the petitioners in bar of the



21 & 22 Vict.  
c. 93, s. 8.

whole proceedings. (*Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J., Mat. Cas. 217; 9 W. R. 285.)

Saving for rights  
of persons not  
cited.

8. The decree of the said court shall not in any case prejudice any person, unless such person has been cited or made a party to the proceedings or is the heir-at-law or next of kin, or other real or personal representative of or derives title under or through a person so cited or made a party; nor shall such sentence or decree of the court prejudice any person if subsequently proved to have been obtained by fraud or collusion.

Persons domiciled  
in Scotland may  
insist, on an ac-  
tion of declarator,  
that he is a natu-  
ral-born subject.

9. Any person domiciled in Scotland, or claiming any heritable or moveable property situate in Scotland, may raise and insist, in an action of declarator before the Court of Session, for the purpose of having it found and declared that he is entitled to be deemed a natural-born subject of her Majesty; and the said court shall have jurisdiction to hear and determine such action of declarator, in the same manner and to the same effect, and with the same power to award expenses, as they have in declarators of legitimacy and declarators of bastardy.

No proceedings to  
affect final judg-  
ments, &c. already  
pronounced.

10. No proceeding to be had under this act shall affect any final judgment or decree already pronounced or made by any court of competent jurisdiction (*f*).

(*f*) This section does not prevent the court from inquiring in any case into the merits of the petition, but only enacts that its decree shall have no effect upon the final judgment already pronounced of another competent court. (*Shedden v. Att.-Gen. and Patrick*, 6 Jur., N. S. 1163; and see *S. C.* in the House of Lords, L. R., 1 H. L., Sc. 470.)

Acts to be read  
together.  
Short title.

11. The said act of the last session and this act shall be construed together as one act; and this act may be cited for all purposes as "The Legitimacy Declaration Act, 1858."

## PAYMENT OF DEBTS OUT OF REAL ESTATES.

11 GEO. IV. &amp; 1 WILL. IV. c. 47.

*An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates.*

[16th July, 1830.]

## REPEAL OF FORMER ACTS.

WHEREAS an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" and whereas an act was passed by the parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" and whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" and whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments or other real estate of any person or persons who died before the passing of this act (a).

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 1.3 & 4 Will. & M.  
c. 14.6 & 7 Will. 3,  
c. 14.

4 Anne, c. 5 (I.)

47 Geo. 3, c. 74.

Recited acts re-  
pealed.

(a) By the common law, freehold lands of inheritance which descended to the heir were assets for the payment of the ancestor's debts by specialty, as by bond or covenant in which the heirs were named. (1 Str. 665; 4 East, 492.) But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment, as the devisee was neither at law, (4 East, 491; 7 East, 135; 2 Atk. 292, 432; 2 Anstr. 515,) nor in equity, (2 Atk. 432,) liable to the payment of the testator's debts in respect of the land devised. The heir at law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors, (1 P. Wms. 777,) although in equity he appears to have been responsible for the value of the land sold. (*Id.* 777, 431; see 1 Fonbl. Eq. 283.) To obviate those mischiefs the statute 3 & 4 Will. & Mary, c. 14, (made perpetual by 6 & 7 Will. 3, c. 14, and extended to Ireland by 4 Anne, c. 5,) was passed, which was repealed and re-enacted by the above act with additional provisions to supply some omissions in the former statute. It must, however, be remembered, that the statutes of 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, c. 74, are still in force as to persons who died before the 16th July, 1830.

Old rule as to  
liability of lands  
to debts.

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 1.

For the old law as to proceedings against the heir upon the bond of his ancestor, as to alienation of assets by the heir, and the statutes of fraudulent devises, see further the notes to *Jeffreson v. Morton* (2 Wms. Saund. 12, ed. 1871.)

It is not necessary under 3 & 4 Will. & Mary, c. 14, as it is under the act 13 Eliz. c. 5, against fraudulent conveyances, that the devise should have been made with the intent to delay, hinder or defraud creditors. (*Coope v. Cresswell*, L. R., 2 Eq. 106.)

Fraudulent  
conveyances.

The statute 3 & 4 Will. & Mary, c. 14, was confined to fraudulent devises, and therefore fraudulent conveyances, whether voluntary or not, were not within it. It was decided that if a man made a conveyance of lands in his lifetime, in order to defraud his creditors, and died, his bond creditors had no right to set aside the conveyance; for the statute (it is said) was only designed to secure such creditors against any imposition which might be supposed in a man's last sickness. But if he gave away his estate in his lifetime, this prevented the descent of so much to the heir, and consequently took away their remedy against the heir, who was liable only in respect of the land descended. And as a bond is no lien whatever on lands in the hands of the obligor, much less can it be so when they are given away to a stranger. (*Parslow v. Weedon*, 1 Eq. Abr. 149, pl. 7; 1 Fonbl. Eq. 286.) This doctrine was much questioned, and when it was first promulgated gave much dissatisfaction. (*Jones v. Marsh*, Forr. 64.) Hence it has been stated that voluntary conveyances of lands cannot be set aside, except by creditors who have reduced their debts to judgment before the death of the party, for until that time they constitute no lien on the land. (1 Fonbl. Eq. ch. 4, s. 12; Gilb. Lex Prætoria, 293, 294; *Colman v. Croker*, 1 Ves. jun. 160.)

Under 13 Eliz. c. 5, fraudulent conveyances may be set aside by creditors after the death of the debtor. (*Lush v. Wilkinson*, 5 Ves. 384.) The bill should be filed by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased. (*French v. French*, 6 De G., M. & G. 95; *Richardson v. Smallwood*, Jac. 552.) And it seems that the plaintiff need not have obtained judgment for his debt. (*Rees River Company v. Atwell*, L. R., 7 Eq. 347.)

#### DEVISES TO BE VOID AGAINST SPECIALTY CREDITORS.

For remedying  
frauds committed  
on creditors by  
wills.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts, and nevertheless it hath often so happened, that where several persons having by bonds, covenants or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her or their decease, shall be seised in fee simple, in possession, reversion or remainder, or have

power to dispose of (b) the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them with whom the person or persons making any such wills or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant or other specialty, binding his, her or their heirs) to be fraudulent and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 2.

(b) The words "power to dispose of" were held to include leasehold estates *pur autre vie*, and therefore, that a devise of them was void against creditors. (*Westfaling v. Westfaling*, 3 Atk. 460, 465.)

Sect. 2 of 3 & 4 Will. & Mary, c. 14, applies to devises of every description of estate legal or equitable. And by sect. 3, the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor. (*Cope v. Cresswell*, L. R., 2 Ch. 121.)

#### DEVISEES TO BE LIABLE TO SPECIALTY DEBTS.

3. And, for the means that such creditors may be enabled to recover upon such bonds, covenants and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain, his, her and their action and actions of debt or covenant (c) upon the said bonds, covenants and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, *or the devisee or devisees of such first-mentioned devisee or devisees* (d) jointly, by virtue of this act (e); and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended (f).

Enabling creditors  
to recover upon  
bonds, &c.

(c) By stat. 3 & 4 W. & M. c. 14, s. 3, the remedy was confined to actions of *debt*, and it was decided that an action of *covenant* would not lie against the devisee of land to recover damages for a breach of covenant entered into by the devisor. (*Wilson v. Knubley*, 7 East, 128.)

3 & 4 W. & M.  
c. 14, confined to  
actions of debt.

The stat. 3 & 4 W. & M. c. 14, only applied where debt, in the ordinary sense of the word, existed between the parties in the lifetime of both. B., as surety for J., became party to an indenture, whereby A. leased land to J., at a rent payable by J. for a term determinable on A.'s death; and B. and J. covenanted jointly and severally for themselves and their heirs that B. and J., or one of them, or their heirs, executors, &c., should pay the rent reserved, and also a further rent as liquidated damages, if the land were farmed contrary to the covenants of the lease. After B.'s death, rents of both kinds became due: it was held, that B.'s devisees were not liable, under 3 & 4 W. & M. c. 14, to an action of debt for any of the sum due. (*Farley v. Bryant*, 3 Ad. & Ell. 839; 5 Nev. & M. 42.) Damages recovered in an action of covenant, brought in respect of breaches of covenant, happening after the death of the testator, were held to be a debt payable out of his real estate, under a charge of debts in his will. (*Morse v. Tucker*, 5 Hare, 79.)

Debts within 3 &  
4 W. & M. c. 14.

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 3.

Application of  
assets as between  
heir and devisee.

Where there was a covenant to pay an annuity, which did not become in arrear till after the testator's death, it was held, that the arrears of the annuity were a debt within 3 & 4 W. & M. c. 14. (*Jenkins v. Briant*, 6 Sim. 603.) So, also, where a testator had covenanted in his son's marriage settlement for the payment of 3,000*l.* during his life, or three months after his decease. (*Coope v. Cresswell*, L. R., 2 Ch. 112.)

(*d*) The remedy is here extended to the devisees of devisees. (*Westfaling v. Westfaling*, 3 Atk. 460.)

(*e*) Equity followed the rule of law; and therefore, in a bill by a specialty creditor against a devisee under the 3 & 4 W. & M. c. 14, it was decided, that the heir at law (if any) of the testator was a necessary party. (*Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stawell*, 2 Atk. 125.) In arranging the funds in equity between the heir and devisee, it is settled that assets descended to the heir must be applied to pay debts before lands can be charged which are specifically devised. (*Chaplin v. Chaplin*, 3 P. Wms. 367; *Powis v. Corbet*, 3 Atk. 556.) See further, as to the order in which assets are applied in payment of debts, the note to 3 & 4 Will. 4, c. 104, *post*, p. 479.

(*f*) If in an action by a bond creditor against the heir of an intestate, the latter plead a false plea, the Court of Chancery will, after a decree obtained in a suit by another creditor for the administration of the intestate's assets, restrain the plaintiff at law from taking out execution against the assets, but not from proceeding against the heir personally. (*Price v. Evans and wife*, 4 Sim. 514.)

In an action of debt against a devisee on a bond of his testator, in which the question is, whether the signature of the testator is a forgery or not, a party entitled, under the testator's will, to an annuity charged on his real estate, was not a competent witness for the defendant. (*Bloor v. Davis*, 7 Mees. & W. 235.)

#### Action against Devisee only.

If there is no heir  
at law, actions  
may be main-  
tained against the  
devisee.

4. If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid (*g*).

(*g*) Where the obligor of a bond, having devised his land, died before the passing of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, it was held, that the specialty creditor could not maintain an action against the devisee alone, there being no heir, under 3 & 4 W. & M. c. 14, s. 3. (*Hunting v. Shel-drake*, 9 Mees. & W. 256. See *Gawler v. Wade*, 1 P. Wms. 100.)

#### Act not to extend to Provisions for Payment of Debts.

Not to affect limi-  
tations for just  
debts or portions  
for children.

5. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors,



messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her and their trustee or trustees, his, her and their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied, anything in this act contained to the contrary notwithstanding (h).

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 5.

(h) The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute, and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts. (*Matthews v. Jones*, 2 Anstr. 515; *Bailey v. Ekins*, 7 Ves. 323; *Earl of Bath v. Earl of Bradford*, 2 Ves. sen. 590; *Plunket v. Penson*, 2 Atk. 292; *Shiphard v. Lutwidge*, 8 Ves. 26; *Kidney v. Coussmaker*, 12 Ves. 154.) But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute. (*Hughes v. Doulsen*, 2 Cox, 170; 2 Br. C. C. 614.) A devisee of all the devisor's lands in trust to sell and pay all the testator's debts could not be sued under the stat. 3 & 4 W. & M. c. 14. (*Gott v. Atkinson*, Willes, 521; *S. C.*, Barnes, 164.)

Provisions for  
payment of debts  
within this sec-  
tion.

Where a testator devised his real estate to trustees and their heirs, upon trust to sell, and after declaring his will to be that the clear money arising from such sale should sink into and become part of his personal estate, he gave and bequeathed the same and all his effects whatsoever to the same trustees, their executors and administrators, upon trust, after converting the same into money, and paying all his debts, funeral and testamentary expenses, to pay legacies, and dispose of the residue: it was held, that the devise was substantially a devise of the real estate for the payment of all debts, and by the 4th section of the stat. 3 & 4 W. & M. c. 14, good against the specialty creditors, and converted the produce into equitable assets. (*Soames v. Robinson*, 1 Mylne & Keen, 500; see *Barker v. May*, 9 B. & C. 489.)

Although a devise for payment of debts by rents and profits is out of the statute, the court would not be willing to adopt the limited construction of confining it to annual rents and profits; but would, upon a devise of a gross sum out of rents and profits for that purpose, hold that the testator intended the debts to be paid with all practicable speed. (*Bootle v. Blundell*, 19 Ves. 528.) And a direction in a will to pay simple contract before specialty creditors was held not to be void, as it was within the exception in the Statute of Fraudulent Devises (*Millar v. Horton*, Coop. C. C. 45); but a devise not for the payment of debts generally would not be within the exception. (3 Barnard. 304.) Though the Statute of Fraudulent Devises will prevent a devise for payment of legacies from disappointing creditors by specialty, it would not prevent a devise for payment of debts generally from letting in creditors by simple contract to the prejudice of creditors by specialty. (*Kidney v. Coussmaker*, 12 Ves. 154; 2 Atk. 104.)

A question frequently arises as to what amounts to a charge of debts upon real estate. In *Graves v. Graves*, 8 Sim. 43, a testator directed all his debts, legacies and funeral expenses to be paid as soon as conveniently might be after his decease. Afterwards he devoted a particular estate to the payment of his debts, legacies and funeral expenses, in aid of his personal estate, and devised the rest of his estates to his children in strict settlement: it was nevertheless held, that all his real estates were charged with his debts. (See *Godolphin v. Penneck*, 2 Ves. sen. 270; *Palmer v. Graves*, 1 Keen, 545; *Douce v. Lady Torrington*, 2 My. & Keen, 600; *Braithwaite v. Britain*, 1 Keen, 206; *Thomas v. Britnell*, 2 Ves. sen. 313; *Shaw v. Borrer*, 1 Keen, 559.)

What amounts to  
a charge of debts  
upon real estate.

A mere desire, expressed by a testator in his will, that his debts shall be

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 5.

paid, creates a charge on his real estate for their payment. But there is a distinction between the expression of a desire that all debts shall be paid, followed by a gift of a particular estate for their payment, and a general charge of the real estate with the debts, followed by a particular provision for their payment. In the former the general charge is qualified and limited to the particular estate, but in the latter it is not. (*Wrigley v. Sykes*, 21 Beav. 837.)

Where a testator gives a general direction that his debts shall be paid, this amounts to a charge of the debts generally upon the real estate, at least where the real estate is afterwards disposed of by the will. But where the direction that the debts shall be paid, is coupled with a direction that they must be paid by the executor, it is assumed that the testator meant that the debts should be paid only out of the property which by law passes to the executor. (*Cook v. Dawson*, 29 Beav. 123)

See, further, as to what amounts to a charge of debts upon real estate, 2 Jarm. Wills, 555 *et seq.*; Hawk. Wills, 282; 1 Seton, 311, 3rd ed.; and *Silk v. Prime* (notes), 2 White & Tudor, L. C. Eq. 130.



#### HEIR TO BE ANSWERABLE FOR VALUE OF LANDS ALIENED.

Heir at law to be answerable for debts, although he may sell estate before action brought.

6. In all cases where any heir at law shall be liable to pay the debts or perform the covenants of his ancestors, in regard to any lands, tenements or hereditaments descended to him, and shall sell, alien or make over the same, before any action brought or process sued out against him, such heir at law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts; saving that the lands, tenements and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution (*i*).

Specialty debts no charge on the land.

(*i*) Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of the debtor or of his heir. (*Richardson v. Horton*, 7 Beav. 112; *Morley v. Morley*, 5 De G., M. & G. 610.) A., who was a trader, at his death, indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died: it was held, that the 3 & 4 Will. & Mary, c. 14, and 47 Geo. 3, c. 74, s. 2, did not charge the real assets, descended or devised, with the ancestor's debts, but made the heir or devisee personally liable to the value of the assets, and, therefore, that the son's widow and children were entitled to hold the estates discharged from the debts of the father. (*Spackman v. Timbrell*, 8 Sim. 253.) But where an intestate's real estate descended to his heiress, and marriage articles were executed by her while yet an infant and by her intended husband containing a covenant by them to settle the descended estate on the issue of the marriage, it was held that the covenant had not the effect of withdrawing the real estate from the claims of the ancestor's creditors in a suit subsequently instituted by them for payment of his debts. (*Pimm v. Insall*, 1 Mac. & Gor. 449; 7 Hare, 193.) By taking proper proceedings the specialty creditors may obtain payment out of the descended or devised estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not

liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated. (*Richardson v. Horton*, 7 Beav. 112.) Simple contract debts are not charged upon a deceased debtor's realty by 3 & 4 Will. 4, c. 104. (See *post*.)

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 6.

An heir taking lands by descent is liable for his ancestor's debts no further than the value of the land descended; therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor. (*Buckley v. Nightingale*, 1 Str. 655; *Horn v. Horn*, 2 Sim. & S. 448; see 8 Sim. 259.) But a plea by an heir to an action on his ancestor's bond, that he claims to retain a certain sum for money laid out in *repairing* the premises descended, cannot be supported (*Shetelmorth v. Neville*, 1 T. R. 454), although it may be otherwise if the repairs were *necessary*. (*Ib.* See *Hill v. Maurice*, 1 De G. & Sm. 214.) The case of an heir at law is not like that of a trustee for the payment of debts; the latter cannot apply the rents and profits to his own use, which must go in diminution of the just debts; but an heir at law is entitled to the rents until judgment is given against him. (1 T. R. 457.) A specialty creditor has the same right under the bankruptcy of the heir of the debtor, as if he had not become bankrupt, and may therefore follow the real assets or their specific produce in the hands of the assignees. (*Ex parte Morton*, 5 Ves. 449.)

Extent of liability  
of heir to debts.

Where a testator covenanted for the payment of 3,000*l.* during his life or within three months after his death, and died having devised realty to trustees in trust for A. for life with remainders over, and the trustees conveyed the estate to new trustees, and A. mortgaged his life interest; it was held (under 3 & 4 W. & M. c. 14, s. 3), that after the death of the testator an action of debt would lie on the covenant against the trustees under the will and the heir, and execution would be thus obtained against the land; and that the conveyance to new trustees was not such an alienation as would (under 3 & 4 W. & M. c. 14, s. 7) prevent the action; nor was the mortgage by the tenant for life such an alienation, though, *semble*, a court of equity would protect the mortgaged interest against execution. (*Coope v. Cresswell*, L. R., 2 Ch. 112.)

Bona fide aliena-  
tion.

### *Plea by Heir.*

7. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead *riens per descent* at the time of the original writ brought or the bill filed against him, any thing herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or *nihil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, tenements or hereditaments so descended (*j*).

Where an action  
of debt is brought  
against the heir,  
he may plead  
*riens per descent*.

(*j*) In an action against an heir or devisee (see Com. Dig. Pleader (2 E)), the defendant may not only plead any matter which might have been pleaded by the ancestor or deviser, but may also deny the character in which he is sued; or admitting it, may plead that he has *nothing by descent* or by *devise*, either generally (*Ib.*) or specially; viz. that he has nothing but a reversion after an estate for life or years (Com. Dig. Pleader (2 E 3)), or that he has

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 7.

paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to third person. (*Ib.*; 1 Chitty on Pleading, 4th ed. 431, 432; 2 *Ib.* 468—470; 3 *Ib.* 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. R. 7, n. 4.) To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum, per fraudem* and *riens per descent*; and the plaintiff replied, that after the death, &c., and before the commencement of the suit, the defendants had lands, &c., by descent, &c.: it was held, that this was a replication under the statute 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands. (*Brown v. Straker*, 1 Cr. & Jer. 583.)

By the Rules of Pleading, made in pursuance of the Common Law Procedure Act, 1852, it is (amongst other things) provided, that in actions on specialties and covenants the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable. The plea of *nil debet* shall not be allowed in any action. (1 Ell. & Bl. App. XXX.)

### Devisees to be liable like Heirs.

Devisees to be  
liable the same as  
heirs at law.

8. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir at law by force of this act, notwithstanding the lands, tenements or hereditaments to him or them devised shall be aliened before the action brought.

### TRADERS' ESTATES LIABLE TO SIMPLE CONTRACT DEBTS.

Traders' estates  
shall be assets to  
be administered  
in courts of  
equity.

9. From and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, or other real estate, which he shall not by his last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs at law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by

specialty, in which the heirs are not bound, shall be paid any part of their demands (*k*).

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 9.

(*k*) This section of the act corresponds *verbatim* with the statute 47 Geo. 3, sess. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death. (*Keene v. Riley*, 3 Mer. 436; *Hitchon v. Bennett*, 4 Mad. 180.)

A bankrupt being entitled to one-third part of freehold property in his own right, and to another third as heir at law to his brother, deposited the title-deeds of the property with his bankers to secure advances. The personal property of the brother, who was a trader subject to the bankrupt law, was insufficient to discharge his debts, and therefore his third of this property was, under this section, assets for payments of his debts: it was held, nevertheless, that the lien of the bank extended to the two-thirds of the estate, in preference to any claims of the brother's creditors. (*Ex parte Baine*, 1 Mont., D. & G. 492.)

See further as to this section, the note to 3 & 4 Will. 4, c. 104, *post*.

### PAROL NOT TO DEMUR.

10. From and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where, according to law, the parol did not demur (*l*).

In actions by or against infant, the parol shall not demur.

(*l*) When in an action or suit the plaintiff or defendant is an infant, in many cases either party may suggest the nonage of the infant, and pray that the proceedings may be deferred till his full age, or (in the legal phrase) that the infant may have his age, and that the *parol may demur*; that is, that the pleadings may be stayed; and then they shall not proceed till his full age, unless it be apparent that he cannot be prejudiced thereby. (3 Bl. Comm. 300; 2 Inst. 257, 291.) But this privilege was always confined to an infant *heir*, to whom lands had come by descent from the specialty debtor, and did not extend to an infant devisee who was sued for a specialty debt under 3 & 4 Will. & Mary, c. 14. (*Plasket v. Beeby*, 4 East, 485.)

Demurrer of the parol at law.

In equity the parol demurred in those cases only in which it would have demurred at law. (*Price v. Carver*, 3 M. & Cr. 162. See *Lechmere v. Brasier*, 2 Jac. & W. 187; *Scarth v. Cotton*, Jac. 635, n.) But all cases of foreclosure and partition, and all others in which a conveyance was required from an heir, except those in which the parol would demur at law, were cases in which a day was given in equity to the infant after attaining twenty-one, to show cause against the decree. (*Price v. Carver*, 3 M. & Cr. 163.)

Demurrer of the parol in equity.

Cases in which a day was given to infant after attaining twenty-one to show cause against decree.

By the above section the demurrer of the parol has been abolished, both in actions at law and suits in equity to enforce payment of debts. In consequence of the power given by sect. 11, the provision giving an infant a day to show cause was omitted in decrees in equity for the sale of estates for the payment of debts. And it seems now that in all cases where a conveyance is required from an infant, 13 & 14 Vict. c. 60, s. 30 (*post*) applies, and it is no longer necessary to insert in the decree the direction giving the infant a day to show cause after he shall have attained twenty-one. (Daniell, Ch. Pr. 151, 5th ed.)

Present law.

In the case of a legal foreclosure, it appears that it is still necessary to insert in the decree a clause allowing the infant six months after he comes

Legal foreclosure.



11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 7.

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paid debts of an equal or superior degree, to the amount of the assets descended or devised, or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to third person. (*Ib.*; 1 Chitty on Pleading, 4th ed. 431, 432; 2 *Ib.* 468—470; 3 *Ib.* 973, 974; Selw. N. P. Debt, s. 6; 2 Saund. R. 7, n. 4.) To debt against heirs on the bond of their ancestors, the defendants pleaded *non est factum, per fraudem* and *riens per descent*; and the plaintiff replied, that after the death, &c., and before the commencement of the suit, the defendants had lands, &c., by descent, &c.: it was held, that this was a replication under the statute 3 & 4 Will. & Mary, c. 14, s. 6, and that the jury, having found that lands descended, ought to have assessed the value of those lands. (*Brown v. Straker*, 1 Cr. & Jer. 583.)

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A bankrupt being entitled to one-third part of freehold property in his own right, and to another third as heir at law to his brother, deposited the title-deeds of the property with his bankers to secure advances. The personal property of the brother, who was a trader subject to the bankrupt law, was insufficient to discharge his debts, and therefore his third of this property was, under this section, assets for payments of his debts: it was held, nevertheless, that the lien of the bank extended to the two-thirds of the estate, in preference to any claims of the brother's creditors. (*Ex parte Baine*, 1 Mont., D. & G. 492.)

See further as to this section, the note to 3 & 4 Will. 4, c. 104, *post*.

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By the above section the demurrer of the parol has been abolished, both in actions at law and suits in equity to enforce payment of debts. In consequence of the power given by sect. 11, the provision giving an infant a day to show cause was omitted in decrees in equity for the sale of estates for the payment of debts. And it seems now that in all cases where a conveyance is required from an infant, 13 & 14 Vict. c. 60, s. 30 (*post*) applies, and it is no longer necessary to insert in the decree the direction giving the infant a day to show cause after he shall have attained twenty-one. (Daniell, Ch. Pr. 151, 5th ed.)

Present law.

In the case of a legal foreclosure, it appears that it is still necessary to insert in the decree a clause allowing the infant six months after he comes

Legal foreclosure.

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 10.

Infant on coming  
of age may put in  
new answer.

Adopting proceed-  
ings on behalf of  
infant.

of age to show cause against the decree. (*Price v. Carrer*, 3 M. & Cr. 157; *Scholefield v. Heafield*, 7 Sim. 669; *Powys v. Mansfield*, 6 Sim. 637; *Clinton v. Bernard*, Dru. 287; *Flood v. Sutton*, 3 Ir. Eq. 340; *Daniell*, Ch. Pr. 151; *Fisher on Mortgages*, 1018—1024.)

Where a decree has been made against an infant defendant who put in the common answer by his guardian, the general rule is, that such defendant on coming of age has the privilege of putting in a new answer, stating a different case, and of going into evidence in support of that case. This privilege does not extend to foreclosure suits. (*Kelsall v. Kelsall*, 2 M. & Keen, 409.)

After a decree and order on further directions in a suit by creditors, the plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the court, the accounts were directed to be taken over again as against the infant, with liberty to the master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do. (*Baillie v. Jackson*, 10 Sim. 167. See *Finch v. Finch*, W. N. 1869, p. 191.)

### CONVEYANCES BY INFANTS.

Infants to make  
conveyances  
under order of  
the court.

11. Where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years (*m*).

(*m*) An application under this section for an infant heir or devisee to convey must be made by petition, and not by motion. (*Anon.*, 1 Y. & Coll. 75.) An infant devisee in tail may be ordered to convey under this section (*Penny v. Pretor*, 9 Sim. 135); and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail. (*Radcliffe v. Eccles*, 1 Keen, 130.) This section of the act extends to a case where the decree for sale of the estate was made prior to the act. (*Chapman v. Tennant*, 2 Russ. & Mylne, 74.) Where a testator devised his estate to two persons as tenants in common in fee, and one of them died after the testator, leaving an infant heir; in a creditor's suit, after a decree for sale of the estate, the infant heir was ordered to join in the conveyance to the purchaser under this section of the act. (*Brook v. Smith*, 2 Russ. & Mylne, 73.) A conveyance by an infant under this section passes only such interest as the infant, if of full age, might pass. (*Heming v. Archer*, 8 Beav. 294.) Orders under this section will be found, Set. 825; see note to sect. 12.

CONVEYANCES BY PERSONS HAVING LIMITED INTERESTS.

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 12.

12. Where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons, whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold (n).

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

(n) It had been decided that where it is necessary to resort to the real assets of a deceased debtor for payment of his debts, the court might direct the money to be raised by mortgage instead of sale, and might also direct the infant heir or devisee of the debtor to convey the estate to the mortgagee. (*Holme v. Williams*, 8 Sim. 557.) In *Smethurst v. Longworth* (7 Law J., N. S., Chanc. 18), it was held that the court was not authorized to direct a mortgage of an infant's estate for payment of the ancestor's debts. By 2 & 3 Vict. c. 60, the provisions of sects. 11 and 12 are extended to authorize mortgages as well as sales of estates.

Mortgages may be made as well as sales.

A decree having been made in a creditor's suit for sale of part of the real estate, and a sale having taken place of freeholds and copyholds, on a petition under this act that the tenant for life might convey and surrender to the purchaser, the same was ordered, notwithstanding that the stat. 3 & 4 Will. 4, c. 104 (making copyhold estate assets for the payments of simple contract and specialty debts), was passed subsequently, the words of the former act having a prospective operation. (*Branch v. Browne*, 17 L. J., Ch. 435; 2 De G. & Sm. 299.)

Section applies to copyholds.

A testator devised real estates to trustees to pay debts, and to convey the real estate, subject to such debts, to his son upon marriage in strict settlement. The trustees accordingly conveyed the estate to the testator's son for life, with remainder in strict settlement: it was held, that the son could convey the legal estate under this section. (*Cheese v. Cheese*, 15 L. J., Ch. 28.)

Conveyances under this section.

This section does not apply to a case where an estate is devised to a trustee during the life of the *cestui que trust*, with remainder over, and by the disclaimer of the trustee the legal estate descended on the heir. (*Heming v. Archer*, 7 Beav. 515; 8 Beav. 294.) An estate was sold to a party to a suit for payment of the testator's debts, and which by the disclaimer of a trustee was vested in the heir *pur autre vie*, with legal remainder to the children of A. (who was living) as tenants in common. The purchase-money was in court. It was held, that no effective conveyance could be made under the act until the class of children had been determined, by the death of A. (*Heming v. Archer*, 9 Beav. 366.)

The case of the devisee for life, or owner of the limited estate, or first executory devisee being an infant, is provided for by 2 & 3 Vict. c. 60,

11 Geo. 4 &  
1 Will. 4,  
c. 47, s. 12.

*post*; and the case of the fee being vested, subject to an executory devise, in the heir by descent, or otherwise than by devise, is provided for by 11 & 12 Vict. c. 87 (*post*, p. 475).

Where copyholds devised to an infant for life, with remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause and pursuant to this statute that the guardian of the infant should surrender them to the purchaser: it was held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant under the 29th section of the Trustee Act, 1850. (*Wood v. Beetlestone*, 1 Kay & J. 212.)

The tenant for life of estates, decreed in a creditor's suit to be sold for payment of debts, was a trustee for the purchaser within the meaning of 1 Will. 4, c. 60, s. 18. (*Re Milfield*, 2 Phill. C. C. 254.)

Orders may still be made under sects. 11 and 12 (see the forms, Seton, 826); but these provisions have been practically superseded by 13 & 14 Vict. c. 60, s. 29 and 15 & 16 Vict. c. 55, s. 1 (*post*). The usual practice is for the decree or order directing the sale or mortgage to declare that the infant heir, devisee, or tenant for life, is a trustee within the meaning of 13 & 14 Vict. c. 60, and then to obtain a vesting order. (Daniell, Ch. Pr. 1144, n. (h).) See the notes to 13 & 14 Vict. c. 60, s. 29, and 15 & 16 Vict. c. 55, s. 1 (*post*).

#### IRELAND.

Not to repeal act  
33 Geo. 1 (I.) re-  
lating to debts  
due to bankers.

13. Nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King George (o) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers" (p).

(o) The following words are here omitted by mistake: "the Second, intituled 'An Act for repealing an Act passed in this Kingdom in the eighth Year of the Reign of King George.'"

(p) By the third section of the Irish act, 33 Geo. 2, c. 14, all dispositions after 10th May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time. As to the act 33 Geo. 2, c. 14, see *Copland v. Davies*, L. R., 5 H. L. 358.

2 & 3 Vict. c. 60.

The stat. 2 & 3 Vict. c. 60, after reciting the 11th and 12th sections of the stat. 11 Geo. 4 & 1 Will. 4, c. 47, (*ante*, pp. 472, 473,) and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant, enacts, "that the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements or hereditaments

Recited provisions  
of 11 Geo. 4 & 1  
Will. 4, c. 47, ex-  
tended to autho-  
rize mortgages as  
well as sales of  
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so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant.

2 & 3 Vict.  
c. 60.

The second section enacts, "That when any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions, and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made (g).

Surplus of money arising from such sale or mortgage to descend in the same manner as the estates so sold or mortgaged would have done.

(g) In a creditor's suit the court has no jurisdiction, under these statutes, 11 Geo. 4 & 1 Will. 4, c. 47, and 2 & 3 Vict. c. 60, to extend the sum to be raised by way of mortgage by an infant for payment of the debts of his ancestor or devisor, so as to include money required for repairs, even where such repairs are necessary in order to obtain an advance on mortgage, and where a mortgage is much more beneficial to the infant than a sale would be. (*Hill v. Maurice*, 1 De G. & S. 214. See *Garmstone v. Gaunt*, 1 Coll. C. C. 577.) For forms of orders under the act, see Seton, 826.

The stat. 11 & 12 Vict. c. 87, after reciting the 12th section of the 11 Geo. 4 & 1 Will. 4, c. 47, (*ante*, p. 473,) "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:" it is enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

Recited provision to extend to lands, &c. of a deceased debtor, in certain cases.

## PAYMENT OF DEBTS OUT OF REAL ESTATES.

3 &amp; 4 WILLIAM IV. c. 104.

*An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and \* Contract Debts.*

[29th August, 1833.]

\* Sic.

3 & 4 Will. 4,  
c. 104.

Freehold and  
copyhold estates  
in all cases to be  
assets for the pay-  
ment of simple  
contract or spe-  
cialty debts.

WHEREAS it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs at law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands (a).

(a) This statute makes freehold estates subject to simple contract debts, which were before subject to specialty debts, but it applies only to estates which the testator has not charged or devised subject to the payment of his debts. It is not the case that all estates subject to the payment of debts will now be liable to be sold without the intervention of a court of equity. The rule that a charge of debts is equivalent to a trust to sell for the payment of debts, leaves the distinction between estates subjected to the payment of debts by the will of the debtor and estates subject to debts by the operation of the law, precisely as it was before this act. (*Ball v. Harris*, 4 My. & Cr. 264.) As to what constitutes a charge of debts on realty, see *ante*, p. 467.

Lands applicable  
as assets under  
this act.

Under this act freehold estates over which a testator has a general power of appointment, and which he appoints by will, are assets for the payment of his simple contract debts. (*Fleming v. Buchanan*, 3 De G., M. & G. 976.)

Where a party dies without heirs, and his land escheats to the lord, it is applicable to payment of debts under this statute, but whether it is so applicable in priority to estates specifically devised seems to be questionable. (*Evans v. Evans*, 6 Jur. 380; 5 Beav. 114; *Hughes v. Wells*, 9 Hare, 749.)

Where A. mortgaged in fee and died intestate and without heirs, it was held that the equity of redemption did not escheat to the crown, but belonged to the mortgagee, subject to the intestate's debts. (*Beale v. Symonds*, 16 Beav. 406.)

3 & 4 Will. 4,  
c. 104.

It seems that real estate which can be reached only by this act is equitable assets, subject only to the proviso preserving the priority of specialty creditors where the heirs are named over those where the heirs are not named and over simple contract creditors. (Haddan's Administrative Jurisdiction, 78.) Thus, in the administration of assets under this act, it has been held that creditors by specialty, in which the heirs are not bound, are not entitled to any priority over simple contract creditors. (*Cummins v. Cummins*, 3 J. & Lat. 64.) And creditors by bond, in which the heirs are named, take priority over creditors by specialty in which the heirs are not named. (*Richardson v. Jenkins*, 1 Drew. 477.)

Lands are equitable assets under this act subject only to the final proviso.

In the case of an equity of redemption of freeholds, it was held that creditors by specialty in which the heirs were bound, were entitled, under the proviso, to be paid the full amount of their debts, before any part of the property was applied in payment of simple contract creditors. (*Foster v. Handley*, 1 Sim., N. S. 200; better reported, 15 Jur. 73.) And the same has been held in the case of an equity of redemption of copyholds. (*Burrell v. Smith*, L. R., 9 Eq. 443.) It was said by Wickens, V.-C., "The rule laid down by the statute 3 & 4 Will. 4, c. 104, is anomalous. I believe that it cannot be reconciled with the principles of equity, but that it must be rested entirely upon decisions and upon the words of the statute." (*Bain v. Sadler*, L. R., 12 Eq. 573.)

Equity of redemption.

In the case of debtors dying on or after the 1st January, 1870, specialty and simple contract creditors are to be treated as standing in equal degree and paid accordingly. (32 & 33 Vict. c. 46, *post*.)

Since this act a mortgagee of freeholds or copyholds may tack his simple contract debt as against the heir. (*Rolfe v. Chester*, 20 Beav. 610; *Thomas v. Thomas*, 22 Beav. 341.)

Tacking.

This act charges the real estates of any person dying seised of such estates, not only with the debts of every description actually due at his death, but also with all liabilities, which may result out of obligations entered into during his life. (*Hamer's Devisees' case*, 2 De G., M. & G. 366.)

Debts payable under this act.

Testator devised estate A. to the plaintiff charged with the payment of debts, and estate B. not so charged, to the defendant. The debts exhausted estate A., and the plaintiff was proceeding under this act to sell estate B., and pay a debt due to himself, part of which was barred by this statute: held, that this act did not give an executor power to pay out of assets obtained by virtue of this act a debt due to himself or a stranger, which was so barred. (*Dring v. Groetham*, 23 L. J., Ch. 156; 1 Eq. R. 442.)

This act has not affected a widow's right to dower or freebench, which still has priority over mere creditors of the deceased. (*Spyer v. Hyatt*, 20 Beav. 621.)

The rights of simple contract creditors of an ancestor, as against the descended estates, are not defeated by judgments entered up against the heir for his personal debts before suit. (*Kinderley v. Jervis*, 22 Beav. 1; 2 Jur., N. S. 602; 25 L. J., Chanc. 538.)

Judgments against the heir.

Although an heir-at-law is bound by specialty debts in respect of freehold lands descended, yet a purchaser of such lands, without notice of any debts, was never held to be subject to them. The Statute of Fraudulent Devises was always considered as placing a devisee on exactly the same footing as an heir-at-law, although the contrary had been ineffectually attempted to be established. (*Matthews v. Jones*, 2 Anstr. 506.) Equity will, however, on behalf of creditors, grant an injunction against a purchaser to restrain payment of the purchase-money to the heir. (*Green v. Lowes*, 3 Br. C. C. 217.) And as simple contract creditors under the 47 Geo. 3, sess. 2, c. 74, were held to stand in this respect in the same situation as specialty creditors under the Statute of Fraudulent Devises (*Woodgate v. Woodgate*, Sugd. V. & P. 834, 835, 11th ed.), so, it is conceived, they will under this act, and that a purchaser of lands from an heir or devisee will not be liable to the payment of the simple contract debts of the intestate or testator. It has

Purchaser of lands from heir or devisee not bound to see to application of purchase-money.

3 & 4 Will. 4,  
c. 104.

since been decided that it was not the object, nor is it the operation, of the 3 & 4 Will. 4, c. 104, to make the simple contract debts of a deceased person in the nature of mortgages or specific charges on his real estate; but, as the statute makes the land assets for the payment of his debts, these debts constitute a general charge upon them, but not so that a *bonâ fide* purchaser of the lands from the heir or devisee is bound to see to the application of the purchase-money, as he would be in the case of a particular mortgage on any portion of the lands themselves. (*Kinderley v. Jervis*, 22 Beav. 1; see as to personalty, *Dilkes v. Broadmead*, 2 De G., F. & J. 566.) Where real estate under this statute is assets for the payment of a simple contract debt, a purchaser of the estate with notice of such debt is not bound to see his purchase-money applied in discharge thereof. (*Jones v. Noyes*, 4 Jur., N. S. 1033; 7 W. R. 21.)

Suits for the administration of real assets.

It was held, under 47 Geo. 3, sess. 2, c. 74, that persons having prior incumbrances on freehold and copyhold estates, of which a trader, who died intestate, was seised at the time of his death, ought not to be made parties to a bill for payment of his debts out of his real estates. (*Parker v. Fuller*, 1 Russ. & Mylne, 656.)

To a suit for administering the real assets of a testator, under 3 & 4 Will. 4, c. 104, the heir-at-law is not a necessary party, as well as the devisee. (*Bridges v. Hinaman*, 16 Sim. 71, overruling *Brown v. Weatherby*, 10 Sim. 125. See *Weeks v. Evans*, 7 Sim. 546.) Nor is the heir a necessary party in respect of Indian realty. (*Story v. Fry*, 1 Y. & C. C. 603.) And it is not necessary to establish the will against the testator's heir. (*Goodchild v. Terrett*, 5 Beav. 398.) In a creditor's suit, seeking the application of real estate in payment of debts, both the heir-at-law and devisees of the debtors being parties, and the will not being admitted by the heir, the court would neither dismiss the bill against the heir, nor direct an issue *devisavit vel non* at his request, as the creditors had a title paramount to that of the heir or devisees, and the question of the validity of the will as between them could not affect the rights of the creditors. (*Spickernell v. Hotham*, 9 Hare, 73.)

In order to obtain a decree for the sale of a testator's real estate, for payment of his debts under this statute, it is not necessary that the bill should be filed by a creditor. (*Dinning v. Henderson*, 2 Coll. C. C. 330.) The court has jurisdiction to order the real estates of a deceased debtor to be sold for payment of his debts in a suit for the administration of his estates, though it be instituted not by a creditor, but by the heir and the next of kin of the deceased (*Price v. Price*, 15 Sim. 484; *Rodney v. Rodney*, 16 Sim. 307); but a legal personal representative cannot alone institute a suit to administer the real estate of an intestate, for the purpose of having it applied towards the payment of his debts under this act. (*Cutley v. Sampson*, 33 Beav. 551.)

A creditor cannot have a decree for the administration of real estate unless he sues on behalf of all creditors. (*Ponsford v. Hartley*, 2 Johns. & H. 736.)

See further as to suits for the administration of real assets, Seton, 224 *et seq.*

Where a testator made a general devise and bequest of all his real and personal estate to A. for life, and on her death devised certain copyholds to B., and directed that on B.'s death the copyholds should be sold, and the proceeds distributed among certain classes who should be living at B.'s death, and a suit was instituted on B.'s death for the sale of the copyholds. It was held, that the executors were not necessary parties on the mere ground that the copyholds were by this act made assets to be administered in equity for payment of debts. (*Curtis v. Fulbrook*, 8 Hare, 25.)

Marshalling assets between creditors.

Before this act freehold estates were not assets for the payment of simple contract creditors, (8 Ves. 384,) although in some cases they acquired a right against the real estate by marshalling. (12 Ves. 154.) The principle of marshalling was, that a person who had two funds to which he might resort for the payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former. (*Trimmer v. Bayne*, 9 Ves. 209.) This rule was applied where a person had a double

fund to resort to, and another person had a demand upon one fund only, in which case the court turned the person having the double fund upon that which was not liable to the other person's demand, in order to leave that fund open to the latter. (*Attorney-General v. Tyndall*, Ambl. 615.) And therefore, if a mortgagee exhausted the whole personal estate in payment of his debt, the simple contract creditors of the mortgagor were entitled to stand in the place of the mortgagee against the freehold estate, for the proportion of the mortgage which had been paid out of the personal estate. (*Aldrich v. Cooper*, 8 Ves. 391.) And where it is necessary for the payment of creditors, that the mortgagee of freeholds and copyholds should be compelled to take his satisfaction out of the latter, and he takes it out of the former, those creditors who are thereby disappointed may stand in his place as to the copyhold estate, (*Aldrich v. Cooper*, 8 Ves. 382,) although the mortgage of the copyhold was distinct from, and subsequent to, the mortgage of the freeholds. (*Gwynne v. Edwards*, 2 Russ. 289.) And where, before this act, creditors holding specialties binding the heir exhausted the personal estate, equity allowed simple contract creditors to stand in their place as against the real estate. (*Cradock v. Piper*, 15 Sim. 301.) It was held, that the court would not marshal assets for the payment of a simple contract debt out of real estate, where the bill had not been filed on behalf of all the creditors of the deceased. (*Connolly v. M'Dermott*, 3 J. & Lat. 260.) This act, however, which renders freeholds and copyholds liable to simple contract debts has obviated the necessity of the court resorting to the doctrine of marshalling for enforcing their payment. (2 White & Tudor, L. C., Eq. 81.)

3 & 4 Will. 4,  
c. 104.

There does not appear to be any authority for holding that the right to marshal assets will be exercised in favour of a simple contract creditor, whose immediate right against the real estate is barred by the Statute of Limitations. *Turner, V.-C.*, observed, "Simple contract creditors have now a direct right against the real estate, in case of a deficiency of the personal. They do not require the aid of this court to marshal the assets, in order to give them a remedy against the estate; and for whatever purpose the doctrine of marshalling may be necessary to be kept on foot, I do not think that it ought to be kept alive for the purpose of giving indirectly a right which could not be asserted directly. The consequence would be, that in all cases where there are any specialty debts, the simple contract creditors would be entitled to sue the real estate at any time within which the specialty creditor could have sued: in effect, to create in equity the same limitation as to simple contract debts as the statute has prescribed as to specialties." (*Fordham v. Wallis*, 10 Hare, 230. See *Busby v. Seymour*, 1 Jones & L. 527.)

Assets are applicable in the following order to the payment of debts: (1) the personal estate not disposed of in the way of general legacies or specific bequests, unless it be exempted from its primary liability by express words or necessary implication. (*Duke of Ancaster v. Mayer*, 1 White & Tudor, L. C., Eq. 564.) (2) Real estate devised or ordered to be sold for payment of debts, not merely charged. (*Harmood v. Oglander*, 8 Ves. 124; *Philips v. Parry*, 22 Beav. 279.) (3) Real estate descended. (*Milnes v. Slater*, 8 Ves. 295, and see *Rom v. Rom*, L. R., 7 Eq. 414; *Ryves v. Ryves*, L. R., 11 Eq. 539; *Stead v. Hardaker*, L. R., 15 Eq. 175.) (4) Real estate simply charged with debts. (*Irvin v. Ironmonger*, 2 Russ. & Myl. 531.) (5) General pecuniary legacies. (*Clifton v. Burt*, 1 P. W. 680.) (6) Real estate specifically devised, or comprised in a residuary devise, and personal estate specifically bequeathed, each contributing rateably. (*Eddels v. Johnson*, 1 Giff. 22; *Hensman v. Fryer*, L. R., 3 Ch. 420.) (7) Real or personal estate appointed under a general power vested in the testator. (*Fleming v. Buchanan*, 3 De G., M. & G. 976.) See, further, 2 White & Tudor, L. C., Eq. 120; 2 Jarm. Wills, 588; 1 Seton, 317, 3rd ed. As to mortgage debts which are now primarily payable out of the mortgaged lands, unless a contrary intention appears by will or deed, see 17 & 18 Vict. c. 113, *post*.

Order in which  
assets are applied  
in payment of  
debts.

If the above order has been disturbed by any creditor, equity will marshal the assets so as to set right the disturbance. Thus, if land de-

Marshalling assets  
between creditors  
and legatees.



3 & 4 Will. 4,  
c. 104.

vised for payment of debts should be so applied before the general personal estate has been exhausted, the persons entitled to such land will have a right to be recouped out of the general personal estate. And if the heir to whom lands have descended should pay debts before both the general personal estate and lands devised for payment of debts have been exhausted, the heir will have a right to be repaid, first out of the general personal estate, and secondly, out of the lands devised for payment of debts. (Wms. Real Assets, 110.) So if the devisee of lands charged with payment of debts should pay debts while any of the previously liable property remains unexhausted, he will have a right to stand in the place of the creditor, so far as regards, first, the general personal estate; secondly, lands devised for payment of debts; and thirdly, lands descended. (Wms. Real Assets, 111.)

Again, if the general personal estate out of which pecuniary legacies are to be paid has been exhausted by any creditor, the legatee will be entitled to be repaid out of lands devised for payment of debts, out of lands descended, and out of lands charged with debts. (Wms. Real Assets, 112; *Rickard v. Barrett*, 3 K. & J. 289. See *Foster v. Cook*, 3 Br. C. C. 347.) But (inasmuch as a residuary devise remains specific notwithstanding the Wills Act, *Hensman v. Fryer*, L. R., 3 Ch. 420), a pecuniary legatee cannot call upon a residuary devisee to contribute to the payment of debts. (*Collins v. Lewis*, L. R., 8 Eq. 708; *Dugdale v. Dugdale*, L. R., 14 Eq. 234.) If a testator agree to purchase land and devise it, and after his death the purchase-money is paid out of his general personal estate, a pecuniary legatee is entitled to stand in the place of the vendor against the land. (*Lilford v. Powys Keck*, L. R., 1 Eq. 347.)

If specific or residuary devisees or specific legatees are called on to pay debts, they have a right to have the whole of the testator's other property marshalled in their favour, so as to throw the debts as far as possible on the other assets which are primarily liable. And on failure of the other assets, any one of such devisees or legatees who may have paid the whole of the debts, will have a right to contribution from the others. (Wms. Real Assets, 113; *Hensman v. Fryer*, L. R., 3 Ch. 430; followed on the question of the specific character of a residuary devise, in *Gibbins v. Eyden*, L. R., 7 Eq. 371; but not followed on the question of the right of pecuniary legatees to contribution. *Dugdale v. Dugdale*, L. R., 14 Eq. 234.)

See, further, as to the marshalling of assets, *Aldrich v. Cooper*, 2 White & Tudor, L. C., Eq. 66; 2 Jarm. Wills, 640 *et seq.*

All creditors are paid *pari passu* out of equitable assets without any regard to legal priority (2 Wms. Exors. 1552, 6th ed.; 2 L. C., Eq. 118, 137, 4th ed.); and in the case of a debt contracted by an Englishman in a foreign country, the *lex loci contractus* does not avail to entitle the creditor to payment out of equitable assets administered in this country in priority to other creditors. (*Pardo v. Bingham*, L. R., 6 Eq. 485.) It seems that in the administration of the separate estate of a married woman dying before the 1st Jan. 1870, debts are to be paid in order of priority, and not *pari passu*. (*Shattock v. Shattock*, L. R., 2 Eq. 182.)

In the case of persons dying before the 1st Jan. 1870, debts are paid in the following order out of legal assets: (1) Debts due to the crown on record or specialty. (2) Debts to which particular statutes give priority, such as debts for poor-rates due from overseers (17 Geo. 2, c. 38, s. 3), debts due to friendly societies from their officers (18 & 19 Vict. c. 68, s. 23), certain debts from officers or soldiers dying on service (26 & 27 Vict. c. 57, s. 4), and debts from a treasurer or collector to paving commissioners (57 Geo. 3, c. 29, s. 51). (3) Judgments in Courts of Record, and decrees of Courts of Equity. (4) Recognizances and statutes. (5) Debts by specialty. (6) Debts by simple contract. (7) Debts due from an incumbent's estate for dilapidation. (8) Voluntary bonds. [See the cases quoted 2 Wms. Exors. 925 *et seq.*; 2 White & Tudor, L. C., Eq. 121, 4th ed.]

In the case of persons dying on or after the 1st Jan. 1870, it is now enacted, that no debt or liability of such person shall be entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is other-

Order in which  
debts are paid.

32 & 33 Vict. c. 46.

wise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, shall be treated as standing in equal degree, and be paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable, any statute or other law to the contrary notwithstanding. But this provision is not to prejudice or affect any lien, charge or other security which any creditor may hold or be entitled to for the payment of his debt. (32 & 33 Vict. c. 46, s. 1.)

3 & 4 Will. 4,  
c. 104.

Before this act, it was held that, in the administration of legal assets, an unregistered judgment recovered against an administratrix had priority over simple contract creditors of the intestate (*Jennings v. Rigby*, 33 Beav. 198), and this has not been altered by the act. (*Re Williams*, L. R., 15 Eq. 270.)

Before 3 & 4 Will. 4, c. 104, lands were not liable to the payment of simple contract debts, except those of traders by stat. 47 Geo. 3, sess. 2, c. 74, and 11 Geo. 4 & 1 Will. 4, c. 47. (*Ante*, p. 470.) Debts by simple contract are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by oral evidence, the most simple of any; or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. It is easy to see in what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. (2 Bl. Comm. 465.) A foreign judgment constitutes but a simple contract debt. (*Wilson v. Lady Dunsany*, 18 Beav. 293.)

Simple contract  
debts.

A person who was a lunatic, but had not been found to be so by inquisition, died seised of a small freehold estate, but not possessed of any personal property. His step-father had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses: it was held, that he was not entitled, under this act, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate. (*Carter v. Beard*, 10 Sim. 7. See *Rogers v. Price*, 3 Y. & Jerv. 28, where it was held that an executor, who has assets sufficient for the purpose, is liable, upon an implied promise, to pay for a funeral suitable to the degree of his testator, furnished by the directions of a third person.) In *Wentworth v. Tubb* (1 Y. & Coll. N. C. 171), it was decided that, in the case of necessities supplied to a lunatic, the law raises a contract by implication on the part of the lunatic, under which the amount of such necessities may become payable as a debt out of his real or personal assets, on a bill filed for the administration of those assets. (See *Manby v. Scott*, 1 Sid. 112; *Baxter v. Earl Portsmouth*, 7 D. & R. 614; 5 B. & C. 170; *Brown v. Joddrell*, 3 Carr. & P. 30; Mood. & M. 105; *Dane v. Lady Kirkwall*, 8 Carr. & P. 679. See Shelford on Lunatics, 462—465, 2nd ed.)

Payments on be-  
half of lunatics.

The law will raise an implied contract or debt against the lunatic or his estate, for the monies expended for the necessary protection of his person and estate. (*Williams v. Wentworth*, 5 Beav. 325.) If a trustee be sued in chancery for an account, and it appears that he has properly expended sums of money for the protection and safety, or for the maintenance and support, of his *cestui que trust*, at a time when he, though adult, was incapable of taking care of himself, the court will allow him credit in account for such sums of money. (*Nelson v. Duncombe*, 9 Beav. 211.)

Costs, charges and expenses incurred by the solicitors employed in prosecuting a commission in lunacy, and subsequently as the solicitors of the committees, were considered as a simple contract debt due by the lunatic for necessities. (*Stedman v. Hart*, Kay, 607.) The claim of the committee of a lunatic for costs paid by him in respect of proceedings in the lunacy, is of the nature of a simple contract debt against the lunatic's estate. (*Jones v. Noyes*, 7 W. R. 21.)

A trustee, who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust*. (*Vernon v. Vandry*, 2 Atk. 119; *Cox v. Bateman*, 2 Ves. sen. 19; see *Perry v. Phelps*, 4 Ves. 116.) But an acknowledgment by a trustee under

Nature of debt  
created by breach  
of trust.

3 & 4 Will. 4,  
c. 104.

his hand and seal, that he alone had received the whole trust money for the purposes of the trust (*Gifford v. Manley*, Cas. temp. Talbot, 109; see *Kay*, 725), or any general words amounting to a covenant on his part, will make him a debtor by specialty. (*Lord Montford v. Lord Cadogan*, 19 Ves. 638; *Wood v. Hardisty*, 2 Coll. 542.) And the words "covenant or agree," are not necessary in a trust deed to constitute a specialty contract: a declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient. (*Richardson v. Jenkins*, 1 Drew. 477.)

A trustee, however, under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it. (*Richardson v. Jenkins*, 1 Drew. 477.) And even where the trustee has executed the deed, the court will not raise a covenant without necessity. (*Adey v. Arnold*, 2 De G., M. & G. 487.) In every case the question is: Was it intended that the trustee should give a covenant for payment of the money? (*Isaacson v. Harwood*, L. R., 8 Ch. 228.) The mere assignment of the trust property will not create a specialty debt (*Adey v. Arnold*, 2 De G., M. & G. 432; *Wynch v. Grant*, 2 Drew. 312); nor a recital of an agreement to become trustee (*Wynch v. Grant*, *ubi sup.*); nor a declaration by the trustee that he accepts the office. (*Holland v. Holland*, L. R., 4 Ch. 449.)

Specialty debts.

As to specialty debts generally, see 2 Wms. Exors. 944 *et seq.* To make a debt a specialty it must be enforceable at law. There is no specialty in equity. (*Holland v. Holland*, L. R., 4 Ch. 455.) Specialty debts have been held to have been created by a covenant in a marriage settlement to settle money (*Eyre v. Monro*, 8 K. & J. 305); by a covenant to execute a lease (*Kidd v. Boone*, L. R., 12 Eq. 89); and by a covenant for further assurance (*Re Dickson*, *ib.* 154). See, also, as to the acknowledgment of a debt by deed, *Saunders v. Milsome*, L. R., 2 Eq. 573; *Isaacson v. Harwood*, L. R., 8 Ch. 225.

Where a company is being wound up under 25 & 26 Vict. c. 89, the liability of a contributory to pay calls made since the winding up is a specialty binding the heirs (*Buck v. Robson*, L. R., 10 Eq. 629), even where the company is not registered under that act. (*Re Muggeridge*, L. R., 10 Eq. 448.)

Copyholds heretofore not liable to debts.

Copyholds were not within the statute 3 & 4 Will. & Mary, c. 14, nor the 47 Geo. 3, sess. 2, c. 74, nor the 11 Geo. 4 & 1 Will. 4, c. 47, and consequently before this act were not liable to specialty debts, or debts of traders. Before this act, copyhold estates were not liable, either at law or in equity, to the debts of a testator any further than he charged them. (*Aldrich v. Cooper*, 8 Ves. 393.) But where a testator having both freehold and copyhold estates, charged all *his real estates* with the payment of his debts, if he had surrendered the copyhold to the use of his will, the freehold and copyhold would have been applied rateably; but if he had not surrendered the copyhold, it would not have been applied until the freehold was exhausted. (*Groomcock v. Smith*, 2 Cox, 397; *Coombes v. Gibson*, 1 Br. C. C. 278; *Kentish v. Kentish*, 2 Br. C. C. 257.) But equity would, before the statute 55 Geo. 3, c. 192, supply a surrender to the use of a will where a manifest intent to charge copyholds with debts appeared in the will. (*Drake v. Robinson*, 1 P. Wms. 448; *Bateman v. Bateman*, 1 Atk. 421.) As to copyholds being charged by a will, see *Noel v. Weston*, 2 Ves. & Bea. 269; *Godolphin v. Penneock*, 2 Ves. sen. 271; *Doe d. Clarke v. Ludlam*, 7 Bing. 275; *Ronalds v. Feltham*, Turn. & Russ. 418.) Where one party had a charge on freehold and copyhold estate, and another party on the freehold estate only, it was held, that the latter was entitled to require that the former should be satisfied out of the copyhold estate so far as it would extend. (*Tidd v. Lister*, 10 Hare, 157.)

Formerly copyholds were not liable to an extent (Park. R. 195; *Drury v. Man*, 1 Atk. 96); and neither the crown nor the subject was allowed to take copyhold tenements held in fee or for lives in execution (8 Ves. 394), yet it was said that leases for years of copyhold tenements, granted by virtue of a licence from the lord, may be taken in execution, that being a common law interest. (3 Prest. Abstr. 351.) Before the stat. 1 & 2 Vict. c. 110, copyhold lands could not be taken in execution upon a judgment (*Cannon v.*

*Pack*, Vin. Abr. Copyhold (O. e), pl. 6; 2 Eq. Cas. Abr. 226, pl. 6); nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor. (*Rex v. Budd*, Park. R. 190.) But it seems that they may be sequestered (*Dunkley v. Scribnor*, 2 Madd. 443; *Marquis of Carmarthen v. Hanson*, 3 Swanst. 294); although the sequestration will not be revived against the heir of the party who was sequestered (*Whitehead v. Harrison*, 1 Barn. K. B. 431); and they are within the rules as to marshalling assets. (*Aldrich v. Cooper*, 8 Ves. 388; 2 Pow. on Mort. 263, n.) But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *cestui que trust*, as the customary descent is in that case broken. (*Kelly v. Kelly*, 2 Eq. Cas. Abr. 509, pl. 4.)

3 & 4 Will. 4,  
c. 104.

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By stat. 1 & 2 Vict. c. 110, s. 11 (*post*), all real estates, including lands and hereditaments of copyhold or customary tenure, of which the person against whom execution is sued, was seised at the time of entering up such judgment, or at any time afterwards, or over which he had alone a power, may be taken in execution; but the person taking such lands in execution, is liable to the performance of the services due to the lord of the manor.

Copyholds now  
liable to be taken  
in execution.

## DEVISE OF REAL ESTATES CHARGED WITH DEBTS.

22 & 23 VICTORIA, C. 35.

*An Act to further amend the Law of Property and to relieve Trustees.*  
[13th August, 1859 (a).]

22 & 23 Vict.  
c. 35, s. 14.

Devisee in trust  
may raise money  
by sale, notwith-  
standing want of  
express power in  
the will.

14. Where by any will which shall come into operation after the passing of this act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein, and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper (b).

(a) The other sections of this act will be found under different heads in this work. (See *ante*, p. 442, and *post*.)

Charge of debts  
and legacies upon  
real estate.

(b) As to what amounts to a charge of debts upon real estate, see the note *ante*, p. 467; and as to a charge of legacies upon real estate, see Hawk. Wills, 289 *et seq.*; *Peacock v. Peacock*, 13 W. R. 516; *Browning v. French*, 24 L. T., N. S. 649.

In cases not  
within act, law  
doubtful as to  
operation of  
charge of debts.

In cases not within the above act, the law is doubtful as to the legal operation of a will creating merely a charge of debts, where no machinery is provided for giving effect to the charge. See Sugd. on Powers, 120—122, 8th ed.; Sugd. V. & P. 662, 14th ed.; 2 Davidson's Conv. 299, 990; 2 Jur., N. S. 68; and Williams on Real Assets.

Case where tes-  
tator charges land  
with his debts  
and devises the  
land upon trusts.

Where a testator charged his real estate with his debts, and devised an advowson to trustees on trust to sell after a certain time, it was held, that the trustees, one of whom was an executor, had power, with the concurrence of the other executors, to sell the advowson before the specified time for the payment of debts. (*Shaw v. Borrer*, 1 Keen, 559.) Where a testator devised his estates subject to debts to a trustee in trust for several persons in succession, and appointed the trustee and his widow executors, it was held, that the trustee had power to mortgage the estates to secure money advanced to the widow and himself as executors. (*Ball v. Harris*, 8 Sim. 485; 4 M. & Cr. 264.)

A testator ordered his debts and legacies to be paid and discharged out of his real and personal estate. He then devised his real estates to trustees for 500 years, and subject thereto, to his five sons as tenants in common in fee; "upon condition" that they should pay in equal shares certain legacies



and his debts; and in case any son should neglect to pay his portion, the trustees were, out of his share, to raise the amount. He appointed the five sons executors. Thirty-three years after the death of the testator the surviving executors sold the estate, as they alleged, to pay the debts. The court held, that they had power to sell, and decreed specific performance against the purchaser; but added, that it certainly should secure to the purchaser, as far as the court was competent to do so, a good legal estate, when the conveyance was made. (*Wrigley v. Sykes*, 21 Beav. 337.) It was laid down, that the general charge for payment of debts gave the executors a power of selling the estate for the payment of debts. (*Ib.*)

22 & 23 Vict.  
c. 35, s. 14.

After a charge of debts, &c., on his real and personal estates, a testator devised the estates to trustees, their heirs and assigns, upon trust for his wife for life, and then for his daughter for her separate use for life, and after her death to the use of such persons as she should appoint by will, and in default of appointment, to the use of her right heirs; and the testator charged his estate with 700*l.* to be paid to his granddaughter when she attained twenty-one. *Wood*, V.-C., said, the testator having charged his real estate with a sum of money must be taken to have given an implied power of sale to some person to raise the sum required. The donee of the power must be ascertained in each case from the whole will. In that case it appeared to him that the persons who were intended to sell were the trustees. (*Eidsforth v. Armstead*, 2 K. & J. 333.)

A testator directed his debts to be paid, and subject thereto devised real estate to E. upon certain trusts, and appointed E. executor. Twenty-seven years after the testator's death, and nine years after the death of E., the executors of E. sold the estate. It was held, that a good title could be made under the implied power of sale, and that the vendors were not bound to state whether there existed any debts which made a sale necessary. (*Sabin v. Heape*, 27 Beav. 553.)

Where A. devised his realty, after his debts, funeral and testamentary expenses should be paid thereout, to trustees, for certain persons, and after the death of the survivor of those persons, upon trust to sell, with power to give receipts: it was held, that the trustees, notwithstanding the preceding implied power in the executors, could make a good title without the executor's concurrence. (*Hodkinson v. Quin*, 1 Johns. & H. 303; 7 Jur., N. S. 65; 30 Law J., Chan. 118; 9 W. R. 197.) In this case *Wood*, V.-C., said, "It was decided that where there is a charge of debts and no distinct provision as to the person by whom a sale is to be made, then the executors take an implied power to sell for the payment of debts, though the persons beneficially interested are capable of concurring, and that where an attempt is made to resist the sale, the executors are entitled to a conveyance of the legal estate. (*Ib.*, 1 Johns. & H. 309.)

Mr. Lewin considers that, where a testator charges his real estate with debts, and then devises it upon certain trusts, which do not provide for a sale, or perhaps even negative the intention of conferring a power of sale, the trustee without the concurrence of the executor could give a good title. (Lewin on Trusts, 342, 5th ed.) And Mr. Dart is of the same opinion. (Vend. & Pur. 567, 4th ed.)

In the case of wills since this act, the devisee in trust has power to sell or mortgage under this section.

Where a testator gave his real and personal estate to A., subject to the payment of his debts and certain annuities, and appointed him executor, it was held, that A. could make a good title to the estate without the concurrence of the annuitants, and that a purchaser from A. was not bound to see to the application of the purchase-money. (*Page v. Adam*, 4 Beav. 269; *Elliot v. Merryman*, 1 White & Tudor, L. C., Eq. 51.)

Case where a testator charges land with his debts and devises the land beneficially.

Lord *Cranworth* observed, "Where there is a general charge of debts and no legal estate given, it may be, that, as against the heir at law, the executors may sometimes, perhaps always, possess impliedly a power to convey the legal estate in order to raise the money to satisfy the charge, but that doctrine certainly does not apply to a case where the estate is devised to others or to another, charged with certain payments of debts or legacies: there that money is to be raised through the instrumentality of a sale by

22 & 23 Vict.  
c. 35, s. 14.

the devisee, and that devisee is the person and the only person that can make a legal title." (*Colyer v. Finch*, 5 H. L. C. 922.)

Mr. Lewin states, that while there was no case in which the question had arisen whether the devisee alone could make a good title, the prevalent opinion, before the recent cases, had been that a devisee subject to debts could sign a receipt for the purchase-money. (Lewin, Trusts, 344; and see Dart, V. & P. 568.) Mr. Waley considers the legitimate conclusion from the recent cases to be, that the power of sale of the executors must prevail notwithstanding a beneficial devisee in fee; and must override the title not only of the devisee himself, but of his alienees. (2 Davidson, Conv. 990.)

By 22 & 23 Vict. c. 35, s. 18, the case of a beneficial devise in fee is excepted from the operation of this act, and the concluding words of that section seem almost tantamount to a declaration by the legislature that beneficial devisees subject to a charge have power to sell or mortgage. (Lewin, Trusts, 343.) Mr. Waley concludes that if the doctrine of an implied power of sale in the executor is maintained, it will be necessary (in the case of wills before the act), to recognize the existence of concurrent powers of sale in the executor and beneficial devisee, so that a good title will be acquired from the one first selling; and that this anomaly will continue, even in the case of wills since the act. (2 Davidson, Conv. 991, 3rd ed.)

Case where a testator charges land with his debts and devises the land for life, with remainders over

A testator devised lands for life with contingent remainders over, and then devised other lands to another tenant for life with contingent remainders over, and charged the latter lands with the payment of a mortgage on the former lands, and also with his debts generally, but he gave no express power of sale: it was held, that the executor took a power of sale by implication, and that after a sale of the latter lands by the executor the devisees of the former had no equity against the purchaser in respect of the charge of the mortgage debt. (*Robinson v. Lowater*, 5 De G., M. & G. 272; 17 Beav. 592.) The judgment of *Turner*, L. J., in this case proceeded upon the ground that it must have been in the contemplation of the testator that the debts should be raised immediately, but no power being given to the devisees to raise it, and the will containing a devise of a life estate with contingent remainders over, it was impossible during the subsistence of those contingent remainders the devisees could themselves raise it. On the face of the will therefore it was not the intention of the testator that the money should be raised by the devisees. It seemed, therefore, without reference to the cases decided upon the subject, that in this case at least it was the intention of the testator that the money should be raised by the executor, and that the executor must be considered as invested with all necessary powers for that purpose. (S. C., 5 De G., M. & G. 277.)

Where a mortgagor died, having devised the mortgaged hereditaments, after payment of debts, to his executrix for life, with remainder to his children, it was held, in a foreclosure suit, that although the executrix had a power of sale available for the plaintiffs in a creditor's suit, she had not in a foreclosure suit. (*Bolton v. Stannard*, 6 W. R. 570.)

Where a testator directed his debts to be paid by his executrix, and he devised his real estate to her for life with remainders over, and he gave his executrix power to mortgage his real estate as far as should be needful for her maintenance and comfort: it was held, that the executrix had no power of sale for payment of the debts. In this case the debts were not charged on the real estate; it being assumed that the testator meant that the debts should be paid only out of the property which by law passes to the executor. (*Cook v. Dawson*, 29 Beav. 128; 3 De G., F. & J. 127.)

Where, in a will since this act, a testator charges his debts and devises his real estate to A. for life, with contingent remainders over, the case seems to fall within sect. 16, under which the executors have power to sell or mortgage. (Lewin, Trusts, 348.)

Case where a testator charges land with his debts and the land is not devised but descends to the heir.

Where a testator charged his real estate with the payment of his debts, and the real estate was not devised, but descended to the heir, it was held, at law, that the executor had no legal power of sale. (*Doe d. Jones v. Hughes*, 6 Exch. 223.)

Mr. Lewin conceives that the executor has an equitable power of sale,

and that the holder of the legal estate is a trustee for him. (Lewin on Trusts, 346, 5th ed.) See the remarks of Lord Cranworth in *Colyer v. Finch*, 5 H. L. C. 922, *ante*, p. 485.

22 & 23 Vict.  
c. 85, s. 14.

Where real estate was being sold for payment of debts, and the legal estate was in the heir, who was out of the jurisdiction, and the charge of debts was not clear, the court declared the heir to be a trustee for the purposes of the will, and made a vesting order under 13 & 14 Vict. c. 60, s. 9. (*Hooper v. Strutton*, 12 W. R. 367.)

Where an estate charged with debts under a will since this act is not devised but descends to the heir, the case seems to fall within sect. 16, under which the executors have power to sell or mortgage.

Where in a will since the act a testator charges his debts, and devises his real estate beneficially, and the devisee dies in the testator's lifetime, so that the estate lapses, Mr. Lewin considers that the case falls within sect. 16. (Lewin on Trusts, 347, 5th ed.)

Lapse.

A testator, who died in 1853, devised real estate to A. in trust to sell, with power to give discharges; A. was to pay the debts and hold the surplus on certain trusts, and was also appointed sole executor; A. having renounced and disclaimed, it was held, that the heir at law who had taken out administration could sell the estate and give valid receipts. (*Austin v. Martin*, 29 Beav. 523; but see *Robson v. Flight*, 13 W. R. 393.)

Disclaimer.

In the case of wills before this act, it seems that the implied power of sale which executors take under a charge of debts, is merely an equitable power; and that the concurrence of the heir or devisee is necessary to pass the legal estate. (Dart. V. & P. 567, 4th ed.; Lewin on Trusts, 346, 5th ed.) In the case of wills since the act, the power of sale taken by executors under sect. 16, seems to be a legal power.

Executor's power  
of sale, whether  
legal or equitable.

The power implied under a charge of debts in wills before this act has been held to exist notwithstanding the lapse of a considerable time. Thus, in *Greetham v. Colton* (34 Beav. 615), thirteen years; in *Forbes v. Peacock* (1 Phill. 717), twenty-five years; in *Sabin v. Heape* (27 Beav. 853), twenty-seven years; and in *Wrigley v. Sykes* (21 Beav. 837), thirty-three years, had elapsed between the testator's death and the sale. It was said, however, by Lord Romilly, M. R., "In all probability there must be some limit in these cases, and some period at which the court will say that the debts must have been paid, and when it would be very difficult to make a good title upon a sale made to satisfy a charge on real estate contained in a will." (*Sabin v. Heape*, 27 Beav. 560.)

Effect of lapse of  
time upon execu-  
tor's power of  
sale.

As to whether a power to sell implies a power to mortgage, see 2 Davidson, Conv. 985, 986, 3rd ed.

Power to mort-  
gage.

It was formerly held that, in the absence of any special direction, an express power to mortgage did not authorize a mortgage with a power of sale. (*Clarke v. Royal Panopticon*, 4 Drew. 26. See *Russell v. Plaice*, 18 Beav. 21.) But a power to raise money by sale or mortgage was held to authorize a mortgage with a power of sale. (*Bridges v. Longman*, 24 Beav. 27.) It has been since held, that under a direction in a will to trustees to raise a sum of money by mortgage of a trust estate, in such manner as they should think fit, the trustees could create a mortgage with a power of sale. (*Re Chamber's Will*, L. R., 8 Eq. 569. See *Cruikshank v. Duffin*, L. R., 13 Eq. 555.) A mere power to mortgage does not create an additional power to sell. (*Cook v. Dawson*, 29 Beav. 128.)

By 23 & 24 Vict. c. 145, ss. 11—16, 34 (*post*), where mortgages are created by deed since 28th August, 1860, and there is no provision to the contrary, any mortgagee, although the deed contains no power of sale, may, when the principal sum has been in arrear for twelve months, or the interest for six months, or there has been any default by the mortgagor in insuring, proceed to a sale after six months' notice, and sign a valid receipt for the purchase-money.

15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise,

Powers given by  
last section ex-  
tended to sur-  
vivors, devisees,  
&c.

22 & 23 Vict.  
c. 35, s. 15.

or to any person or persons who may be appointed under any power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid (c).

(c) See the questions which have been raised as to how far the devisee of a trust estate can execute the trust. (*Braybrooke v. Inskip*, Tudor's L. C., Conv. 892, 2nd ed.)

Executors to have power of raising money, &c. where there is no sufficient devise.

16. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any), shall have the same or the like power of raising the said monies as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate (d).

(d) See note to sect. 14, *ante*.

Purchasers, &c. not bound to inquire as to powers.

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Sections 14, 15 and 16 not to affect certain sales, &c., nor to extend to devises in fee or in tail.

18. The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do (e).

(e) See note to sect. 14, *ante*.

Not to be bound to see to the application of purchase-money.

23. The bonâ fide payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security (f).

(f) See also 23 & 24 Vict. c. 145, s. 29, *post*, as to the present law.

Previous law as to purchaser's obligation in case of

Before these statutes, where a will contained no express trust or charge for payment of debts, a purchaser of the testator's land sold for payment

of debts, was not bound to see to the application of the purchase-money, where the land was made assets, either by 11 Geo. 4 & 1 Will. 4, c. 47 (see *ante*, p. 468); or by 3 & 4 Will. 4, c. 104 (see *ante*, p. 477).

Where a will contained an express trust or charge for payment of debts generally, a purchaser was not bound to see to the application of the purchase-money (Williams, Real Assets, 51, 62): even where a testator charged the land with a specified debt, and also with his other debts generally. (*Robinson v. Lowater*, 17 Beav. 592; 5 De G., M. & G. 272.)

The rule which relieved a purchaser from seeing to the application of the purchase-money, when the estate was subject to a primary general charge of debts, had reference to the time of the testator's death, and did not cease to be applicable, though the debts were subsequently paid; and, therefore, where an estate so charged was sold by the trustee, it was held, that the *cestui que trusts* were not necessary parties to the conveyance, though the sale did not take place till twenty-five years after the testator's death, and the vendor, on being asked by the purchaser, whether all the debts were not paid, had refused to answer the question. (*Forbes v. Peacock*, 1 Phill. C. C. 717. See *Stroughill v. Anstey*, 1 De G., M. & G. 653.)

Where a testator, "in case his personal estate should be insufficient for the payment of his debts," charged the same upon his real estate, it was held that the executor could sell and give valid receipts for the purchase-money, without showing the insufficiency of the personal estate. (*Greetham v. Colton*, 34 Beav. 615.)

Where debts and legacies were charged generally, a purchaser was not bound to see to the application of the purchase-money. (*Johnson v. Kennett*, 3 M. & K. 630.) Freehold and leasehold estate was devised to A., subject to the payment of debts and annuities. A. sold the real estate. The purchaser, insisting that the annuitants ought to concur, filed a bill against the vendor for a specific performance. The vendor's answer admitted the sufficiency of the personal estate to pay the debts; that they had all been paid since the contract, and that the sale had not been made for the specific purpose of satisfying the debts. It was held, that these circumstances did not vary the rule as to the liability of the purchaser to see to the application of the purchase-money, and that he was bound to complete. (*Page v. Adam*, 4 Beav. 269. See *Jones v. Price*, 11 Sim. 557; Sugd. V. & P. 840, 841, 11th ed.)

It was a general rule, that where debts are charged generally, the purchaser or mortgagee was not bound to see to the application of the money. But where real estate was devised subject to debts and legacies, and the devisee was also executor, a purchaser or mortgagee from him of the real estate was held liable to the charge, where the circumstances of the transaction afforded intrinsic evidence of a breach of trust, and that the mortgage or purchase-money was not to be applied for payment of the debts and legacies. (*Watkins v. Cheek*, 2 Sim. & Stu. 199. See *Eland v. Eland*, 4 My. & Cr. 420.)

Where the trust was for payment of specified debts, or of legacies only, the purchaser was bound to see to the application of the purchase-money. (Lewin on Trusts, 336, 5th ed.) And it was decided, that where a person who was a trader at his death devised his real estates, subject to the payment of legacies, the purchaser of the estate from the devisee was bound to see to the application of his purchase-money in satisfaction of the legacies charged on the land, notwithstanding their liability under 47 Geo. 3, sess. 2, c. 74, to the payment of the simple contract debts. (*Horn v. Horn*, 2 Sim. & Stu. 448.)

It seems to be doubtful whether this section is retrospective. (See Lewin on Trusts, 332, 5th ed., and *Bennett v. Lytton*, 2 J. & H. 158.)

See, further, as to the liability of a purchaser to see to the application of the purchase-money, *Elliot v. Merryman*, 1 White & Tudor's L. C., Eq. 59 *et seq.*, and the note to 23 & 24 Vict. c. 145, s. 29, *post*.

22 & 23 Vict.  
c. 35, s. 23.

sale for payment  
of debts or lega-  
cies:

Where express  
trust or charge  
for payment of  
debts generally;

For payment of  
debts and lega-  
cies;

For payment of  
particular debts  
or legacies.



## PAYMENT OF MORTGAGE DEBTS.

17 & 18 VICTORIA, c. 113.

*An Act to amend the Law relating to the Administration of the Estates of Deceased Persons.*

[11th August, 1854.]

17 & 18 Vict.  
c. 113, s. 1.

Heir or devisee of  
real estate not to  
claim payment of  
mortgage out of  
personal assets.

Not to affect  
rights claimed  
under any will,  
&c. before 1st  
January, 1855.

Extent of act.

Previous law as  
to the payment of  
mortgage debts.

WHEREAS it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted as follows:

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five (a).

2. This act shall not extend to Scotland.

(a) Before this act it followed from the known rules, both of law and equity, that as between the real and personal representatives of the *debtor*, the personal estate was primarily liable to the payment of the mortgage debt, and must indemnify the real estate against it. All instances to the contrary were mere exceptions to that general rule, and whether the lands in mortgage devolved on the heir at law as *heres natus*, or on a general devisee as *heres factus*, or on a particular devisee, in either case the personal estate was liable, in the absence of evidence of intention to the contrary, as the primary fund, to exonerate the real estate descended or devised from the debt. (See Coote on Mortgages, p. 452, 3rd ed.; 2 Jarm. Wills,

597.) The rule previous to this act was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the act was to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty. (*Goodwin v. Lee*, 1 Kay & J. 378; *Smainson v. Smainson*, 6 De G., M. & G. 652.)

17 & 18 Vict.  
c. 113, s. 1.

For the previous law as to the exoneration of estates from mortgage debts contracted, or adopted, by the owner, and also as to the acts which amounted to an adoption of a mortgage debt, see further, *Duke of Ancoaster v. Mayer*, 1 White & Tudor, L. C., Eq. 656 *et seq.*

The act applies to copyholds (*Piper v. Piper*, 1 J. & H. 91), but not to leaseholds. (*Solomon v. Solomon*, 12 W. R. 540.) Where freeholds were settled by deed upon trusts for conversion, a share in the produce, which was under the terms of the deed taken as personal estate, was held not to be an "interest in land" within the act (*Lewis v. Lewis*, L. R., 13 Eq. 218.) It seems that where an interest in land is given by a testator, with the option of retaining it in specie, or of having it converted, a person, electing to take without conversion, must under the act, in the absence of a contrary intention on the part of the testator, take *cum onere*; but in case he takes it as converted, the act does not apply. (*Ib.*) As to when a legatee of an incumbered chattel is entitled to claim exoneration, see 2 Jarm. Wills, 595 *et seq.*

Land, &c. within  
the act.

An equitable mortgage by deposit and memorandum is within the act (*Pembroke v. Friend*, 1 J. & H. 132), even where the memorandum expressed that the deposit was made as collateral security for the repayment of a sum borrowed upon a promissory note. (*Coleby v. Coleby*, L. R., 2 Eq. 803.)

Charge by way of  
mortgage within  
the act.

The act only applies where there is a defined and specified charge upon a specific estate, and to the extent of that charge. A general charge on real estate by a testator, in aid of his personal estate, does not come within the definition of such a mortgage as is spoken of in the act, unless and until the amount of it has, in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate, subject to such ascertained charge. (*Hepworth v. Hill*, 30 Beav. 476.)

Where A. conveyed estate (No. 1) to B., on B. covenanting to pay off a mortgage debt, due from A. on estate (No. 2), it was held, that as between the real and personal representatives of B. his personal estate was primarily liable to the mortgage debt. (*Day v. Day*, 14 W. R. 261.)

A. granted a Scotch estate to his son under the burden of the payment of a mortgage debt, secured upon another estate belonging to A. in England. A. died, domiciled in England, and by his will he appointed executors, directed payment of his just debts as soon as conveniently might be after his death; and devised the mortgaged estate to the grantee of the Scotch estate. It was held, that the mortgage debt was properly payable out of the Scotch estate, and that the testator's general personalty was exonerated therefrom. (*Smith v. Moreton*, 37 L. J., Ch. 6; W. N. 1867, p. 251.)

A lien for unpaid purchase-money was held not to be a charge by way of mortgage within the act. (*Hood v. Hood*, 5 W. R. 74; *Barnwell v. Ironmonger*, 1 Dr. & Sm. 260.) The word "mortgage" has since been extended so as to include a lien for unpaid purchase-money upon lands or hereditaments purchased by a testator. (30 & 31 Vict. c. 69, s. 2.) But where the purchaser dies intestate, the last-mentioned section does not apply. (*Harding v. Harding*, L. R., 13 Eq. 493.)

Vendor's lien.

Where the personalty goes to the crown for want of next of kin, it has been held, notwithstanding the words of the act, "as between the different persons claiming through or under the deceased person," that the statute applies, and the crown takes exonerated from mortgage debts. (*Dacre v. Patrickson*, 1 Dr. & Sm. 186.)

Act applies in  
favour of crown.

A will, executed by the testator before 1855, but not coming into operation until after that date, is, as between the claimants under it, "a will already made," within the proviso, and republication at a time subsequent to the 1st January, 1855, does not deprive it of this character.

Proviso in the  
act.

17 & 18 Vict.  
c. 113, s. 1.

(*Rolfe v. Perry*, 3 De G., J. & S. 481.) The proviso was held not to apply to the case of an heir, where the intestate, before 1855, had executed a mortgage, reserving the equity of redemption to himself and his heirs. (*Piper v. Piper*, 1 J. & H. 91.) Nor where the personal estate had been bequeathed by a will made before 1855. (*Power v. Power*, 8 Ir. Ch. R. 340.) The heir of a testator, taking by descent an estate which has been the subject of a lapsed devise in a will made prior to 1855, was held to take *cum onere*, inasmuch as he was not a person claiming "under or by virtue of a will" within the meaning of the proviso. (*Nelson v. Page*, L. R., 7 Eq. 25.)

Contrary intention  
within the act.

Lord Campbell's  
dictum in *Wool-  
stencroft v. Wool-  
stencroft*.

Lord Campbell, C., expressed an opinion that the same rule should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, as was before observed with respect to exempting the personal estate, the mortgaged land being now primarily liable, as the personal estate had been previously. Expressed intention was formerly allowed to prevail over the usual rule of law, but the intention to transfer the liability from the personal estate to the heir or devisee of the mortgaged land was required to be clear and unequivocal. (*Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 350, 351.)

Turner, L. J., said, "With reference to the above *dictum* of Lord Campbell, that the rule which had been before observed with respect to exempting personal estate, should now be observed with respect to exempting the mortgaged land from the payment of the mortgage money, probably meant no more than that the intention must be clearly proved. If Lord Campbell intended to say, that, as before the act it had been necessary to show an intention, not only to charge the mortgaged estate, but also to discharge the personalty, so now it was necessary to show an intention, not only that another fund should be charged, but also that the mortgaged estate should be discharged," Turner, L. J., was not prepared to follow him. In order to take a case out of the act, it was sufficient to show a contrary or other intention: this destroyed the analogy between the two cases. In the one case the intention to be proved was contrary to the established law; in the other, it was only contrary to a statutory rule expressly made dependent upon intention. (*Eno v. Tatham*, 11 W. R. 476; 3 De G., J. & S. 443.) In *Mellish v. Vallins* (2 Johns. & H. 199), Wood, V.-C., said, "That he had not been able to satisfy himself, that in cases under the act the rule suggested by Lord Campbell is applicable." (See the observations of Stuart, V.-C., *Smith v. Smith*, 3 Giff. 263.) Lord Westbury remarked, that he should be unwilling to hold that a mere technical rule of interpretation was to be regarded in all cases as sufficient to exclude, or signifying marks of intention so as to bring the case within, the statute: and that it might probably be better to rest each case on its own particular circumstances, collecting the signification and intention in every particular case, not from the words only, but also from the effect of the disposition, from the whole will and the nature of the gifts made by the will. (*Rolfe v. Perry*, 3 De G., J. & S. 486.)

In the case of persons dying after the 31st December, 1867, regard must be had to 30 & 31 Vict. c. 69 (*post*), in determining the question whether an intention has been expressed to exclude the operation of the act. But upon this question in the case of persons dying before 1868, the following distinctions have been laid down.

Cases as to per-  
sons dying before  
1868.

Where a testator directs his debts to be paid out of some particular fund or property, or description of property, out of which, according to the rule established by the statute, they would not be primarily payable, he must be taken to signify an intention to exclude the statutory rule: but when he merely directs his debts to be paid, or to be paid out of his estate generally, he does not signify an intention to exclude that rule. (Per Romilly, M. R., *Brownson v. Lawrence*, L. R., 6 Eq. 5.) Whenever a testator has mortgaged his estates, and by his will provides a fund, either his residuary personal estate, or an estate devised for the purpose, or the general personal estate and other property mixed up with it, or, in other words, when he provides a fund of any description whatever for the payment of his debts; that is an indication of an intention that the land is not to be

the primary fund within the act; but that the personal estate or the particular fund provided is to exonerate it from the mortgage debt. (Per *Malins, V.-C., Macmillan v. Hyslop*, L. R., 4 Eq. 413.)

17 & 18 Vict.  
c. 113, s. 1.

A direction in a will that "all just debts be paid as soon as may be," followed by a devise in fee of a freehold house (which was subject to an equitable mortgage), was held not to be such an expression of a contrary intention as to bring the case within the saving of this act, and consequently that the devisee took *cum onere*. *Wood, V.-C.*, said, "The testator does not say that the debts are to be paid out of his personal estate or by his executors. Had he used the words, 'by my executors,' there would have been something on which to build the conclusion that he meant to express an intention that the general statutory rule should not apply. There would have been more room for the argument if the property had been devised in strict settlement; but the gift to the widow being in fee, there was nothing to prevent a sale for payment of the mortgage debt immediately after the testator's death." (*Pembroke v. Friend*, 1 J. & H. 182, 184.) Where, however, a testator, after giving a general direction that his debts should be paid as soon as could be after his decease, devised in strict settlement estates which were subject to mortgages, directed the trustees, during minorities, to receive the rents and profits of the estates, and thereout, amongst other things, to keep down the interest of any sums which might be charged by way of mortgage or otherwise on the premises; gave power of sale and exchange over part of the mortgaged estates only; and bequeathed his residuary personalty to his next of kin; it was held, that the act was not excluded. (*Coote v. Lowndes*, L. R., 10 Eq. 376.) Where a testator directed that all his just debts should be paid out of his estate, the act was held not to be excluded. (*Brownson v. Lamrance*, L. R., 6 Eq. 1.)

Expressions not  
excluding the act.

A direction in a will that all the testator's just debts, funeral and testamentary charges and expenses should be paid and discharged *by his executors*, as soon as convenient after his decease, out of his estate, followed by a gift of all the testator's real and leasehold estates (which were subject to a mortgage) to trustees, who, with his wife, were named also executors of his will: was held, not to exclude the act. (*Woolstencroft v. Woolstencroft*, 2 De G., F. & J. 347, overruling *Stuart, V.-C.*, 2 Giff. 192.)

A direction by a testator that all his just debts and funeral and testamentary expenses should be paid and discharged out of his personal estate did not exclude the act. (*Rowson v. Harrison*, 31 Beav. 207.)

In *Smith v. Smith* (3 Giff. 263), a testator devised a house, which was subject to a mortgage, to his daughter in fee, and bequeathed all his personal estate to trustees (of whom his daughter was one), and he declared that they should thereout pay his debts, and "subject thereto" divide the residue amongst his children. *V.-C. Stuart* was of opinion, that the circumstance that the devise of the mortgaged estate was to one of the trustees who had been plainly directed by the testator to pay all the debts out of the personal estate, made such a distinction between that case and *Woolstencroft v. Woolstencroft* (*ante*), that he could not consider the language of this testator's will and the construction put upon it as bound by that decision. His Honor held that the act was excluded. (*Smith v. Smith*, 3 Giff. 275.)

Expressions ex-  
cluding the act.

Where a testator bequeathed his personal estate to trustees upon trust to pay thereout all his debts, funeral and testamentary expenses, and invest the residue upon the trusts therein mentioned, and disposed of his real estate, part of which was subject to a mortgage, it was held that the act was excluded. (*Moore v. Moore*, 1 De G., J. & S. 602, reversing M. R., 10 W. R. 877; *Porcher v. Wilson*, 12 W. R. 1001.)

A bequest of personalty, "subject to the payment thereout of all the testator's just debts," following a devise of land in mortgage which made no reference to the mortgage, was held to exclude the act. (*Mellish v. Vallins*, 2 J. & H. 194.) A gift of all the testator's personal estate, "subject to the payment of his debts, funeral and testamentary expenses," was held sufficient to charge the personalty with the payment of mortgage debts. The real estate was devised in a mode not pointing in any way to

17 & 18 Vict.  
c. 113, s. 1.

the mortgage debt being paid out of the property, the trustees were to let the property, to apply the rents for maintenance, and in a certain event to sell and hold the proceeds upon certain trusts. (*Eno v. Tatham*, 11 W. R. 475; 3 De G., J. & S. 443.)

A testator, having mortgaged his real estate for 6,000*l.*, by his will devised it to his wife for life, and afterwards to four of his children and their issue. The residue of his real and personal estate was given to trustees upon trust for sale, and the monies arising therefrom were to be held upon trust in the first place to pay his funeral and testamentary expenses, and debts, and to invest the residue for the benefit of his six children. It was decided that the personal estate, and the proceeds of the sale of the testator's real estate, were primarily liable to discharge the mortgage debt of 6,000*l.* (*Newman v. Wilson*, 31 Beav. 33.) And where a testator gave the residue of his real and personal estate to trustees upon trust to convert and pay thereout all his just debts, &c., it was held that a heritable bond charged upon Scotch realty was primarily payable out of the residuary estate. (*Maxwell v. Hyslop*, L. R., 4 Eq. 407; 4 H. L. 506.)

In *Stone v. Parker* (1 Drew. & Sm. 212), the testator declared that his trustees should stand possessed of his residuary real and personal estate, and the proceeds thereof, subject in the first place to the payment of his just debts, &c., and, in a subsequent passage, empowered the acting trustees and executors for the time being of his will to pay and satisfy any debts owing or claimed to be owing by or from him, and any liabilities to which he or his estate might be subject. *Kindersley*, V.-C., was of opinion that the testator had signified an intention to exonerate a real estate specifically devised from a mortgage charged upon it.

Where a testator left the residue of his real and personal estate "after paying his mortgage and other debts," to be divided in certain shares, it was held that a mortgage was payable primarily out of the residue. (*Greathed v. Greathed*, 26 Beav. 621.)

A testatrix had an estate (A.), which she had mortgaged, and an estate (B.), which had been mortgaged by a former owner. She devised A. for sale and payment of some legacies, and she devised the residue of her real and personal estate, including B., under her two sons in fee. The testatrix directed any mortgages, debts or incumbrances, specifically affecting any parts of her residuary real or personal estate before disposed of, to be exclusively borne by and paid out of the premises specifically charged therewith; and subject thereto the testatrix directed all her debts, &c., to be paid out of her said residuary real and personal estate. It was held, that the mortgage on A. was primarily payable out of the residuary real and personal estate. (*Allen v. Allen*, 30 Beav. 395.)

The owner of the equity of redemption of two estates comprised in the same mortgage, specifically devised one estate and left the other to pass by a residuary devise; it was held, that he thereby signified a "contrary or other intention" within the act, so as to make the estate which passed by the residuary-devise primarily liable to the whole of the mortgage debt. (*Brownson v. Lawrence*, L. R., 6 Eq. 1; but see the remarks of *Malins*, V.-C., on this decision in *Gibbins v. Eyden*, L. R., 7 Eq. 375.)

As to the order in which funds are to be applied in payment of a mortgage debt, where the statutory rule has been excluded by the expression of a contrary intention, see the observations of M. R., in *Allen v. Allen*, 30 Beav. 395; and the argument in *Smith v. Moreton*, 37 L. J., Ch. 6; see also 2 Fisher on Mortgages, 756, 2nd ed. It may be the result of a testator's words that a mortgaged estate is to be exonerated only so far as his personalty extends; and that there is no right to go upon the other real estate. (*Rodhouse v. Mold*, 13 W. R. 854.)

Where the mortgage debts of a testator are (under a direction in his will) primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied; the pecuniary legatees and annuitants being entitled to have the assets marshalled, so that any payments in respect of the mortgage

Order in which  
funds are appli-  
cable where statu-  
tory rule ex-  
cluded.

Marshalling.



debt out of the personal estate would have to be recouped by the mortgaged estate. (*Porcher v. Wilson*, 14 W. R. 1011.)

17 & 18 Vict.  
c. 113, s. 1.

As to the apportionment of a mortgage debt between several estates comprised in the same mortgage, see 2 Fisher on Mortgages, 756, 2nd ed.; Story, Eq. Jur. sects. 484, 1233 b. Where freeholds and leaseholds were mortgaged together, and the mortgagor died intestate, it was held, as between his heir and administrator, that the freeholds and leaseholds must bear the burden rateably. (*Erans v. Wyatt*, 31 Beav. 217; see *Lipscomb v. Lipscomb*, L. R., 7 Eq. 501; *De Rochfort v. Daves*, L. R., 12 Eq. 540.) But where the owner of estates A. and B. mortgaged estate A. for 800*l.*, and on the same day charged estate B. in aid, to the extent of 200*l.*, and died having devised B., but intestate as to A.; it was held, that as between his devisee and heir the whole 800*l.* was primarily chargeable on estate A. (*Stringer v. Harper*, 26 Beav. 33.)

Contribution.

## PAYMENT OF MORTGAGE DEBTS.

30 &amp; 31 VICTORIA, C. 69.

*An Act to explain the Operation of an Act passed in the Seventeenth and Eighteenth Years of her present Majesty, Chapter One hundred and thirteen, intituled "An Act to amend the Law relating to the Administration of Deceased Persons."*  
[25th July, 1867.]

30 & 31 Vict.  
c. 69, s. 1.

WHEREAS by an act passed in the seventeenth and eighteenth years of her present Majesty it is enacted, among other things, when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof:

And whereas doubts may exist upon the construction of the said act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate (a).

In construing wills, general direction for payment of debts out of personalty not to include mortgage debts, unless such intention expressly implied.

(a) The meaning of this section appears to be this—that if a testator wishes to give a direction which shall be deemed a declaration of an intention contrary to the rule laid down by Mr. Locke King's Act, it must be a direction applying to his mortgage debts in such terms as distinctly and unmistakeably to refer to or describe them. (Per *Giffard*, V.-C., *Nelson v. Page*, L. R., 7 Eq. 28.)

30 & 31 Vict.  
c. 69, s. 1.

Where a testator devised and bequeathed the residue of his estate to trustees upon trust, after payment thereof of all his debts and subject thereto, for A. absolutely; it was said by *Malins*, V.-C., that there was an absence of any "contrary intention" on the part of the testator, within the meaning of 17 & 18 Vict. c. 118 and 30 & 31 Vict. c. 69, to exonerate the mortgaged estate from the mortgage debts. (*Lewis v. Lewis*, L. R., 13 Eq. 218.)

For the previous cases as to a "contrary intention" within 17 & 18 Vict. c. 69, see *ante*, p. 492.

2. In the construction of the said act and of this act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator (b).

Interpretation of  
word "mort-  
gage."

(b) This section does not apply where the purchaser dies intestate. (*Harding v. Harding*, L. R., 13 Eq. 493.)

3. This act shall not extend to Scotland.

Extent of act.

## AMENDMENT OF THE LAWS RESPECTING WILLS.

1 VICTORIA, c. 26.

*An Act for the Amendment of the Laws with respect to Wills.*  
[3rd July, 1837.]

1 Vict. c. 26,  
s. 1.

Meaning of cer-  
tain words in this  
act;

"Will:"

12 Car. 2, c. 24.

14 & 15 Car. 2  
(L)

"Real estate:"

"Personal estate:"

Number:

Gender:

Repeal of the Sta-  
tutes of Wills,  
32 Hen. 8, c. 1,  
and 34 & 35  
Hen. 8, c. 5.

BE it enacted, that the words and expressions hereinafter men-  
tioned, which in their ordinary signification have a more con-  
fined or a different meaning, shall in this act, except where the  
nature of the provision or the context of the act shall exclude  
such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

2. An act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a Man may devise Two Parts of

his Land ;” and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled “The Bill concerning the Explanation of Wills ;” and also an act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled “An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins ;” and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled “An Act for Prevention of Frauds and Perjuries,” and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled “An Act for Prevention of Frauds and Perjuries,” as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate pur autre vie, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise or bequest therein ; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled “An Act for the Amendment of the Law and the better Advancement of Justice,” and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled “An Act for the Amendment of the Law and the better Advancement of Justice,” as relates to witnesses to nuncupative wills ; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled “An Act to amend the Law concerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth year of the reign of King Charles the Second, intituled ‘An Act for Prevention of Frauds and Perjuries,’ ” as relates to estates pur autre vie ; and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled “An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty’s Colonies and Plantations in America,” except so far as relates to his Majesty’s colonies and plantations in America ; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled “An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates ;” and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled “An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will,” shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates pur autre vie to which this act does not extend.

1 *Vict. c. 26,*  
s. 2.

10 *Car. 1, sess. 2,*  
c. 2 (L.)

Sects. 5, 6, 12, 19,  
20, 21 and 22 of  
the Statute of  
Frauds, 29 *Car. 2,*  
c. 3; 7 *Will. 3,*  
c. 12 (L.)

Sect. 14 of 4 & 5  
*Anne, c. 16.*

6 *Anne, c. 10 (L.)*

Sect. 9 of 14 *Geo.*  
2, c. 20.

25 *Geo. 2, c. 6*  
(except as to  
colonies).

25 *Geo. 2, c. 11*  
(L.)

55 *Geo. 3, c. 192.*

3. It shall be lawful for every person (a) to devise, bequeath or dispose of, by his will executed in manner hereinafter re-

All property may  
be disposed of by  
will,



1 Vict. c. 26,  
s. 2.

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

Wills of realty governed by the *lex loci rei sitæ*; wills of personalty by the *lex domicilii*.

Aliens

quired, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir at law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*b*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*c*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates pur autre vie, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate (*d*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

(*a*) A will of realty is governed by the *lex loci rei sitæ*. (1 Jarm. Wills, 1.) In the case of personalty, the law of the country in which the deceased was domiciled at his death not only decides the course of distribution or succession, but regulates the decision as to what constitutes the last will. (1 Wms. Exors. 352; *Lynch v. Paraguay*, L. R., 2 P. & M. 268.) The provisions of 1 Vict. c. 26 apply only to persons having an English domicile. (*Croker v. Marquis of Hertford*, 4 Moore, P. C. 339; *Bremer v. Freeman*, 10 Moore, P. C. 306; 5 W. R. 618.) But as to the form in which wills of personalty may be executed by British subjects dying after 6th August, 1861, see now 24 & 25 Vict. c. 114, *post*. As to conventions between this country and foreign countries for the purpose of determining the domicile of deceased persons, see 24 & 25 Vict. c. 121, *post*; and as to domicile generally, see 2 Wms. Exors. 1403; Hayes & Jarm. Wills, 581, 7th ed.; and *Douglas v. Douglas*, L. R., 12 Eq. 617, where the recent cases are discussed.

Aliens may dispose of personalty by will. (1 Wms. Exors. 10.) Aliens were formerly incapable of devising realty. (*Fourdrin v. Gowdey*, 3 M. & K. 383.) As to aliens claiming under a devise, see *Davies v. Lynch*, I. R.,

4 C. L. 570. But now real and personal property of every description may be taken, acquired, held, and disposed of by an alien in the same manner in all respects as by a natural-born British subject; and a title to real and personal property of every description may be derived through, from, or in succession to an alien, in the same manner in all respects as through, from, or in succession to a natural-born British subject. (33 & 34 Vict. c. 14, s. 2.) This last section is not retrospective. (*Sharp v. St. Sauveur*, L. R., 7 Ch. 343.)

1 Vict. c. 26,  
s. 3.

As to the power of the sovereign to dispose of personalty by will, see 39 & 40 Geo. 3, c. 88, s. 10; and to devise realty, see 39 & 40 Geo. 3, c. 4. See further, *Att.-Gen. v. Windsor*, 8 H. L. C. 369. *In the goods of Geo. 3*, 11 W. R. 190; 3 Sw. & Tr. 199.

The sovereign.

See as to the wills of infants, sect. 7 of this act; of married women, sect. 8; of soldiers and seamen, sects. 11 and 12; of lunatics, 1 Wms. Exors. 18 *et seq.* *Smith v. Tebbitt*, L. R., 1 P. & M. 398; *Banks v. Goodfellow*, L. R., 5 Q. B. 549.

Infant, married women, soldiers and seamen, lunatics.

(b) It was never intended that this section should make any kind of personalty bequeathable which was not bequeathable before. Therefore a testator cannot bequeath a promissory note, made to him, so as to pass the right to sue on it: such right is in the executor. (*Bishop v. Curtis*, 18 Q. B. 879.)

Chose in action.

A person in possession of land without other title has a devisable interest. (*Asher v. Whitlock*, L. R., 1 Q. B. 1; *Clarke v. Clarke*, L. R., 2 C. L. 895.) Even before the passing of this Act a person who had sold an estate under circumstances which entitled him in equity to have the sale set aside had in the estate an interest of such a nature as to be devisable. (*Gresley v. Mousley*, 4 De G. & J. 78.)

Devisable interests in land.

A doubt has been suggested whether this act extends to the case of a testator dying without heirs, and whether, therefore, in order to prevent an escheat, three witnesses should not in such a case attest the will as under the old law. (Williams, R. P. 120, note (u), 8th ed.)

Testator dying without heirs.

(c) The effect of this section in the case of copyholds is to enable a copyholder to devise his estate in every case, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till the admittance of the devisee. (*Garland v. Mead*, L. R., 6 Q. B. 441.) Where a copyholder devised his estate to trustees, appointing them guardians of his customary heir who was an infant, and the trustees without disclaiming tendered the infant heir for admittance, and the lord would not admit on account of the devise, the Court of Queen's Bench refused (as a matter of discretion) to grant a mandamus to compel the lord to admit the heir. (*Regina v. Garland*, L. R., 5 Q. B. 269.) But subsequently held, that the lord could not seize *quousque* for want of a tenant. (*Garland v. Mead*, L. R., 6 Q. B. 441.)

Copyholds:—  
Estate remains in heir till admittance of devisee.

(d) Before this Act, contingent and executory estates and possibilities accompanied with an interest were devisable. (*Selwin v. Selwin*, Burr. 1131; *Moore v. Hawkins*, 2 Eden's C. C. 342; *Roe v. Griffiths*, 1 Bl. Rep. 605; *Roe v. Jones*, 1 Hen. Bl. 30; *Jones v. Roe*, 3 East, 88; 17 Ves. 182; *Scawen v. Blunt*, 7 Ves. 800.) Such an interest, however, was not devisable at law where the person who was to take was not in any degree ascertainable before the contingency happened; as where there was "a devise to two equally, or to the survivor of them, and to be disposed of by her, the survivor, as she might by will devise;" the will of one of such devisees made during their joint lives, although she survived, was held inoperative. (*Doe d. Calkin v. Tomkinson*, 2 Maule & Sel. 164.) As to a power of appointing an equitable estate given to two persons or the survivor, see *Thomas v. Jones*, 1 De G., J. & S. 63. By this section contingent interests are devisable whether the testator may or may not be ascertained as the person, or one of the persons, in whom the same respectively may become vested. A contingent estate in fee under a shifting clause may be devised both under the old and new law. (*Ingilby v. Amcotts*, 21 Beav. 585.)

Contingent and executory interests.

Possibilities in personal estate could be disposed of by will as well as assigned in equity before this statute and 8 & 9 Vict. c. 106. (Ferne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 608; 1 P. Wms. 572; 3 P. Wms. 132.)

1 *Vict. c. 26,*  
s. 4.

See further as to what property may be devised or bequeathed, 1 *Jarm. Wills*, 40 *et seq.*

As to the fees and  
fines payable by  
devisees of custo-  
mary and copy-  
hold estates.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid (e).

(e) See 4 & 5 *Vict. c. 35*, ss. 88, 89, 90, as to admissions. The cases as to the admittance of devisees of copyholds and the fines payable are collected in *Fisher's Digest*, 1848—1855. As to the fines on admission payable by trustees of copyholds, see *Lewin on Trusts*, 191, 5th ed. *Bence v. Gilpin*, L. R., 3 Ex. 76; *Bristow v. Booth*, L. R., 5 C. P. 80; *Everingham v. Ivatt*, L. R., 7 Q. B. 683.

Wills or extracts  
of wills of cus-  
tomary freeholds  
and copyholds to  
be entered on the  
court rolls;

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been

and the lord to be  
entitled to the  
same fine, &c.

made, the same fine, heriot, dues, duties and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, duties and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

1 *Viot. c. 26,*  
s. 5.

when such estates are not now devisable as he would have been from the heir in case of descent.

6. If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple ; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant ; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate (*f*).

Estates *pur autre vie*.

(*f*) The words "in case there shall be no special occupant" in this section include both the case where there is no special occupant named in the grant, as also the case where the heir is named as special occupant but the grantee dies without leaving an heir. (*Plunket v. Reilly*, 2 Ir. Ch. R. 585.) So where leasehold estates *pur autre vie* were devised in trust for A., his heirs, sequels in right, executors, administrators and assigns. A. survived the deviser, and, being illegitimate, died without heirs and intestate, living the *cestui que vie* : it was held, that the devised estates passed under this act to A.'s administrator, the nominee of the crown. (*Reynolds v. Wright*, 2 De G., F. & J. 589.)

A testator gave a rent-charge to A. for life, and directed that after her death it should be continued and equally divided between B., C. and D. during their lives and the life of the longest liver. B. predeceased A. ; and it was held, that the interest in the rent-charge which passed on A.'s death, to B.'s executors, was an estate *pur autre vie* within this section. (*Chatfield v. Berchtoldt*, L. R., 7 Ch. 192.) As to estates *pur autre vie*, see 1 Wms. Exors. 643—648, Tudor's L. C., Conv. 40—46.

7. No will made by any person under the age of twenty-one years shall be valid (*g*).

No will of a person under age valid;

(*g*) Sect. 24 makes a will speak from the testator's death ; but this does not extend to the testator's capacity, and the will of an infant would not become operative by his attaining his majority. (Sugd. R. P. Stat. 330.) The power given by 12 Car. 2, c. 24, s. 8, to infants to appoint guardians of their children by will appears to be repealed (*ib.*). As to an infant appointing a guardian by deed, see *Morgan v. Hatchell*, 19 Beav. 86.

A will made by an infant seaman was held valid under sect. 11. (*Re M'Murdo*, L. R., 1 P. & M. 540.)

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act (*h*).

nor of a feme covert, except such as might now be made.

(*h*) For the law as to the testamentary capacity of married women

1 Vict. c. 26,  
s. 8.

Previous testa-  
mentary status of  
married women  
preserved.

before the passing of the act, see 1 Wms. Exors. 51—61. And as to a married woman's power of disposing by will of her separate estate, see *ante*, p. 378.

"By the law, as it stood at the time when this act was passed, an infant might make a valid will of personal estate, but married women had no testamentary capacity, except by virtue of a delegated authority. By means of a power or under a trust, as in case of separate estate, a married woman might, by a writing in the nature of a will, dispose of real or personal estate; and, with the licence and consent of her husband, she might make a will, properly so called, of personal property. It was the intention of the legislature, by this statute, to render infants absolutely incapable of making a will; but it has, I think, preserved the testamentary status of married women equally as it stood under the existing law. Therefore a married woman's devise of real estate must still be made by means of a trust or power created for the purpose, and her capacity to bequeath personal estate must still be derived from the licence or authority of her husband." (Per Lord Westbury, C., *Thomas v. Jones*, 1 De G., J. & S. 81.) "The construction I give to the 8th section is, that it disables a married woman from doing anything which, before the passing of the act, she could not have done by reason of her coverture; it preserves the incapacity of coverture, as it stood before the act; but, as regards any incapacity arising from matters independent of coverture, applicable to men and women alike, the statute was not intended to draw a distinction between married women and other persons." (Per Wood, V.-C., *Thomas v. Jones*, 2 J. & H. 488.)

Effect of sect. 24  
on the wills of  
married women.

Property acquired  
by wife after hus-  
band's death.

It seems that section 24 does not make the simple will of a married woman valid without re-execution if she survives her husband. (*Re Wolleston*, 12 W. R. 18, and see the remarks of Shadwell, V.-C., *Price v. Parker*, 16 Sim. 202, and of Wood, V.-C., *Thomas v. Jones*, 2 J. & H. 482.) A married woman, entitled to separate property, executed when under coverture a will with her husband's assent, in which she disposed of her separate property, and then bequeathed the residue of the real and personal estate which she should possess or have power to dispose of at the time of her death to her niece; she survived her husband, who left to her considerable personal property, but she did not re-execute her will. Lord Penzance expressed an opinion that the testatrix had effectually disposed of the property acquired from her husband. (*Noble v. Phelps*, L. R., 2 P. & M. 276), and Bacon, V.-C., subsequently decided that the will was operative to pass the whole of her personal estate. (*Noble v. Willock*, 21 W. R. 353; 27 L. T., N. S. 781.)

Effect of sect. 27  
on the wills of  
married women.

It has been decided that, notwithstanding this section, a general gift in the will of a married woman will (under sect. 27), operate to pass property over which she has only a testamentary power. Wood, V.-C., apprehended that this act means simply this, the capacity of a married woman to execute a testamentary instrument shall be regulated by those rules which existed before the passing of the act. Before the passing of the act she was competent to dispose of property over which she had a power of appointment, exercisable during coverture. Her capacity in that respect shall remain unaltered, but the provisions of the act as to the mode in which a power shall be exercised by will, and all the other provisions of the act, will apply to any testamentary instrument which a married woman would have been competent to execute previous to the passing of the act, just as it would apply to any testamentary instrument executed by any person *sui juris*. (*Bernard v. Minshull*, Johns. 297.)

*Thomas v. Jones*.

This section does not preserve in the case of married women any incapacities not specially dependent on coverture, which are removed generally by other sections of the act—as, for example, those relating to after-acquired property or power. Therefore, where a general power was vested in the survivor of A., B. and C., (a married woman with testamentary capacity,) and C. ultimately became the survivor: it was held (under sections 24, 27) that the power was well exercised by a residuary devise in the will of C., made while under coverture and during the life of B. (*Thomas v. Jones*, 2 J. & H. 475; 1 De G., J. & S. 63.) It was said by Lord Westbury, "a distinction exists between the testamentary power of a



feme covert, and the effect and operation of her testamentary appointment. No greater testamentary power is to be obtained from the act than would otherwise have existed. But an effect and operation may be given under the statute to a testamentary instrument executed by a married woman, which may make *that* instrument a valid exercise of an existing testamentary power which, before the statute, it would not have been held to be. . . . But the appointment and the will are still to be confined within the limits of the authority of the matter existing at the time of the death. It is not, however, necessary that the authority should exist at the time of the execution of the instrument, if it be afterwards acquired and be subsisting at the time of the death of the testatrix." (1 De G., J. & S. 81, 82. See the remarks of Lord Penzance on this case, *Noble v. Phelps*, L. R., 2 P. & M. 284.)

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s. 8.

Trust funds were limited by settlement to a married woman absolutely if she survived her husband, but if she predeceased him, she was to have a general power of appointment by will. During the coverture she made her will disposing of the property; she survived her husband, but did not re-execute her will, and administration was granted limited to such personal estate as by the settlement the testatrix had a right to dispose of: held, that the power had not arisen, and the will was therefore inoperative. (*Trimmell v. Fell*, 16 Beav. 537; *Price v. Parker*, 16 Sim. 198; see *Jones v. Southall*, 30 Beav. 187; *Blaklock v. Grindle*, L. R., 7 Eq. 215.)

Will of married woman in execution of power which never arises.

As to the revocation of the will of a married woman, made under a power, by a subsequent will made by her during a second coverture, see *Hawksley v. Barrow*, L. R., 1 P. & M. 147.

In the case of a will executed by a married woman, under a power, the Court of Probate must determine whether or not there is a will (*Re Hallyburton*, L. R., 1 P. & M. 90), and should see that every properly executed testamentary paper, which may be material for the consideration of the Court of Chancery, is included in the probate. (*Re Fenwick*, L. R., 1 P. & M. 319.) But the Court of Probate will not determine whether or not the testatrix was testable (*Barnes v. Vincent*, 5 Moore, P. C. 201); nor whether the power has been duly executed (*Paglar v. Tongue*, L. R., 1 P. & M. 158); nor will it decide questions of construction (*Re De Pradel*, L. R., 1 P. & M. 454), all of which are questions for the Court of Chancery. Probate will be granted limited to the property which the deceased had power to dispose of, and has disposed of, accordingly, and her husband or her next of kin will be entitled to a grant of administration *cæterorum*. (1 Wms. Exors. 369; *Re Crofts*, L. R., 2 P. & M. 18; *Re Graham*, *Ib.* 385; *Noble v. Phelps*, *Ib.* 276, where see form of probate.)

Court of Probate will not decide whether testatrix was testable, nor whether power was duly executed, nor questions of construction.

Form of probate.

9. No will shall be valid unless it shall be in writing (i) and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof (j) by the testator or by some other person in his presence and by his direction (k); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (l), and such witnesses shall attest and shall subscribe the will in the presence of the testator (m), but no form of attestation shall be necessary (n).

Every will shall be in writing and signed by the testator in the presence of two witnesses at one time.

(i) See *Harter v. Harter*, L. R., 3 P. & M. 11.

(j) As to the position of the signature of the testator, see 15 & 16 Vict. c. 24, s. 1, *post*, and cases there quoted.

(k) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute. (*In bonis Olding*, 2 Curt. 865; *In bonis Byrd*, 3 Curt. 117.) A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt upon the point. (*Cooper v. Bockett*, 3 Curt. 648; *Brenchley v. Still*, 2 Rob. 162; *Thompson v. Hall*, 16 Jur. 1144.) A mark by the testator for a signature was

Signature by testator.

1 Vict. c. 26,  
s. 9.

By some other  
person by testa-  
tor's direction.

Signature made in  
presence of wit-  
nesses.

Acknowledgment  
of signature in  
presence of wit-  
nesses.

held sufficient, although the name did not appear (*In bonis Bryce*, 2 Curt. 325); and even where a wrong name was added to the mark, but there was no doubt as to the identity of the testator, the execution was held good. (*In bonis Clarke*, 1 Sw. & Tr. 22; *In bonis Douce*, 2 Sw. & Tr. 593.)

An attesting witness may sign the will for the testator by his direction, for there is nothing in the act which prevents the person signing for the testator being one of the witnesses to attest and subscribe the will. (*In bonis Bailey*, 1 Curt. 914.) The witness, in fact, attests the direction of the testator, and that direction amounts to an acknowledgment. (*Smith v. Roberts*, 1 Rob. 262.) A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient. (*Clark's case*, 2 Curt. 829.) A., in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp upon which such signature had been engraved: it was held, that the will was duly signed. (*Jenkyns v. Gaisford*, 11 W. R. 854; see further, 1 Wms. Exors. 78—80.) There must be some act or word on the part of the testator to show that the signature was made at his request. (*Re Marshall*, 18 L. T., N. S. 643.)

(1) The testator's signature must be made or acknowledged in the presence of the witnesses. Where the witnesses had seen the testatrix write what the Court presumed to be her signature, it was held sufficient, although they did not see the signature, and she did not acknowledge it to them. (*Smith v. Smith*, L. R., 1 P. & M. 143.)

It is not necessary that the party should say in express terms to the witnesses, "that is my signature;" it is sufficient if it clearly appears that the signature was existent in the will when it was produced to the witnesses, and was seen by them when they did, at the testator's request, subscribe the will. (*Keignin v. Keignin*, 3 Curt. 607; *In bonis Ashmore*, 3 Curt. 756; *Hudson v. Parker*, 1 Rob. 25.) And the Court may judge from the circumstances whether the signature was in the will at the time of the attestation. (*Gwillim v. Gwillim*, 3 Sw. & Tr. 200; *Re Huckvale*, L. R., 1 P. & M. 375.)

Where a will is signed by the testator before the witnesses are called in, the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument which they are signing, does not amount to an acknowledgment of the signature by the testator. (*Flott v. Genge*, 4 Moore, P. C. 265; *Re Swinford*, L. R., 1 P. & M. 630; *Pearson v. Pearson*, 19 W. R. 1014.) And even where the testator, in the joint presence of the witnesses, acknowledged the paper to be his will, but they did not see him sign the paper, nor did they at the time of subscribing see his signature, the writing being purposely concealed from them: this was held to be a void will (*Hudson v. Parker*, 1 Rob. 14); but see *Beckett v. Howe* (L. R., 2 P. & M. 1), where an acknowledgment was held sufficient, although the testator did not sign in the presence of the witnesses, nor did they see his signature.

The court rejected probate of a will entirely in the testator's handwriting, with perfect testimonium and attestation clauses, where the witnesses deposed to the effect that the deceased asked them to sign a paper which was folded down so that they saw no writing whatever upon it, and that the deceased did not write his name or acknowledge any signature in their presence. (*Shaw v. Neville*, 2 Adm. & Eccl. R. 203; 1 Jur., N. S. 408.)

A testator produced a will entirely in his own handwriting, and having his name signed at the end thereof, to three persons, and requested them to put their names underneath his: it was held a sufficient acknowledgment of the signature, the court being satisfied (although there was no express evidence of the fact) that the signature was in the testator's handwriting. (*Gaze v. Gaze*, 3 Curt. 451.)

Where the name of the deceased was signed to his will at his request by the drawer, and on a subsequent day in the presence of witnesses, the deceased placed his seal on the paper, and delivered it as his act and deed, it was held not to have been duly acknowledged. (*In bonis Sumners*, 2

Rob. 295.) A testatrix having pointed to her will, which she had previously signed, and expressed her satisfaction at its contents, and by gestures intimated that she had signed the same, and that she wished two persons present together to attest the will: she was held to have duly acknowledged her signature. (*In bonis Davies*, 2 Rob. 337.)

1 Viot. c. 26,  
s. 9.

(m) It has long been settled, that after a will has been signed or acknowledged by the testator in the presence of both the witnesses, there must be the subscription of the witnesses in the presence of the testator. (*White v. British Museum*, 6 Bing. 310.) To make a valid subscription and attestation to a will there must be either the name of the witness or some mark intended to represent it. An acknowledgment by a witness of his signature by putting a dry pen over it is not sufficient. A correction of an error in a previous writing of his name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose. The signature or acknowledgment of the testator must be made in the presence of two witnesses, present at the time, and they must, after he has so signed or so acknowledged his signature, subscribe the will in his presence. (*Hindmarsh v. Charlton*, 8 H. L. C. 160.)

Attestation and  
subscription by  
witnesses.

A will may be attested by the witnesses making marks (*In bonis Amiss*, 2 Rob. 116); and the testator may write the names of the witnesses opposite their respective marks. (*In bonis Ashmore*, 3 Curt. 756.) But an attesting witness, able to write, cannot subscribe for another witness who is unable to write. (1 Notes of Cases, 456.)

A husband who is witness to a will cannot also subscribe for his wife (*In bonis White*, 2 Notes of Cases, 461); nor a wife for her husband. (*Re Duggins*, 39 L. J., Prob. 84.) To pass over a signature previously made with a dry pen amounts to no more than an acknowledgment of a signature; and if an attesting witness, on the re-execution of a will, merely traces his previous signature with a dry pen, it is insufficient. (*Playne v. Soriven*, 1 Rob. Eccl. R. 772.) An attesting witness to a will, duly executed, attested and subscribed a second execution of the will by adding the word "Bristol" (the name of the city) at the end of her name and street in which she dwelt written on the former execution, but did not otherwise subscribe on the second execution. The court held, that there was no proof of an attestation to the signature of the testatrix, and that the addition made could not be held to be an attestation by a witness. (*In bonis Trevanion*, 2 Rob. 315; 14 Jur. 919.)

Where the name of one of the attesting witnesses to a will was written on an erasure, but it appeared that the will had been duly executed and attested, and that, subsequently, the attesting witness's name had been erased by the testator, and had at his request been re-written by the attesting witness, the court granted probate to the widow, on affidavit that she and two infant children were the only persons entitled in distribution, and that notice had been given to the children. (*In bonis Coleman*, 2 Sw. & Tr. 314.)

A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness, who could neither read nor write. This having taken place in the presence of the testator, was held to be a sufficient attestation. (*Harrison v. Elvin*, 3 Q. B. 117; *In bonis Frith*, 4 Jur., N. S. 288; 27 Law J., Prob. 6.) The names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen: it was held, that the will was duly attested. (*In bonis Lewis*, 31 Law J., Prob. 153.)

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this act, which does not require them to sign their names. (*In bonis Christian*, 2 Rob. 110; *In bonis Martin*, 6 Notes of Cases, 694.) Where one of the attesting witnesses subscribed his description, without signing his name, it was held sufficient. (*Re Sperling*, 12 W. R. 354.) A testatrix having signed her will desired M. C. and E. T. to attest; but as E. T., one of them, could not write, the testatrix desired J. J. C., who was also present, to write the name of E. T., which J. J. C. did, but did not sign his own name. It was held, that the paper was not entitled to probate, as E. T. might have made his mark, and that a desire that

1 Vict. c. 26,  
s. 9.

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another should sign for a witness could not be construed to be a subscription by that witness. (*In bonis Cope*, 2 Rob. 335.)

In the case of *Casement v. Fulton* (5 Moo. P. C. C. 14), before the Judicial Committee of the Privy Council, it was laid down that the witnesses to a will must subscribe their names in the presence of each other; but, according to subsequent decisions, it is not necessary that the witnesses should subscribe in the presence of each other. (*Fuulds v. Jackson*, 6 Notes of Cases, Suppl. 1; *In bonis Webb*, 1 Jur., N. S. 1096; 2 Jur., N. S. 309.) This is considered to be a settled point. (Sugd. on Stat., p. 342, 2nd ed.) If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink. (*Trott v. Trott*, 29 Law J., Prob. 156.)

A. wrote out a draft will, which, on his death, was found completed, with the names of two attesting witnesses. On inquiry, no such persons could be traced, and the writing of the names was sworn to be that of A. himself. The court granted administration of the goods of A., as having died intestate, without the parties, interested under the draft will, having been first cited to propound it. (*In bonis Lee*, 4 Jur., N. S. 790.)

The court must be satisfied that the names of the alleged witnesses were subscribed on it for the purpose of attesting the testator's signature. (*Re Wilson*, L. R., 1 P. & M. 269; *Griffiths v. Griffiths*, L. R., 2 P. & M. 300.)

A will was contained in five sheets of paper, and at the bottom of each of the first four sheets the signatures of the testator and of the attesting witnesses were in the margin, and at the end of the will there was a regular attestation, but unsigned, although the testator signed his name at the end of the will. The witnesses were both dead, and no other person was present at the execution of the will, and the will was rejected, as there was nothing to show that the signatures in the margin were intended to attest the signature of the testator at the end of the will, which alone gave validity to the will. (*Ewon v. Franklin*, Deane's Eccl. R. 7; 1 Jur., N. S. 1220. See Sugd. on Stat., p. 344, 2nd ed.; *Sweetland v. Sweetland*, 13 W. R. 504.) But where the attesting witnesses, instead of signing their names near to that of the testator on the first side of a sheet of paper where the will ended, and where there was ample space for their signatures, signed under an endorsement on the fourth page, such attestation was held to be good, for the statute does not point out the place where the witnesses are to sign. (*In bonis Chamney*, 1 Rob. 757.)

Testator's presence.

The execution must be attested by the witnesses in the actual or constructive presence of the testator. A testator, intending to execute a codicil, signed the same lying in bed, there being present in the room two witnesses who attested the codicil. The curtains at the foot of the bed being drawn at the time, one of the witnesses could not actually see the testator sign his name, nor could the testator see that witness subscribe the codicil as attesting it. It was held, that the testator and the witness signed their names in the presence of each other, as required by this section of the act. (*Newton v. Clarke*, 2 Curt. 320; but see *Tribe v. Tribe*, 1 Rob. 275; *Longford v. Eyre*, 1 P. W. 740; *Casson v. Dade*, 1 Br. C. C. 99.) Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have seen the witnesses subscribe. (*In bonis Piercy*, 1 Rob. 278.)

Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names. A testator wrote his will, and signed it in the presence of two persons summoned by him for the purpose; they took the will into an adjoining room to sign their names; the rooms communicated by a door, which was left open. There was no proof that the testator did actually see the witnesses sign their names: it was held, that the signature of the witnesses was not made in the presence of the testator, as required by this section. (*Norton v. Bazett*, 2 Jur., N. S. 766; 8 Jur., N. S. 1084.)

See further as to the attestation of wills, 1 Wms. Exors. 83—93.

(n) Although a will may be valid without any attestation clause (*Bryan v. White*, 2 Robert. 315), yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the act, in reference to the execution of the will, have in fact been complied with. (*Belbin v. Skeats*, 1 Sw. & Tr. 148.)

1 Vict. c. 26,  
s. 9.

Attestation clause  
should be added.

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *prima facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same. (*Burgoyne v. Showler*, 1 Rob. 5; *Vinnicombe v. Butler*, 13 W. R. 392; *Re Puddephatt*, L. R., 2 P. & M. 97.) Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted by proof of circumstances, showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them. (S. C.; *In bonis Ayling*, 1 Curt. 913; *Gove v. Gaven*, 3 Curt. 151; *Pennant v. Kingscote*, *Id.* 642; *Crofts v. Crofts*, 13 W. R. 526; *Wright v. Rogers*, L. R., 1 P. & M. 678; *Bailey v. Frowan*, 19 W. R. 511.)

Presumption in  
favour of due exe-  
cution in absence  
of evidence.

Evidence showing  
that statutory re-  
quisites were not  
complied with.

A will appeared to have been signed by two attesting witnesses: neither had any recollection of the circumstance; they both, however, when shown the signatures, acknowledged them to be theirs: it was held, that the will must be presumed to have been duly executed. (*Fbot v. Stanton*, 1 Deane, Eccl. R. 19; 2 Jur., N. S. 380.) A testamentary paper, in the handwriting of a party, concluded as follows:—"In witness of this I have set my hand this 14th day of January, 1854; signed by the testatrix, A., her last will, in our presence." There was no other signature of the deceased at the end of the writing. The surviving attesting witness could give no distinct account of the state of the paper at the time of or the circumstances attending the execution, and there was no direct evidence on the former point. It was admitted to probate. (*In bonis Torre*, 8 Jur., N. S. 494.)

Where witnesses have deposed, the one positively that the will was not executed in the testator's presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause. (*Brenchley v. Still*, 2 Rob. 176, 177; *Farmer v. Brock*, 1 Deane, 187; 2 Jur. 670.)

The subscribing witnesses to a will differed in the account which they gave of the execution, one not recollecting whether the deceased signed or not, the other deposing that she did not see the deceased sign. They agreed that the signature was not acknowledged in their presence. A witness present at the time deposed, that the deceased signed her name in the presence of the subscribing witnesses. It was held, on this evidence, that the will was duly executed, the court being satisfied that the signature of the testatrix was subscribed to the will at the time when the witnesses subscribed their names. (*Bennett v. Sharp*, 1 Jur., N. S. 456.)

Positive affirmative evidence by the subscribing witnesses of the facts of a testator acknowledging his signature in their joint presence, and of their subscribing in conformity with the requisites of the law, is not absolutely essential to the validity of testamentary papers. When the inaccuracy and imperfect recollection of witnesses are established, the court may upon the circumstances of the case presume due execution. (*Leech v. Bates*, 1 Rob. 714.) Positive evidence of one of the subscribing witnesses, negating the fact of signing or acknowledgment of the signature by the deceased in his presence, in the absence of circumstances raising any presumption of his being mistaken, will compel the court to pronounce against the due execution of a testamentary paper. (*Noding v. Alliston*, 14 Jur. 904.)

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative, and no particular form of expression is neces-

Invalid testamen-  
tary instrument  
rendered valid by  
subsequent instru-



1 Vict. c. 26,  
s. 9.

ment duly exe-  
cuted.

sary; therefore, where there was a will duly executed, then a codicil attested by one witness only, and lastly, a codicil duly executed, which was described as "another codicil to my will," the second codicil was held to give operation to the first codicil. (*Ingoldby v. Ingoldby*, 4 No. Cas. 439; *Re Hilhouse*, 1 Eccl. & Adm. Rep. 111.) And it of course would be the same if the will were informally executed, but a codicil duly executed were to be described as a codicil to his last will (*Hill's Case*, 4 No. Cas. 404; *Hally's Case*, 5 No. Cas. 510); it is not properly a question of incorporation, (see *Id.* 512.)

Where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the court refused to grant probate of the draft, which was an unexecuted paper, and not specifically adverted to or recognized by the codicil. The court gave no opinion as to what would be the case if the will had been accidentally lost or destroyed without *animus revocandi*. (*Hale v. Tuke*, 2 Robert. 318.) A testator made a will in 1858, and another in 1859, and then the will of 1858 was actually destroyed, the will of 1859 having previously revoked it. A codicil was afterwards made in terms purporting to be a codicil to the will of 1858. It was decided that it could not again become a will, as the instrument had been destroyed, and it no longer existed either in law or fact. It did not exist as a will from the time when the second will was executed, and it no longer existed as a written instrument, as a paper writing from the time it was burnt. (*Rogers v. Goodenough*, 2 Sw. & Tr. 342; see *Re Steele*, L. R., 1 P. & D. 577.)

Incorporation of  
unattested papers.

An unattested paper, which would have been incorporated in an attested will or codicil executed according to the Statute of Frauds, is now in the same manner incorporated, if the will or codicil is executed according to the requirements of this section. (*Allen v. Maddock*, 11 Moore, P. C. 427; 6 W. R. 825; see *Anderson v. Anderson*, L. R., 13 Eq. 381.) The paper to be incorporated need not be void or valid *per se*, and whether of itself void or valid is equally entitled to probate. (*Sheldon v. Sheldon*, 1 Robert. 81; and see *Dickens' Case*, 3 Curt. 60; *Willesford's Case*, *Ib.* 77; *Bacon's Case*, 3 No. Cas. 644; *Smartt's Case*, 4 No. Cas. 88; *Darby's Case*, 4 No. Cas. 427.) But the paper intended to be incorporated must be in existence; it must be already written. (*Countess Ferraris v. Lord Hertford*, 3 Curt. 468; *Re Watkins*, L. R., 1 P. & D. 19.) As to lists of articles referred to, see *In re Ash*; *In re Countess Dowager of Pembroke*, 2 Jur., N. S. 526; Sugd. on Stat., pp. 345, 346.

Paper must be in  
existence,

and capable of  
identification.

In order that a testamentary paper duly executed may incorporate another, it must refer to it as a written document then existing in such terms that it may be ascertained. (*Smart v. Prujean*, 6 Ves. 565; *Von Straubenzee v. Monck*, 11 W. R. 109; *Re Norris*, 14 W. R. 848.) Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence, and such parol evidence is not excluded by this statute. If the parol evidence satisfactorily prove that in the existing circumstances there is no doubt as to the instrument referred to, it is no answer that by possibility circumstances might have existed in which the instrument could not have been identified. (*Allen v. Maddock*, 11 Moore, P. C. 427. See Wigram on Evid., prop. 5.) The Court of Probate will not extend the principle laid down in *Allen v. Maddock*. (*In bonis Greves*, 1 Sw. & Tr. 250; 7 W. R. 86.)

Where the will did not refer to a document as then existing, the court refused to receive parol evidence, to show that the document was written before the will was signed. (*Re Dallow*, L. R., 1 P. & M. 189; *Re Sunderland*, *Ib.* 198.)

Effect of codicil  
on papers referred  
to in will.

A will contained the following clause:—"I request my trinkets shall be divided as I shall direct in a small memorandum." After the death of the deceased an unexecuted memorandum in her handwriting, disposing of certain trinkets, was found; and it appeared that this was in existence before the execution of a codicil, but it was not referred to by it. It was held, that the re-execution of the will by the codicil could not make that part of the will which was no part of it before, and that the memo-

random ought not to form part of the probate. (*Re Matthias*, 3 Sw. & Tr. 100; and see *Re Willmott*, 1 Sw. & Tr. 36.) It was said by Lord Penzance, that the proposition in *Re Matthias* must be read with reference to the circumstances of that case (L. R., 1 P. & M. 204): and he has laid down, that where the will, if read as speaking at the date of the codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil, although not in existence until after the execution of the will. (*Re Truro*, *Ib.* 201. As to the probate of incorporated documents, see *Re Sibthorp*, L. R., 1 P. & M. 106.)

See further as to the incorporation in wills of unattested papers, 1 Wms. Exors. 93 *et seq.*

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity (*o*).

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

(*o*) This section does not apply to a case where the power authorizes an appointment only by deed or writing and does not in terms authorize an appointment by will or a testamentary writing. A settlor reserved a power of appointing, "during the term of his natural life, by any *deed or deeds, writing or writings*, under his hand *and seal*, to be attested by two or more credible witnesses," and then he made an appointment by will, *not under seal*, but executed and attested as required by this statute. V.-C. Wigram, in *Buckell v. Blenkhorn* (5 Hare, 131), which was followed in *Man v. Ricketts* (7 Beav. 95), held, that the power was well executed. It was also held by the Master of the Rolls, on the authority of that case, that a will not sealed, but executed according to the formalities of this act, was a due execution of a power required to be executed by writing under hand and seal. (*Collard v. Sampson*, 16 Beav. 548.) But the Lords Justices held that the title was too doubtful to force upon a purchaser, and that it could not be assumed that a power to appoint by "any writing" is identical with a power to appoint by will. (*Collard v. Sampson*, 4 De G., M. & G. 224. See *Orange v. Pickford*, 4 Drew. 363.) It has since been decided by V.-C. Wood, that where a power of appointment is to be exercised by a writing under the hand and seal of the donee, it cannot be exercised by a will executed with only the formalities required by this act, because the essential requisition of the power is that it should be exercised under hand and seal, and the statute applies to a power of which the essential requisition is that it should be exercised by will. (*West v. Ray*, Kay, 385. See Sugd. Pow. 217—221, 8th ed.) And this decision has been followed by Lord Westbury. (*Taylor v. Meads*, 13 W. R. 394.)

Power to appoint by writing under hand and seal, not well executed by will valid under this act, but not sealed.

Where a power was required to be exercised by instrument in writing signed, sealed and delivered by the donee in the presence of two or more credible witnesses, it was held well executed by a will not expressed to be delivered, but stated in the attestation clause to be "signed, sealed, published and acknowledged, and declared by the donee to be her last will," in the presence of three attesting witnesses. (*Smith v. Adkins*, L. R., 14 Eq. 402.)

A testamentary instrument signed, but invalid for want of attestation, is not a good execution of a power to appoint by writing signed, or by will. (*Re Daly's Settlement*, 25 Beav. 456.)

Unattested instrument.

A power over personal property given to an English lady who died domiciled abroad, was held duly executed by a will invalid according to English law, but valid according to the law of her domicile, and admitted to probate in England. (*D'Huart v. Darkness*, 34 Beav. 324.) A will

Power well executed by will valid according to law of domicile.

1 Vict. c. 26,  
s. 10.

in execution of a power, invalid according to the law of the domicile, but valid according to English law, was admitted to probate. (*Re Hallyburton*, L. R., 1 P. & M. 90.)

This section applies to powers created since as well as to powers created before the act. (*Hubbard v. Lees*, L. R., 1 Ex. 255.)

As to the execution of powers by deed, see 22 & 23 Vict. c. 35, s. 12 (*post*).

Soldiers and  
mariners' wills  
excepted.

11. Provided always, and be it further enacted, that any soldier being in actual military service (*p*), or any mariner or seaman being at sea (*q*), may dispose of his personal estate as he might have done before the making of this act.

Soldiers.

(*p*) This privilege, as it respects soldiers, has been held to be confined, by the insertion of the words, "actual military service," to those who are *on an expedition*; and, consequently, it has been decided that the will of a soldier made while he was quartered in barracks, either at home (*Drummond v. Parish*, 3 Curt. 522), or in the colonies (*White v. Repton*, 3 Curt. 818; *In bonis Phipps*, 2 Curt. 368; *In bonis Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will of a soldier made at Bangalore, in the East Indies, whilst in command of the army there stationed, and who died whilst on a tour of inspection of the troops under his command. (*In bonis Hill*, 1 Rob. 276.) But where an officer was on his way from one regiment to another, both regiments being at the time on active service, it was held that his will was privileged. (*Herbert v. Herbert*, D. & Sw. 10.) An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will. (*In bonis Phipps*, 2 Curt. 368.)

The term "soldier" in this section extends to persons in the military service of the East India Company. (*In bonis Donaldson*, 2 Curt. 386.)

As to obtaining probate of soldiers' wills privileged under this section, see *Re Hackett*, 28 L. J., Prob. 42; *Re Neville*, ib. 52; *Re Thorne*, 4 Sw. & Tr. 36.

Seamen.

(*q*) The term "mariner or seaman" does not exclude any person in her Majesty's navy, though superior of the ship, being "at sea," from the exception contained in this act. (*In bonis Hayes*, 2 Curt. 338.) The section applies to seamen, whether in the Queen's or merchants' service. (*In bonis Milligan*, 2 Rob. 108; *Morrell v. Morrell*, 1 Hagg. 51.) Probate was allowed of an unattested codicil made at sea by the purser of a man-of-war, as that of a seaman. (*In bonis Hayes*, 2 Curt. 338.) A surgeon in the navy is a mariner or seaman within this section. (*Re Saunders*, L. R., 1 P. & M. 16.)

At sea.

A codicil signed but not attested on board a Queen's ship in a river by the commander-in-chief actually engaged in a naval operation was held to be within this section, and to incorporate a prior codicil signed by him but not attested whilst living on shore. (*In bonis Austen*, 2 Rob. 611; 17 Jur. 284.) But in a case in which the testator was commander-in-chief of the naval force of Jamaica, but lived on shore at the official residence, his family and establishment being also on shore: it was held, that the testator did not come within the exception as to mariners at sea. (*Seymour's case*, cited 3 Curt. 530; 2 Curt. 339.) Where a naval officer, invalidated at a foreign station, was returning home in a steamer, his will was held entitled to probate as made at sea. (*Re Saunders*, L. R., 1 P. & M. 16.) And a will made by a seaman on board a man-of-war permanently stationed in Portsmouth harbour was held privileged under this section. (*Re M'Murdo*, L. R., 1 P. & M. 540.)

In the pocket-book of a mariner, who died on shore in this country, was found a testamentary paper without date, headed "Instructions to be followed if I die at sea or abroad:" probate was refused on the ground that it was a conditional will. (*Lindsay v. Lindsay*, 27 L. T., N. S. 322.)

Where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception.

although such will was in fact made on shore. (*In bonis Lay*, 2 Curt. 375.) But where the deceased wrote a letter stating that he had shipped on board a vessel lying in Melbourne harbour on the date of the letter, but it did not appear whether the letter was written before or after he went on board, the letter was not admitted to probate. (*In bonis Corby*, 18 Jur. 634.)

1 Vict. c. 26,  
s. 11.

A will made under this section remains operative unless expressly revoked, although the maker of such will lives in England several years after the date of such will. (*In bonis Leese*, 17 Jur. 216.)

12. This act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy (*r*).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

(*r*) This section, and 11 Geo. 4 & 1 Will. 4, c. 20 (which bound the crown; *Re Bevan*, 14 W. R. 147), have been repealed by 28 & 29 Vict. c. 112, s. 1. As to the wills of marines and seamen in the royal navy, see now 28 & 29 Vict. c. 72; and as to the wills of merchant seamen, see 17 & 18 Vict. c. 104, s. 200.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Publication not to be requisite.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

Will not to be void on account of incompetency of attesting witness.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will (*s*).

Gifts to an attesting witness to be void.

(*s*) Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the court held that the signature of the two latter must be regarded as affixed likewise in attestation of the will, and not as merely verifying the attestation of the marksmen, and that the legacy to the wife of one of them failed under this section. (*Wigan v. Rowland*, 11 Hare, 157.) Where there was a bequest to several as joint tenants, one of whom was an attesting witness to the will, it was decided, that as the gift to the witness was simply void, the other joint tenants took the whole, there being no lapse. (*Young v. Davies*, 2 Dr. & Sm. 167.)

1 *Viot. c. 26,*  
s. 15.

Where a devisee put his name to a second clause of attestation to a will, as a third witness, at the request of another person, but objected to by the testator, it was held that the interest of such devisee passed to the heir-at-law. (*Randfield v. Randfield*, 11 W. R. 847.)

Where a will was executed in the presence of two witnesses, and the signature of a third person, who was residuary legatee, appeared also at the foot of the will, the court received evidence to show that the legatee's name was not written to attest the testator's signature, and ordered it to be omitted in the probate. (*Re Sharman*, L. R., 1 P. & M. 661; *Re Pursglove*, 26 L. T., N. S. 405.)

Gift in trust.

A bequest in trust was not invalidated by the wife of the trustee attesting the signature of the testatrix. (*Cresswell v. Cresswell*, L. R., 6 Eq. 69.)

Attestation of  
codicil by legatee.

A legacy was given by will, and a codicil confirming the will was attested by the legatee: the gift was held to be good. A person entitled to a share of a residue given by will, attested a codicil which indirectly increased the residue: such attestation was held not to invalidate the witness's claim to a share of the residue. (*Gurney v. Gurney*, 3 Drew. 208; *Tempest v. Tempest*, 2 Kay & J. 635; see *Gaskin v. Rogers*, L. R., 2 Eq. 284.)

Will attested by  
legatee's wife con-  
firmed by codicil.

A testatrix gave a share of her residue to B., and one of the attesting witnesses to the will was B.'s wife. By a codicil, attested by other witnesses, the testatrix, after an immaterial direction, confirmed her will in other respects. It was held, that the codicil incorporated the will so as to render the gift to B. valid. (*Anderson v. Anderson*, L. R., 13 Eq. 381.)

Creditor attesting  
to be admitted a  
witness.

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be  
admitted a wit-  
ness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be re-  
voked by mar-  
riage.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions) (t).

Old law.

(t) Under the old law the marriage of a testator did not revoke his will; but under certain circumstances there was an implied revocation by marriage and the birth of issue. (1 Wms. Exors. 184—194.)

Marriage with de-  
ceased's wife's  
sister.

Under this section a will is not revoked by a marriage with a deceased wife's sister; and there is no distinction in such a case between a testator who is a natural-born subject and one who is a naturalized British subject. (*Mette v. Mette*, 1 Sw. & Tr. 416.)

Exception in case  
of wills in execu-  
tion of powers.

The reason for the exception is, that a revocation of the will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit from it. (*Re Fitzroy*, 1 Sw. & Tr. 133.)

Where in certain contingencies the property appointed would not in default of appointment pass to the persons who would have taken in case of intestacy under the Statute of Distributions, there the exception applies. (*Re Fenwick*, L. R., 1 P. & M. 319.)

Where freehold estates would, in default of appointment, have passed under a settlement to the heir of a testatrix, it was held that her will was revoked by marriage. (*Vaughan v. Vanderstegen*, 2 Drew. 168; see *Logan*



*v. Bell*, 1 C. B. 872.) But where personalty would, in default of appointment, have passed under the settlement to the same persons as would have taken under the Statute of Distributions in case of an intestacy, it was held that a will was not revoked by marriage, inasmuch as those persons would have taken under the settlement and not under the statute. (*Re Fitzroy*, 1 Sw. & Tr. 133; 6 W. R. 863; *Re Fenwick*, L. R., 1 P. & M. 319; *Re Worthington*, 20 W. R. 260.)

1 Vict. c. 26,  
s. 18.

Where under A.'s will power was given to B. to appoint certain property, and in default of appointment the property was to devolve on the persons who at her decease should be her next of kin; it was held that B.'s will was not revoked by marriage, on the ground that the words next of kin alone mean something different from next of kin under the Statute of Distributions. (*Re M'Vicar*, L. R., 1 P. & M. 671.)

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be revoked by presumption.

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (u), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (x), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (y).

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

(u) If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate. (*Lemage v. Goodban*, L. R., 1 P. & M. 57; *Geaves v. Price*, 11 W. R. 809; see *Re Howard*, L. R., 1 P. & M. 636.) The question in these cases is, what disposition of his property was intended by the testator. (*Lemage v. Goodban*, sup.; *Re Hastings*, 20 W. R. 616.)

Revocation by another will or codicil.

A testator left two substantive wills, by the latter of which he disposed of the whole of his property, but without expressly revoking the former will, nor appointing executors by the latter will. The court held the latter paper to have been executed as a will, and not as a codicil, and to have revoked the prior will. (*Henfrey v. Henfrey*, 2 Curt. 468.)

A testator executed a will in 1825, which was found uncanceled at his death, which happened in 1853. In 1852, he executed another testamentary paper, the contents of which were wholly unknown, except the circumstance of the paper commencing with the words "This is the last will and testament." This latter instrument was not forthcoming at the testator's death, but there was no evidence of its destruction. The Judicial Committee decreed probate of the will of 1825 upon the following grounds:—1st. That the *onus probandi* lies upon the party setting up the subsequent instrument as a revocation of the former will. 2nd. That, to establish the revocation of a former will relating to personalty by a subsequent testamentary paper not forthcoming, by parol evidence of execution only, in the absence of any draft or instructions, such evidence must be strong and conclusive as to its contents. 3rd. That the mere fact of such an instrument commencing with the words "This is my last will and testament," does not make it operate as a revocation, as those words do not necessarily imply that such instrument contained a different disposition of the property; and that, to make it operate as a revocation of a former will, it must be proved that the contents of the latter instrument differed from the former. 4th. That a subsequent will (the contents of which were unknown) having remained in the custody of the deceased, and not forthcoming, the presumption of law was, that it was destroyed by him *animo revocandi*, and did not revoke a prior will uncanceled. (*Cutto v. Gilbert*, 9 Moo. P. C. C. 131.) But where it was proved that the subsequent will contained a clause of revocation, the Court held that the prior will was revoked, although the subsequent will could not be found. (*Wood v. Wood*, L. R., 1 P. & M. 309.)

1 Vict. c. 26,  
s. 20.

Revocation by  
writing declaring  
an intention to  
revoke.

Revocation by an  
act of destruction.

Animus revocandi  
necessary.

Dependent rela-  
tive revocation.

Mistake.

Part of will may  
be revoked by  
tearing.

Tearing off seal.

As regards real estate, the expression "This is my last will and testament" does not operate as a revocation of a former will without words to that effect. (*Freeman v. Freeman*, 5 De G., M. & G. 704.)

A testator left four testamentary instruments, duly executed. After the Ecclesiastical Court had held that the second and third alone were valid as to the personal estate (1 Rob. 264), the Court of Chancery, on the certificate of the Common Pleas (6 C. B. 201), decided that, as to the real estate, the last instrument alone constituted the last will. (*Plenty v. West*, 16 Beav. 173.)

(x) A testatrix by her will devised real estates, and by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. It was held that the deed, assuming it to be void as a *turpis contractus*, was not a writing declaring an intention to revoke within this section; and, therefore, that the will operated on such estate and interest as the testatrix possessed in the property at her death. (*Ford v. De Pontes*, 30 Beav. 572.)

A writing, by which a testator merely revokes a prior testamentary disposition, will not be admitted to probate (*Re Fraser*, L. R., 2 P. & M. 40); *secus*, if it be of a testamentary character. (*Re Durance*, ib. 406; *Re Hubbard*, L. R., 1 P. & M. 53; and see *Re Hicks*, ib. 683.)

As to revocation by another will or codicil, see further 1 Wms. Exors. 153 *et seq.*

(y) A mere abandonment of his will by a testator is not a sufficient revocation. There must be some act done by him, or by some one in his presence, and by his direction. (*Andrew v. Motley*, 12 C. B., N. S. 514.)

All acts by which a testator may destroy or mutilate a testamentary instrument are in their nature equivocal: unless the act be done *animo revocandi*, there is no revocation. (*Powell v. Powell*, L. R., 1 P. & M. 212.)

Where, therefore, the act of destruction is referable wholly and solely to the intention of setting up some other testamentary paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the paper intended to be substituted; and where the condition is unfulfilled, there is no revocation (*ib.*): but the evidence must be clear as to the intention of the act of destruction (*Eckersley v. Platt*, L. R., 1 P. & M. 281), and subsequent declarations by the testator as to his intention will not be admitted. (*Re Weston*, L. R., 1 P. & M. 633.) See, further, as to dependent relative revocation, 1 Wms. Exors. 142 *et seq.*

Where a testator tore up his will under a mistaken impression that it was invalid, it was held that there was no revocation (*Giles v. Warren*, L. R., 2 P. & M. 401); and so where a man destroyed his will in a fit of delirium tremens. (*Brant v. Brant*, 21 W. R. 392.) But it seems that a testator may subsequently adopt the act so as to effect a revocation.

It is not the manual operation of tearing the instrument, or the act of throwing it into a fire, or of destroying it by other means which will satisfy the requisites of the law; the act must be accompanied with the *intention* of revoking; there must be the *animus* as well as the act, both must concur in order to constitute a legal revocation. It is the *animus*, also, which must govern the extent and measure of operation to be attributed to the act, and determine whether the act shall effect the revocation of the whole instrument, or only of some, and what portion thereof. (Per Sir J. Dodson, *Clarke v. Scripps*, 2 Rob. 567; *Clarkson v. Clarkson*, 2 Sw. & Tr. 497. See *Doe v. Harris*, 6 Ad. & Ell. 209.) Thus, where the first seven or eight lines of a will had been cut and torn off, it was admitted to probate in its incomplete state. (*Re Woodward*, L. R., 2 P. & M. 206; *Christmas v. Whinyates*, 11 W. R. 371.) But where the third and fourth sheets of a will were alone discovered, it was held, by the Master of the Rolls, that a power to appoint by will or by any writing in the nature of, or purporting to be, a will, was not duly executed. (*Gullan v. Grove*, 26 Beav. 64.)

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word: it was held, that the tearing off the seal was sufficient within this section to revoke the will. (*Price v. Powell*, 3 H. & N. 341. See *Doe d. Rees v. Harris*, 6 Ad. & E. 209.) By the usual statement in the witnessing clause at the end of a will that

the testator has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if having so recited he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation of the whole will under this section. (*Williams v. Tyley*, Johns. 530.) A will, dated in 1835, was held to have been revoked by the testator in 1838 cutting out his signature. (*Hobbs v. Knight*, 1 Curt. 768; *Walker v. Armstrong*, 21 Beav. 305, on appeal, 4 W. R. 770.)

1 Vict. c. 26,  
s. 20.

Tearing off signatures.

A testator cut out of his will the names of the attesting witnesses, giving as his reason that he had some idea of altering it and having a new will made, and afterwards on the same day replaced the piece so cut out, saying that the will would do for the present. The court upon motion, with the consent of the persons interested in case of intestacy, granted probate. (*In bonis Eccles*, 32 L. J., Prob. 4. See *In bonis De Bode*, 5 Notes of Cases, 189.) Where the signature of the testator to a will had been cut out, but gummed on to its former place, the will was not admitted to probate (*Bell v. Fothergill*, L. R., 2 P. & M. 148); but where a testator partially erased his own signature, and then re-wrote it, probate was granted. (*Re Kennett*, 2 N. R. 461.)

Signatures re-  
placed.

A will is not destroyed within this section by being struck through with a pen, the name of the testator being crossed out and the names of the attesting witnesses being struck through. It was said by Sir H. Jenner, that when the legislature, after mentioning "burning" a will, and "tearing" a will, speaks of "otherwise destroying" a will, they must be understood as intending some mode of destruction *ejusdem generis*, not an act which is not a destroying in the primary meaning of the word, though it may have the same metaphorically, as being a destruction of the contents of the will; it never could have been their intention that the cancelling of a will should be a mode of destroying it. (*Stephens v. Taprell*, 2 Curt. 465. *Re Brewster*, 6 Jur., N. S. 56.) A testatrix obliterated, with the intention of revoking, several passages of her will, so that none of the parts obliterated could be distinguished upon the face of the will: it was held, that this was a complete revocation of those parts within this section. (*Tornley v. Watson*, 3 Curt. 761.)

Cancelling.

If the act of destruction be done by any person other than the testator, it must be by the testator's order and in his presence. Where a codicil was burnt by a testator's order, but not in his presence, probate was granted of a draft copy. (*Re Dadds*, D. & Sw. 290.)

Destruction by  
any person other  
than the testator.

After the due execution of a will has been proved, the burden of proving that it was revoked lies upon those who set up the revocation; and in the absence of evidence, revocation will not be presumed. (*Benson v. Benson*, L. R., 2 P. & M. 172.)

Onus of proof of  
revocation.

But where a will remains in the custody of the testator from the time when it is made until his death, and cannot then be found, the presumption of law is, that it was destroyed by the testator, *animo revocandi* (*Eckersley v. Platt*, L. R., 1 P. & M. 281); but the court must be satisfied that the will was not in existence at the time of the testator's death. (*Finch v. Finch*, L. R., 1 P. & M. 371.) To rebut the presumption, declarations made by the testator that he has settled his affairs and appointed executors, and as to the person in whose possession the will is, are admissible in evidence. (*Whiteley v. King*, 17 C. B., N. S. 756; 13 W. R. 83.) The presumption does not apply to a case where the testator became insane after the execution, and continued insane until his death. (*Sprigge v. Sprigge*, L. R., 1 P. & M. 608.)

Will in testator's  
custody not forth-  
coming at his  
death;

Where a will in the custody of a testator is found after his death mutilated, the presumption in the absence of evidence is that it was mutilated by him after its execution, and, if there be a codicil, after the execution of the codicil. (*Christmas v. Whinyates*, 11 W. R. 371.)

found mutilated  
at his death.

Where a will is executed in duplicate, the presumption is that the destruction of one part revokes the other. (1 Wms. Exors. 148.)

Duplicate will.

Under the old law before this statute, it was held that a codicil stands or falls with the will to which it belongs; and it has been held under the new law, that where a will has been revoked, probate of the codicil will

Revocation of  
codicils.

1 Vict. c. 26,  
s. 20.

Revocation by  
married woman.

No alteration in a  
will shall have  
any effect unless  
executed as a  
will.

Presumption as to  
time of alterations  
in wills of per-  
sonalty;

in wills of realty.

Erasures super-  
induced by other  
writing.

not be granted, unless the court is satisfied that the testator intended the codicil to operate separately from the will. (*Re Greig*, L. R., 1 P. & M. 72. See *Re Ellice*, 12 W. R. 353.) But it is now settled that a codicil can only be revoked by one of the modes indicated in this section, and is not revoked by the revocation of the will. (*Re Savage*, L. R., 2 P. & M. 78; *Re Turner*, *ib.* 403; *Black v. Jobling*, L. R., 1 P. & M. 635.)

A married woman may revoke a will made under a power in any of the modes pointed out by this section. *Hawksley v. Barrow*, L. R., 1 P. & M. 147.)

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will (z).

(z) Where certain erasures appearing in a will of personalty were omitted in the probate, the Court of Chancery in construing the will ordered the original will to be produced, notwithstanding an objection that the probate alone could be looked at. (*Manning v. Purcell*, 7 De G., M. & G. 55. See 1 Wms. Exors. 539, 540.)

Where a will contains alterations and erasures affecting the amount and objects of the testator's bounty, the existence of which at the time of the execution the attesting witnesses cannot depose to, in the absence of all direct evidence as to the alterations and erasures, the presumption of law is that such alterations and erasures were made after the execution of the will, and probate of the will was granted in its original form. (*Cooper v. Bockett*, 4 Moo. P. C. C. 439.) Where an expert deposed that in his opinion some trifling alterations and interlineations appearing on the face of a will were written at the same time as the rest, they were admitted to probate (*Re Hindmarch*, L. R., 1 P. & M. 307; *Moore v. Moore*, 1 R., 6 Eq. 166); and from the nature of certain interlineations and the internal evidence furnished by the document itself, the court concluded that they were made before execution and admitted then to probate. (*Re Cadge*, L. R., 1 P. & M. 543; *Re Duffy*, 1 R., 5 Eq. 506.) Certain words were admitted as being in the nature of an interlineation. (*Re Birt*, L. R., 2 P. & M. 214.)

Where the Ecclesiastical Court granted probate of a will of personalty with cross lines drawn in ink over the bequest of certain legacies, the Lord Chancellor held that it must be taken that the testator executed the instrument with the cross lines drawn over it, and inferred his meaning from the instrument in that form. (*Gann v. Gregory*, 3 De G., M. & G. 777; *Shea v. Boschetti*, 18 Beav. 321.)

Where there are alterations on the face of a will devising realty, the court will not presume such alterations to have been made either before or after execution. The onus is cast upon the party seeking to derive an advantage from the alteration to adduce evidence that the alteration was made before the will was executed. (*Williams v. Ashton*, 1 J. & H. 115; *Simmons v. Rudall*, 1 Sim., N. S. 137.)

The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting, does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been

superinduced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator. (*Greville v. Tylee*, 7 Moo. P. C. C. 320.)

1 Vict. c. 26,  
s. 21.

Where the alteration is not attested in the manner required by this section probate will be granted of the will as it originally stood, if that is apparent (*In bonis Beavan*, 2 Curt. 369; *In bonis Martin*, 1 Rob. 712; *Re Gausson*, 16 W. R. 212); but if not, probate will be granted in blank as to such parts of the will as cannot be read. (*In bonis Ibbetson*, 2 Curt. 337.) In order to discover the words as they originally stood, the court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature. (*Ib.*) Sometimes probate is granted in fac-simile. (1 Wms. Exors. 319.)

Form of probate.

The word "apparent" here used does not mean capable of being made apparent by extrinsic evidence, but applies to what is apparent on the face of the instrument itself. A testator obliterated *animo revocandi* several passages of his will, so that none of the parts could be distinguished upon the face of the will: it was held, that this was a complete revocation of those parts. The court being of opinion that it was the intention of the legislature, that if a testator shall take such pains to obliterate certain passages in his will, and shall so effectually accomplish his purpose that those passages cannot be made out on the face of the instrument itself, it shall be a revocation as good and valid as if done according to the stricter forms mentioned in this act. (*Townley v. Watson*, 3 Curt. 761.)

Meaning of "apparent."

Although this section does not, like the preceding one, contain the words, "with the intention of revoking the same," it has been held, that intention must accompany the acts mentioned in this section in the same way as intention must accompany the acts mentioned in the 20th section. Under the Statute of Frauds (*Bibb d. Mole v. Thomas*, 2 W. Bl. 1044) and this act, intention is indispensable; under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke, and only for the purpose of making immediately some new disposition or alteration; and if, from want of compliance with the statutory regulations, such new disposition or alteration could not take effect, then the burning, tearing or obliteration, in no degree revoked the will, but it remained in full force as if nothing had been done to it. Similar principles must be applied in cases arising under the present statute; there is nothing in the statute which tends to a contrary conclusion. (Per Dr. *Lushington*, *Brooke v. Kent*, 3 Moo. P. C. C. 349, 350.) It was decided by the Privy Council, where a testator intended to revoke a legacy by substituting a different sum to that originally given, and such substituted sum was not effectually given for want of compliance with the statute, the original legacy is not revoked, and that evidence is admissible to show what was the original legacy. (*Brooke v. Kent*, 3 Moo. P. C. C. 334.)

Interlineations were made in a will by the testator after its execution. He sent for the witnesses, pointed out the alterations, declared he republished his will, and then acknowledged his original signature, but did not re-sign. The witnesses placed their initials opposite to the alterations and also signed a memorandum at the foot of the will. The court granted probate of the will with the alterations, but intimated that the proper course, perhaps, would have been for the testator to have re-signed his name as the witnesses did. (*In bonis Dewell*, 1 Adm. & Eccl. R. 103; 17 Jur. 1180.)

Attestation of alterations.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.



1 Vict. c. 26,  
s. 22.

not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown (a).

Codicil must show  
an intention to  
revive.

(a) Since the passing of this statute a will cannot be revived by mere implication. To revive a will, a codicil must show an "intention to revive;" and the intention must appear on the face of the codicil either by express words referring to a will as revoked and importing an intention to revive the same, or by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying to the mind of the court with reasonable certainty the existence of the intention. (*Re Steele*, L. R., 1 P. & M. 575.)

Reference to re-  
voked will by  
date.

References in codicils to revoked wills by their dates were held insufficient to revive them. (*Ib.*) Where, however, one entire part of a will, in duplicate, in the possession of the testator, remained undestroyed, but the other part, in the possession of his solicitor, was destroyed by the testator on the execution of a subsequent will made in 1838, in terms revoking the prior will; it was held, that the prior will was revived by a codicil made subsequently to the second will, though referring to the first will *merely by date*; that such reference sufficiently showed the intention to revive as required by this section; and that parol evidence was not admissible to establish a mistake in the date. (*Payne v. Trappes*, 1 Rob. 583. See *Re Reynolds*, 21 W. R. 512.)

Revoked will  
must be in exist-  
ence.

The revoked will must be in existence: and if a codicil refer to a will with the intention of reviving it, and it turn out that such will had been entirely burnt or destroyed by the testator *animo revocandi*, the codicil cannot effect its revival. (*Hale v. Tuke*, 2 Rob. 318; *Newton v. Newton*, 12 Ir. Ch. R. 118; *Rogers v. Goodenough*, 2 Sw. & Tr. 342.)

Destruction of  
revoking instru-  
ment.

A testatrix duly executed a will, and subsequently thereto, two other wills, both of which contained a clause revoking all former wills. She afterwards destroyed the two latter wills. It was held, that the first will was not thereby revived, and that parol evidence was not admissible to show an intention to revive. (*Major v. Williams*, 3 Curt. 432; *Powell v. Powell*, L. R., 1 P. & M. 209.)

Revocation of a  
substituted  
legacy.

Where a testator gave 100*l.* to his executor, and by a subsequent codicil gave him 500*l.* in substitution for the first gift, and then revoked the second gift; it was held, that the first gift was not set up again. (*Boulcott v. Boulcott*, 2 Drew. 25.)

A devise not to be  
rendered inopera-  
tive by any sub-  
sequent convey-  
ance or act.

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death (b).

(b) This clause of the act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estate in fee and afterwards take a re-conveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone. (Per *Shadwell*, V.-C., *Moor v. Raisbeck*, 12 Sim. 139.) All those cases in which it was formerly held that a will was revoked by an alteration of the estate of the testator, are now put an end to by this section. (*Ford v. De Pontes*, 30 Beav. 593.) As to revocation by alteration of estate, see, further, *Plowden v. Hyde*, 2 De G., M. & G. 684; 1 Jarm. Wills, 186 *et seq.*; and as to the bearing of this section upon wills prior to 1838, see *Lord Langford v. Little*, 2 J. & Lat. 618; *Walker v. Armstrong*, 21 Beav. 284.

Devise of lands  
and subsequent  
contract to sell.

A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held that the purchase-money belonged to the personal representatives, and not to the devisees of

the testatrix, notwithstanding her lien on the estate for the purchase-money, and notwithstanding this section of the act. (*Farrar v. Earl of Winterton*, 5 Beav. 1.) A similar decision was given where the estate devised had been conveyed to a purchaser who had deposited the deeds with the testatrix as a security for the purchase-money. (*Moor v. Raisbeck*, 12 Sim. 139.) And where the owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company, and died before completion; it was held, that his executors and not the devisee were entitled to the purchase-money. (*Re Manchester & Southport R. Co.*, 19 Beav. 365; *Ex parte Hawkins*, 13 Sim. 569.)

1 Vict. c. 26,  
s. 23.

But where a testator devised, by special description, lands subject to an option of purchase to A. for life, with remainders over, it was held, that the purchase-money was subject to the same limitations as had been declared of the lands. (*Drant v. Vanse*, 1 Y. & C. Ch. 580; *Emuss v. Smith*, 2 De G. & Sm. 722. See *Bowen v. Barlow*, L. R., 8 Ch. 171.)

Option of purchase subsequently exercised.

As to the effect of a devise upon lands contracted to be sold, see, further, 1 Jarm. Wills, 46 *et seq.*; 1 Dart, V. & P. 243. And as to the effect, under the old law, of a contract to sell lands upon a prior devise, see *Andrew v. Andrew*, 8 De G., M. & G. 336; Sugd. R. P. Stat. 360—364.

Under a settlement A. had power to appoint the reversion in fee of the settled estates, and the trustees had a power of sale with his consent, the purchase-money to be laid out in realty to be settled to the same uses. By his will A. appointed the property to trustees to sell and stand possessed of produce in trust for a class. Subsequently the trustees, with A.'s consent, agreed to sell the property: but at his death the conveyance had not been executed by one of the trustees, and the purchase-money had not been received; held, that the appointment in A.'s will had no effect either on the new estate to be purchased with the produce of the old, or on purchase-money which stood in the place of the settled estate. (*Gale v. Gale*, 21 Beav. 349.)

Revocation of prior devise by contract under power of sale.

Where a testator bequeathed certain leaseholds for all the residue of the terms for which the same should be held by him at his death, and afterwards acquired the fee, it was held that the fee passed. (*Struthers v. Struthers*, 5 W. R. 809; see *Cox v. Bennett*, L. R., 6 Eq. 422.)

Bequest of leaseholds and subsequent purchase of fee.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will (c).

A will shall be construed to speak from the death of the testator.

(c) As to the period from which a will prior to 1838 speaks, see Hawk. Wills, 14; 1 Jarm. Wills, 198; *Hance v. Trumhitt*, 2 J. & H. 216.

Under this section the court will consider what would be the proper construction of the will, assuming it to have been executed immediately before the testator's death, and whether, regard being had to the time when it was executed, anything appears in the will showing that, by this construction, the intention of the testator will be contravened. (*O'Toole v. Browne*, 8 El. & Bl. 572.)

The qualification "unless a contrary intention shall appear by the will," does not render it necessary to find a contrary intention expressed in so many words: it is sufficient, if on a fair construction of the will, adhering to those rules which are usually adopted in construing wills, that the contrary intention does appear. (*Cole v. Scott*, 1 H. & T. 477.)

Contrary intention.

Thus a contrary intention may appear from a particular description being given of the subject of the gift. A testator devised all his freehold estate at B., which he purchased of C., by a will dated before, and republished by a codicil dated after this act, but a small piece of land, purchased with the estate by the testator of C., and always held and mixed with it, was leasehold. After making the codicil, the testator purchased the fee of that small piece of land: it was held, that the codicil did not pass the after-acquired fee. (*Emuss v. Smith*, 2 De G. & Sm. 722.)

Particular description of subject of gift.

1 Vict. c. 26,  
s. 24.

Leaseholds.

Where, however, a testator has bequeathed particular leaseholds, describing them as such, and has subsequently acquired the fee, the fee has been held to pass. (*Struthers v. Struthers*, 5 W. R. 809; *Miles v. Miles*, L. R., 1 Eq. 462; *Cox v. Bennett*, L. R., 6 Eq. 422.) See also *Pierce v. Att.-Gen.*, 3 W. R. 612, where a subsequently-acquired freehold house was held not to pass under a gift of leaseholds and all other estate and effects.

Arbitrary designations of real estate.

Where a testatrix devised "all my Quendon Hall estates in Essex," and after the date of her will she acquired other estates in the same locality with those clearly comprised in the devise; it was held, that the after-acquired estates did not pass. The court said that the term was an arbitrary designation which had acquired a certain meaning in the mind of the testatrix, and could not be extended to other property to which she had not ascribed the arbitrary designation. (*Webb v. Byng*, 1 K. & J. 580.) It was said by *Malins*, V.-C., that the decision in this case entirely proceeded upon the failure of the evidence to prove that the after-acquired lands were an addition to the Quendon Hall estates. (L. R., 11 Eq. 554.) Where a testator devised his mansion and estate called Cleeve Court, with the appurtenances, upon certain trusts, it was held, that property acquired by him after the date of the will, and treated by him immediately before his death as additions to the Cleeve Court estate, passed under the particular devise. (*Castle v. Fox*, L. R., 11 Eq. 542. See also *Stevens v. Bailey*, 8 Ir. C. L. R. 410.)

"Heretofore mentioned."

As to the effect of the words "heretofore mentioned," &c., occurring in the description of the property, see *Jepson v. Key*, 2 H. & C. 873; 12 W. R. 621.

Devises have been held to pass after-acquired real estate, notwithstanding provisions which seemed to refer to personal estate only. (*Stokes v. Salomons*, 9 Hare, 75; *O'Toole v. Browne*, 3 El. & Bl. 572.)

Descriptions of money, stock, &c.

It was observed by *Wood*, V.-C., "A gift of 'all my stock' would pass all stock to which the testator was entitled at the time of his death. But suppose the bequest were of 'all my stock which I have purchased,' that would make a considerable difference, and would, I think, be enough on the face of the will to show that the testator was defining the particular portion of property which he intended to give as being property then in his possession." A will, made since the statute, contained the words "I hereby exonerate my sister from all claims in respect of money laid out by me in improvements of the estates in Scotland, and which money has, according to the laws of Scotland, been charged thereon:" it was held, that this exoneration only applied to money so charged at the date of the will, and not to money afterwards laid out and charged, nor even to money then laid out but afterwards charged. (*Douglas v. Douglas*, Kay, 400.)

"My."

Again, it was said by *Wood*, V.-C., "When I refer to a particular thing, such as a ring or a horse, and bequeath it as 'my ring' or 'my horse,' it seems to me there might be considerable difficulty in saying that the 'contrary intention,' to which the act in its 24th section refers, does not appear on the face of the will; but when a bequest is of that which is generic—of that which may be increased or diminished, then, I apprehend, the Wills Act requires something more on the face of the will, for the purpose of indicating such 'contrary intention,' than the mere circumstance that the subject of the bequest is designated by the pronoun 'my.'" A testatrix in 1850, bequeathed thus, "I give my New Three-and-a-quarter per Cent. Annuities." The testatrix, at the date of her will, was possessed of 3,010*l.* 3*l.* 5*s.* per Cent. Annuities; and, at the time of her death, she was possessed of 17,010*l.* like annuities: it was held, that the bequest comprised all the New 3¼ per Cent. Annuities which she had at her death. (*Goodlad v. Burnett*, 1 Kay & J. 341; and see *Trinder v. Trinder*, L. R., 1 Eq. 695.) But where a testator, possessed of 1,000*l.* guaranteed stock in the N. B. railway, bequeathed "my one thousand N. B. railway preference shares," and after his will sold his guaranteed stock, and subsequently acquired, by various purchases, other shares and stock in the N. B. railway; it held that nothing passed by the bequest. (*Re Gibson*, L. R., 2 Eq. 669.)

A bequest "of my stock in trade and debts accruing therefrom" was held to pass the testator's stock in trade and trade debts existing at the time of his death. (*Ferguson v. Ferguson*, I. R., 6 Eq. 199. See also *Moore v. Madden*, I. R., 2 Eq. 511.)

1 Vict. c. 26,  
s. 24.

Again, a contrary intention may appear from the words of the gift referring to the present time. Thus, where a testator devised the house "wherein I *now* reside," and "all the remainder of my real estates whereof I am *now* seised," and afterwards devised "all such trust estates as are *now* vested in me, or as to the leasehold premises as shall be vested in me at the time of my death:" it was held, that freehold estates purchased by him between the date of his will and his death, did not pass under the devise, the court being satisfied that the testator, in using the word "now," meant the day on which he made his will. (*Cole v. Scott*, 1 Hall & T. 477; 1 Mac. & G. 518.) The word "now" received the same construction in *Hutchinson v. Barrow* (6 H. & N. 533; 9 W. R. 538); and "a gift of the house I now live in" was held to refer to the house as occupied by the testatrix at the date of the will, and not at the time of her death. (*Williams v. Owen*, 9 L. T., N. S. 200.)

Effect of words referring to present time.

"Now."

On the other hand, where a testator devised a messuage wherein A. "now resides, with the stables or appurtenances thereto belonging and therewith occupied;" it was held, that a garden attached to the messuage, which had been acquired by the testator after the date of his will, passed. (*Re Midland R. Co.*, 34 Beav. 525.) Under a gift of "any other property that I may now possess," personalty acquired after the date of the will was held to pass. (*Wagstaff v. Wagstaff*, L. R., 8 Eq. 229; *Hepburn v. Skirring*, 4 Jur., N. S. 651.) And *Malins*, V.-C., has expressed his dissent from the decision in *Cole v. Scott*, *ubi sup.* (*Castle v. Fox*, L. R., 11 Eq. 542.)

Under a devise of lands "of which I am seised" at a particular place, lands acquired after the date of the will have been held to pass. (*Doe d. York v. Walker*, 12 M. & W. 591; *Lady Langdale v. Briggs*, 3 Sm. & Giff. 246; *Lord Lilford v. Keck*, 30 Beav. 300.)

Lands "of which I am seised."

For the bearing of this section on the wills of married women, see the note to sect. 8 (*ante*, p. 503); and on wills in execution of powers see the note to sect. 27 (*post*, p. 525).

Wills of married women, and in execution of powers.

After the date of his will a testator was duly declared lunatic, and so remained till his death. During his lunacy changes were made by the court in the state of his property. It was held, that his will must be read as speaking from its date and not from the death of the testator. (*Wheeler v. Thomas*, 4 L. T., N. S. 173.)

Will of testator subsequently found lunatic.

It is doubtful whether this section applies to the construction of an excepting clause in a will. (*Hughes v. Jones*, 1 H. & M. 765.)

Whether section applies to excepting clauses.

This section of the act does not apply to the objects of the testator's bounty who are to take the real and personal estate given by the will, but only to the real and personal estate comprised in the will. A testator bequeathed certain funds to A., a widow, for life or until her marriage, and after her death or marriage, amongst her children. A. married again between the date of the will and the death of the testator, and he was aware of her marriage: it was held, that A. was not entitled to the income of the funds, but that the gift, upon her decease or marriage, came at once into operation. (*Bullock v. Bennett*, 7 De G., M. & G. 283; and see the remarks of *Kindersley*, V.-C., *Gibson v. Gibson*, 1 Drew. 62.)

Section does not apply to the objects of gift.

It was said by *Turner*, L. J., that the words in the section, "with reference to the real estate and personal estate comprised in it," mean "so far as the will comprises dispositions of real and personal estate." (*Lady Langdale v. Briggs*, 8 De G., M. & G. 436.)

As to the period from which a will speaks, with reference to the objects of the gifts contained in it, see 1 Jarm. Wills, 303—306; and as to the construction of a gift to the husband of an unmarried daughter of the testator, see *Radford v. Willis*, L. R., 7 Ch. 7.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised or in-

A residuary devise shall include estates compr

1 Vict. c. 26,  
s. 25.

In lapsed and void  
devises.

Rule as to wills  
prior to 1838.

Residuary devises  
within this sec-  
tion.

Gift of particular  
residue.

Residuary devise  
remains specific  
notwithstanding  
this statute.

A general devise  
of the testator's  
lands shall include  
copyhold and  
leasehold as well  
as freehold lands.

tended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will (*d*).

(*d*) In wills prior to 1838, a residuary devise does not include specific devises which lapse (Hawk. Wills, 44), or which are void. (*Smith v. Lomas*, 12 W. R. 949.) But a residuary bequest does include lapsed and void legacies. (Hawk. Wills, 40. See 1 Jarm. Wills, 610—620.)

This section is to be construed upon the principle of assimilating a residuary devise of real estate, with a similar bequest of personalty; and therefore a devise which was by construction residuary was held to pass lands in a devise void as being contrary to law. (*Carter v. Haswell*, 26 L. J., Ch. 576; 5 W. R. 308.)

A testatrix devised estate E. to A. absolutely, and "all my freeholds, &c. not hereinbefore devised" to A. for life, with remainders over; A. died before the testatrix: held that estate E. passed under the residuary devise. (*Green v. Dunn*, 20 Beav. 6.) A testator devised specific real estate to M., and devised and bequeathed "*All other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within this section, and included the real estate devised to M. (*Cogswell v. Armstrong*, 2 Kay & J. 227; and see *Culsha v. Cheese*, 7 Hare, 236; *Hickson v. Wolfe*, 9 Ir. Ch. R. 452.)

A married woman having a power of appointment under a settlement over estates A. and B., appointed estate A. to her husband for life, with remainder to trustees to sell and pay certain legacies and pay the residue to charities; and she appointed "all the other hereditaments comprised in the settlement not hereinbefore disposed of" to another person: it was held, that the appointment of "all other the hereditaments," &c. by the will, was not a residuary devise within this section, and that the void gifts to the charities did not pass by it. (*Re Brown*, 1 Kay & J. 521.) A testatrix gave lands in the parish of H. to A., B. and C. as joint tenants in fee, and devised to the plaintiff "all the rest of my freehold hereditaments in the parish of H., and all my freehold hereditaments in the parishes of," &c. The devise to A., B. and C. having been declared void, it was held that the lands comprised in that devise did not pass to the plaintiff under this section. *Mellish*, L. J., thought that the section only applied where there was what might be called an universal residuary devise; that is to say, a devise of all the residue of the testator's lands. (*Springett v. Jennings*, L. R., 6 Ch. 333.)

A residuary devise of real estate was held to be specific before the Wills Act. (*Mirchouse v. Scaife*, 2 M. & Cr. 695.) And such a devise remains specific, notwithstanding the Wills Act. (*Hensman v. Fryer*, L. R., 3 Ch. 420; *Gibbins v. Eyden*, L. R., 7 Eq. 371.)

And accordingly lands specifically devised, lands comprised in a residuary devise, and personal estate specifically bequeathed, are to be applied rateably in payment of debts. (*Eddels v. Johnson*, 1 Giff. 22; *Pearmain v. Twiss*, 2 Giff. 130; *Clark v. Clark*, 4 Giff. 702.) But a pecuniary legatee has no right to call upon a residuary devisee to contribute to the payment of debts. (*Collins v. Lewis*, L. R., 8 Eq. 708; *Dugdale v. Dugdale*, L. R., 14 Eq. 234.)

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to in-



clude the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will (*e*).

1 Vict. c. 26,  
s. 26.

(*e*) For the rules on this point governing wills prior to 1838, see 1 Jarm. Wills, 632—646; Hawk. Wills, 30.

Where a testator having bequeathed the residue of his personal estate whatsoever and wheresoever to A., devised all his manors, lands, &c. at W. in the county of Durham, and at B. in the county of York, and all other his real estates in the counties of Durham and York, and elsewhere, and all his estate and interest therein to trustees; it was held, under this section, by Sir J. Romilly, following the opinion of the Courts of Exchequer (5 Exch. 752), and Queen's Bench (18 Q. B. 474); but contrary to the opinion of Lord Langdale (11 Beav. 237), that the testator's leaseholds in Durham passed to the trustees. (*Wilson v. Eden*, 16 Beav. 153.)

Where a testator devised all his "freehold land" at a certain place, in part of which (then in question) he was possessed of a term of years, and he was also seised of the reversion of the same in fee from the expiration of the three years after the end of the term, it was held that both the freehold and leasehold interest of the testator passed. (*Mathews v. Mathews*, L. R., 4 Eq. 278.)

A testator who had no freeholds, but had leaseholds for a long term which he believed to be of freehold tenure, gave his real estate upon trust to make a certain payment; it was held that the leaseholds were charged with the payment. (*Gully v. Davis*, L. R., 10 Eq. 562.)

**27.** A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will (*f*).

A general gift shall include estates over which the testator has a general power of appointment.

(*f*) The general rule governing wills prior to 1838 has been thus stated: "It is clearly settled that a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but it is also settled that where a testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate; and that as to both realty and personalty, if the court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power." (Per Lord St. Leonards, *Lake v. Currie*, 2 De G., M. & G. 547. See further, Hawk. Wills, 22—26; 1 Jarm. Wills, 646—649; *Re Comber's Settlement Trusts*, 14 W. R. 172; *Re Bringloe's Trusts*, 26 L. T., N. S. 58.)

Rule as to wills prior to 1838.

Where a married woman is the donee of the power, the rule seems to be, that if the will would be ineffectual unless construed as an execution of the

1 Vict. c. 26,  
s. 27.

New law.

What powers are  
within this sec-  
tion.

Powers exercised  
by general resi-  
duary bequest;

by general pecu-  
niary legacies.

Ineffectual ap-  
pointments.

Property ineffec-  
tually appointed

power, that construction shall prevail; but that if there is any other subject upon which her will may operate, the power will not be executed. (1 Jarman, 648; *Att.-Gen. v. Wilkinson*, L. R., 2 Eq. 816.)

Under the new law it is necessary to show a contrary intention in order to exclude the execution of the power, while under the old law it was necessary to show the intention to exercise the power. (*Lake v. Currie*, 2 De G., M. & G. 548.) This section is confined to general powers, and does not extend to a special or limited power. Thus a power to appoint by will amongst children in such manner as the appointor shall think proper, is not within this section of the act. (*Cloves v. Awdry*, 12 Beav. 604; *Russell v. Russell*, 12 Ir. Ch. R., N. S. 377.) Nor is a power given by a testator to his wife to appoint by will among her relations or friends. (*Re Caplin's Will*, 2 Dr. & Sm. 527.) But a power in a marriage settlement to appoint by deed or will to all and every "person or persons, child or children," was held to be within this section. (*Copfield v. Pollard*, 5 W. R. 774.) A power of appointment by will only is within this section. (*Re Powell's Trusts*, 18 W. R. 228.)

Under this section a general residuary bequest will operate as an appointment of the personal estate, which the testator has power to appoint in any manner he may think proper. (*Spooner's Trust*, 2 Sim., N. S. 129; *Clifford v. Clifford*, 9 Hare, 675; *Att.-Gen. v. Brackenbury*, 1 H. & C. 782; 11 W. R. 880.)

It seems that general pecuniary legacies, with no particular fund indicated for the payment, are bequests of personal property described in a general manner, and therefore, where the proper assets of the testator are inadequate, without resort to the property over which the testator has a general power of appointment, general pecuniary legacies are within the operation of this section, and the will must be held to include and extend to the personal estate subject to the power of appointment, so far as is necessary to satisfy general pecuniary legacies described in a general manner. (*Hanthorn v. Shedden*, 2 Jur., N. S. 749; 3 Sm. & Giff. 293; doubted by *Wood, V.-C.*, in *Hurlstone v. Ashton*, 11 Jur., N. S. 725; but followed in *Re Wilkinson*, L. R., 4 Ch. 587; and see *Wilday v. Barnett*, L. R., 6 Eq. 193.) "It must also, I think, be considered as settled law that where a testator with a general power of appointment gives legacies and appoints an executor, he must be taken as exercising his general power to the extent to which the fund subject to it is required to make the legacies effective. And even that where a testator having such a power makes a will directing the payment of his debts without more, and appointing an executor, the appointed fund is liable for the payment of his debts, if his own estate is insufficient. The same rule would, I conceive, apply in both these cases, though no executor were appointed. It has not yet been decided that an appointment of an executor without more would, since the Wills Act, make the fund assets. And so to hold would appear to give a very unnatural construction to sect. 27 of the Wills Act, as to the execution of powers by a general disposition." (Per *Wickens, V.-C.*, *Re Davies' Trusts*, L. R., 13 Eq. 166.)

"A testamentary appointment under a general power to A., in trust for B., which lapses as to the beneficial interest by B.'s death before the appointor, operates as a good appointment in favour of A., who holds on the same trusts as if it had been the appointor's own property. . . . It does not appear to have been yet decided that where there is no appointment to A., but merely an appointment to B. direct, and B. dies before the testator, the result is the same." (Per *Wickens, V.-C.*, *Re Davies' Trusts*, L. R., 13 Eq. 166.) In that case S., who had a general power of appointment over a moiety of her deceased husband's residuary estate, by will in 1869, after directing that her debts should be paid, and giving pecuniary legacies, bequeathed the residue of her personal estate to M., E., W. and J. equally, and appointed an executor. M. and J. died in the life of the appointor. Held, that the husband's next of kin were entitled to the shares which M. and J. would have taken if they had survived the appointor. (*Ib.*)

A general residuary bequest includes property over which the testator

has a general power of appointment, and which he has ineffectually appointed. (*Spooner's Trusts*, 2 Sim., N. S. 129; *Gale v. Gale*, 21 Beav. 349.) Thus, A. having power to appoint 1,000*l.* by will, and which in default of appointment was given over to B., duly appointed it to C., who died in the testator's lifetime: A. afterwards made a codicil giving his residue, and the dividends due at his death on the 1,000*l.* to his wife: it was held, that the 1,000*l.* passed to the wife under the residuary gift. (*Bush v. Coman*, 32 Beav. 228.) Funds ineffectually appointed were held not to pass by a residuary clause in *Wilkinson v. Schneider*, L. R., 9 Eq. 423.

1 Vict. c. 26,  
s. 27.

Included in general residuary bequest.

Estates A. and B. were so settled that the testator had no power to deal with A., but had a power of appointment over B. By his will, made after this act, he referred to the settlement and confirmed it, and then reciting that he had considerable freehold estates and might become possessed of more, he devised all his real estates of which he might die possessed to certain persons as trustees for purposes totally different from those of the settlement. He had not at the date of his will or at his death any other estates besides A. and B.: it was held, that the testator must be taken to have known that he had a power of appointment over estate B., that the confirmation of the settlement operated only upon the estate A.; and that the devise was a good execution of the power. (*Lake v. Currie*, 2 De G., M. & G. 536; 16 Jur. 1027; 15 Beav. 472.) By a settlement leaseholds were limited in trust for a wife for life, with remainder as her husband should appoint, with remainder over. The husband by will made a general residuary bequest to the wife, but subject as to such property as was comprised in the settlement, which he thereby ratified and confirmed in all respects, to the trusts thereof. It was held that the will was an execution of the power. (*Hutchins v. Osborne*, 3 De G. & J. 142.) A testatrix, by her will dated in 1860, devised real estate on trust, in case her personal estate should prove insufficient to pay her debts, legacies, &c., to raise a sum to make good the deficiency. Subsequently she put the estate into strict settlement, reserving to herself a power to charge it with 1,000*l.* in priority to the uses declared by the settlement. Lastly, she made a codicil bequeathing a legacy, and in other respects confirming her will. Held, that the codicil, without any aid from this section, operated as an appointment under the power; and that even if the codicil had not been made, the will was an express exercise of the power. (*Meredyth v. Meredyth*, I. R., 5 Eq. 565.)

Instances of powers exercised by general gifts.

By a voluntary settlement in 1848, a settlor transferred a debt to a trustee in trust for such persons and purposes as the settlor should by any deed or instrument in writing appoint, and in default to pay the income to the settlor for his life, and on his death to distribute the amount amongst specified persons. He afterwards executed an appointment, by deed, of part of the fund, and confirmed the trusts of the settlement as to the remainder. By his will, made in 1852, the settlor gave certain legacies, and then gave all his personal estate not otherwise effectually disposed of to trustees. It was held, that the settlor had sufficiently expressed his intention not to affect the unappointed property comprised in the settlement of 1848. (*Moss v. Hasler*, 2 Sm. & G. 458; 18 Jur. 973.) It has been suggested that the only safe rule for discriminating between mere conjecture and the contrary intent required by the statute, is to inquire whether there is anything in the will inconsistent with the notion that the residuary bequest is meant to operate as an execution of the power. A testator was under a covenant to pay 2,000*l.* to the trustees of his settlement, upon trust for his wife for her life, with remainder to his general appointees, by deed or will. By the will he directed his executors to pay the 2,000*l.* to the trustees, in order that they might invest it, and pay the income to the wife for life; and he then bequeathed his residuary estate, subject to certain legacies, to the wife absolutely: it was held, that the residuary bequest was a good execution of the power. (*Scriven v. Sandom*, 2 Johns. & H. 743.) As to a contrary intention, see further, *Pettinger v. Ambler*, L. R., 1 Eq. 510.

Contrary intention.

Coupling sections 24 and 27 together, the true construction of this statute is, that a will may operate as an execution of all powers vested in the

Effect of sections 24 and 27.

1 Vict. c. 26,  
s. 27.

General powers  
executed by wills  
of prior date.

testator immediately before his death. A person *sui juris* must, therefore, be held to intend his will to operate on powers, which he had not at the date of executing it, but which he acquired before his death. (Per Wood, V.-C., *Thomas v. Jones*, 2 J. & H. 482.) General powers have been held to have been executed by wills dated prior to the instrument creating the power. (*Patch v. Shore*, 2 Dr. & Sm. 589; *Hodsdon v. Dancer*, 16 W. R. 1101.) But where the testator is himself the settlor, the court may gather from the surrounding circumstances an intention on the part of the settlor to take the property comprised in the settlement out of a will of prior date. (*Re Ruding's Settlement*, L. R., 14 Eq. 266.)

Where A. bequeathed her residue to such persons as B. should by deed or will appoint, and in default to his next of kin, and B. died before A., it was held that B.'s will could not operate as an execution of the power by anticipation. (*Jones v. Southall*, 32 Beav. 31.)

Special powers  
not within section  
27.

Special powers are not within sect. 27 (*Re Caplin's Will*, 2 Dr. & Sm. 527), and are therefore governed by the old law. Thus, wills dated since 1837 have been held to operate in execution of special powers, on the ground of the testator's intention to dispose of the property which was the subject of the power. (*Rooke v. Rooke*, 2 Dr. & Sm. 38; *Re Gratwick's Trusts*, L. R., 1 Eq. 177. See *Ferrier v. Jay*, L. R., 10 Eq. 550.)

A settlement contained a power for the tenant for life by deed or will to charge lands comprised in the settlement with 500*l.* for his younger children, and to limit a term to raise the money. In 1846, the tenant for life devised the lands, charged with the payment to his younger children of legacies amounting to 500*l.*: but the will contained no reference to the settlement, nor did it limit any term. Held, that the will operated as an exercise of the power. (*Davies v. Davies*, 7 W. R. 85.)

Special power  
executed by will  
of prior date.

A., being entitled to a share of a testator's residuary estate, by will dated in 1845, bequeathed all the effects due to him from that estate to his children. The estate was then unadministered, but it was afterwards administered, and certain debts due to it were allotted to A. as his share of the residue. After which he settled the debts in trust for himself for life, remainder in trust for his sons and daughters, or any of them or any of their children, as he, from time to time by deed or writing to be by him duly executed and attested or by his will, should appoint: it was held, that by sect. 24 the will spoke from A.'s death; and that inasmuch as the terms used in the will referred to the property which was the subject of the power, the will was a good execution of the power. (*Stillman v. Weedon*, 16 Sim. 26.)

Powers given to  
survivor of  
several.

A general power given to the survivor of two persons may, under sect. 24, be exercised by the will of the ultimate survivor executed during the joint lives. (*Thomas v. Jones*, 2 J. & H. 475; 1 De G., J. & S. 63.) As to whether a special power can be so exercised, see Sugd. Powers, 124, 8th ed.; *Cronin v. Roche*, 8 Ir. Ch. R. 103; *Cooper v. Martin*, L. R., 3 Ch. 47; 4 Davidson, Conv. 88, 2nd ed.) Where a power to appoint among children was, in default of any joint appointment by the husband and wife, to be exercised by the survivor "after the decease of the other:" it was held, that a will made during their joint lives by the one who survived did not operate as an execution of the power. (*Cave v. Cave*, 8 De G., M. & G. 131.)

Sect. 27 applies to the wills of married women. (*Bernard v. Minshull*, Johns. 276; see the note to sect. 8, *ante*, p. 503.)

Powers of revoca-  
tion.

An appointment expressed to be made in exercise of every power enabling the appointor, does not exercise a power of revocation, if there be other property to which the appointment can apply. (*Pomfret v. Perring*, 5 De G., M. & G. 775; *Palmer v. Newell*, 20 Beav. 38.)

General clause of  
revocation.

A married woman, in 1846, duly made a will in execution of a general power of appointment, disposing of certain stock, and appointing executors thereof. In 1855, she made another will without the consent of her husband, disposing of certain other property under her marriage settlement, and of other articles; it did not refer to the general power under which the will of 1846 was made, nor to the stock thereby appointed, but it contained a general clause of revocation, and named a different executor. It was held, that this section was intended to enlarge the dispositive powers of

testators, and has no bearing on questions of revocation. That the clause of revocation in the will of 1855 being in general terms, and containing no reference to the general power in the execution of which the will of 1846 was made, or to the property thereby appointed, did not operate to revoke that will. (*In bonis Merritt*, 1 Sw. & Tr. 112.)

1 Viot. c. 26,  
s. 27.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will (*g*).

A devise without any words of limitation shall be construed to pass the fee.

(*g*) In wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only. (Hawk. Wills, 130.) The various cases in which such indefinite devises are enlarged to a fee simple are considered; 2 Jarm. Wills, 248; Hawk. Wills, 131. And see *Lloyd v. Jackson*, L. R., 2 Q. B. 269; *Bolton v. Bolton*, L. R., 5 Ex. 145; *Pickwell v. Spencer*, L. R., 7 Ex. 105; *Re Harrison's Estate*, L. R., 5 Ch. 408; *Lander v. Elsmore*, 27 L. T., N. S. 603.

Rule as to wills prior to 1838.

A devise, before 1838, of "rents and profits" to A. without words of limitation passes an estate for life: such a devise, since 1837, passes the fee. (Hawk. Wills, 120.) And a devise of the "income" of land also passes the fee. (*Mannox v. Greener*, L. R., 14 Eq. 456.)

A. being seised in fee of freeholds, by his will dated since this act, devised them to B. "to be kept in trust for C., that is, B. is to let the premises, and give the rent to my son C. for his support." Held, that C. took the absolute interest. (*Malcolmson v. Malcolmson*, 17 L. T. 44.)

Cases under this section.

A testator, by his will dated in December, 1838, gave to his niece the house she lived in, and grass for a cow in Gill Field. Held, that she took an estate in fee simple in the house, and the right of pasture of a cow during her pleasure. (*Reay v. Rawlinson*, 29 Beav. 88.)

A testator devised his real estate to a devisee in fee charged with certain annuities or annual rent-charges to two annuitants: it was held, on a special case, that the annuitants took the annuities for life; and that this section of the act only applies to estates vested in or in the power of the testator, and not to estates or interests created *de novo* by his will. (*Nicholls v. Hawkes*, 22 L. J., Chanc. 255; 10 Hare, 342.) As to the question whether an annuity given by will is perpetual or for life only, see Hawk. Wills, 125; *Bent v. Cullen*, L. R., 6 Ch. 235.

Lord St. Leonards considers that cases where, after the devise without any words of limitation, there are gifts over also without words of limitation, were not within the purview of the act, and that it would be dangerous to extend it to them. (R. P. Stat. 382.)

Where the particular devise is without words of limitation, a "contrary intention" that the fee shall not pass does not appear from the fact that in other parts of the will words of inheritance have been used. (*Wisden v. Wisden*, 2 Sm. & Giff. 396.)

Contrary intention.

A testatrix, by her will dated in 1852, devised copyholds to a married woman to be her sole and separate property, and with power to her to appoint the same to her children and her husband in such way and in such proportions as she might think fit. It was argued, that a contrary intention appeared by the will; but the court held, that the married woman was devisee in fee, that the execution of the power was not made a duty, and, therefore, there was no trust in favour of the husband and children. (*Brook v. Brook*, 3 Sm. & Giff. 280.)

A contrary intention was collected from the circumstance, that by the same will an estate was subsequently given which could not come into existence unless the first devise was construed to be a life estate. (*Gravenor v. Watkins*, L. R., 6 C. P. 500.)

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or

The words "die without issue," or "die with



1 Vict. c. 26,  
s. 29.

leaving issue,"  
shall be construed  
to mean die with-  
out issue living at  
the death.

"have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue (*h*).

Old rules of con-  
struction as to  
wills prior to  
1838.

(*h*) In wills prior to 1838, the words "die without issue" and "die without having issue," in gifts both of real and personal estate, are construed to mean the death of the person spoken of and failure of his issue at the time of his death or at any time afterwards; unless the context shows the meaning to be confined to a failure of issue at the time of his death. The words "die without leaving issue" in devises of real estate are construed in the same way as the words "die without issue;" but in bequests of personalty they import a failure of issue at the death of the person spoken of. (Hawk. Wills, 205, 213.)

The various cases in which the words "die without issue," &c., are restrained by the context to mean a failure of issue at the death of the person are considered in Hawk. Wills, 207; 2 Jarm. Wills, 472 *et seq.*; see *Eastwood v. Arison*, L. R., 4 Ex. 141; *Morgan v. Morgan*, L. R., 10 Eq. 99, which was the case of a settlement; *Lander v. Elsmore*, 27 L. T., N. S. 603; and *Wilson v. Maddison*, 16 W. R. 417.

It was said, that the object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning. (*Greenway v. Greenway*, 1 Giff. 138.)

Cases under new  
law.

Where a testator, by his will dated in 1859, directed his residuary personal estate to be invested "and the interest to be divided half-yearly between his four sons, and at the decease of either without lawful issue, such share to revert to the remainder then living or their child or children:" it was held, that each of the four sons took an absolute interest in his share, subject to be divested in case of his dying without leaving issue. (*Dowling v. Dowling*, L. R., 1 Ch. 612.)

By his will, dated in 1857, a testator devised land to A.; in case of A. dying before B. and leaving no issue, then to B.; should both A. and B. die without lawful issue, then over. Held, that A. took an estate in fee liable to be divested, (1) in the event of his dying in the lifetime of B. without leaving children living at his death; and (2) in the event of both A. and B. dying without leaving any children. (*Re Mid Kent R. Co.*, 11 W. R. 417.)

By his will, dated in 1845, a testator gave a freehold house and the furniture therein to A., but if A. should die in the lifetime of B., without leaving lawful issue, then over. A. died in the lifetime of B., leaving issue, who all died in the lifetime of B. Held, that the gift over took effect. (*Jarman v. Vye*, L. R., 2 Eq. 784.) See also *Re Allen's Estate*, 3 Drew. 382.

Words importing  
failure of issue.

It has been held, that as this section is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body." (*In re Sallery*, 11 Ir. Ch. R. 236; *Harris v. Davis*, 1 Coll. 416, and the remarks on that case, 2 Jarm. 507; see *contra*, *Dodds v. Dodds*, 10 Ir. Ch. R. 476). Where a testator, by his will dated in 1840, devised

real estate to his daughter "and her lawful heirs," "but in case she should not happen to have any child," then to his nephew and his heirs, it was held, that the daughter took a fee simple with an executory devise over to the nephew. (*Mathews v. Gardiner*, 17 Beav. 254.)

1 Vict. c. 26,  
s. 29.

This section of the act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one;" which additional words, upon the authority of decided cases, modify their meaning. (*Morris v. Morris*, 17 Beav. 198; 17 Jur. 966.) A testator devised an estate in fee to his son, but if he should die under twenty-one, over; by a codicil he limited the estate over in the event of the son dying without issue "or" under twenty-one: it was held, that "or" must be read "and," and that the executory devise over took effect only on the happening of both events, and consequently that A., on attaining twenty-one, had an absolute estate in fee simple. (*ib.*)

A testator, by his will dated in October, 1838, gave the residue of his real and personal estate to trustees, "in trust for all my children in equal shares, and the heirs of their bodies . . . and in case there shall be a failure of issue of any such children, then as to the share or shares of him, her or them, whose issue shall so fail, to the use of the others or other of them, and the several heirs of their respective bodies." The testator was possessed of freehold and leasehold property and left one daughter, and one son, who executed a disentailing deed of all the freeholds devised to him by his father's will. It was held, that the son was entitled in fee to half of the freeholds, and absolutely to half of the leaseholds. The Vice-Chancellor appears to have decided that, although speaking with strict accuracy there cannot be a bequest of personalty to a person in tail, yet that both as to freeholds and leaseholds the case fell within the exception "unless a contrary intention," &c. (*Green v. Green*, 3 De G. & Sm. 480.)

Contrary intention.

A testator, by his will dated in 1850, gave his real and personal estate in trust as to the annual income for his brothers E. and C. or the heirs of their bodies; and if either should die leaving heirs of his body, his share should go to such heirs; but if one die without issue, then the whole income should go to the survivor, or in case of his death to his heirs; but in case both should die without issue, then the whole property should be divided equally among the testator's next of kin. It was held by *Stuart*, V.-C., that the case was governed by the rule laid down in the statute, and that there was a valid gift over of the personalty to the testator's next of kin, in the event of both his brothers dying without leaving issue at their respective deceases. (*Greenway v. Greenway*, 1 Giff. 131.) This decision was affirmed on the ground, that on the true construction of the will the words by which the gift over was introduced, were equivalent to "in case both the testator's brothers should die without leaving issue at the time of their death." But he abstained from giving any opinion as to whether the words in this section "unless a contrary intention," &c., apply to a gift of personalty, or are to be confined to a devise of real estate. (*Greenway v. Greenway*, 2 De G., F. & J. 137; and see *Re O'Beirne*, 1 J. & Lat. 352.)

The operation of the section is limited by the final proviso. The question whether words importing a failure of issue refer to the objects of a preceding gift, is discussed 2 Jarm. Wills, 424 *et seq.*

Final proviso.

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication (i).

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

(i) "The meaning of this section is, that any devise under which before the passing of the act a trustee would have been held to take an indefinite

1 Vict. c. 26,  
s. 30.

or uncertain term of years shall now be construed to pass the fee." (Hawk. Wills, 143.) Thus, in wills prior to 1838, where a testator devises lands to his executors for payment of his debts, or until his debts are paid, the executors only take an estate for so many years as are necessary to raise the sum required. (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509.) It is the same where an estate is devised till such time as a particular sum shall be raised out of the rents and profits thereof. (*Corbet's case*, 4 Rep. 81 b; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens (A. 1). See further, Hawk. Wills, 142; 2 Jarm. Wills, 288.)

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate and not an estate determinable when the purposes of the trust shall be satisfied (*k*).

(*k*) The effect of this section "is to propound in regard to wills made or republished since the year 1837 the following general rule of construction: that whenever real estate is devised to trustees (and it would seem to be immaterial whether the devise is to the trustees indefinitely, or to them and their heirs, or to them and their executors or administrators), for purposes requiring that they should have *some* estate, without any specification of the nature or duration of such estate, and the beneficial interest in the property is not devised to a person for life, or being so devised, the purpose of the trust may endure beyond the life of such person; the trustees take (not as in *Carter v. Barnardiston*, 1 P. W. 505, an estate for years, or as in *Doe v. Simpson*, 5 East, 162, an estate for life with a superadded term for years, but) an estate in fee simple. The result, in short, is, that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee." (2 Jarm. Wills, 296.)

Sections 30 and 31 have thus been compared: "The 30th and 31st sections of the Wills Act have been described as obscure, and even conflicting; their meaning, however, will be apprehended by observing that the 30th section, which speaks of a devise passing 'the fee simple or other the whole estate or interest of the testator' relates to the quantity of estate to be taken by a trustee for the purposes of the trust; while the 31st section, which declares that a devise shall vest in trustees 'the fee simple or other the whole legal estate' in the premises devised, relates to the disposition of the legal estate not required for the purposes of the trust. The 30th section enacts, that in no case shall trustees or executors be held for the purposes of the trust, to take an indefinite term of years; the 31st section enacts, that where the estate of the trustees is not expressly limited, they shall in all cases take either an estate determinable on the life of a person taking a beneficial life interest in the property, or the absolute *legal* estate in fee simple." (Hawk. Wills, 156.)

As to the quality and extent of the estate conferred by devises in trust, see further, Hawk. Wills, 140 *et seq.*; 2 Jarm. Wills, 268 *et seq.*; *Collier v. McBean*, L. R., 1 Ch. 81.

Devises of estates tail shall not lapse.

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the

time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

1 *Viot. c. 26,*  
s. 32.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will (*l*).

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

(*l*) As to the doctrine of lapse, see 1 Jarm. Wills, 314 *et seq.*; 2 Wms. Exors. 1118 *et seq.*; *Elliot v. Davenport*, Tudor, L. C., Conv. 803.

The words "shall die" in this section refer to the period at which the act came into operation. Thus it has been held, that lapse was prevented by this section where the devisee or legatee died before the date of the will; but after the act came into operation (*Winter v. Winter*, 5 Hare, 306; *Mower v. Orr*, 7 Hare, 478; *Wisden v. Wisden*, 2 Sm. & G. 396, and see *Loxley v. Heath*, 27 Beav. 535); *secus*, where he died before the act came into operation. (*Wild v. Reynolds*, 5 Notes of Cases, 1; *Barkworth v. Young*, 4 Drew. 21.)

Date of death of devisee or legatee.

This section was held to extend to a case where the issue of the legatee, who was alive at the date of the will, was not the same issue as was in existence when the legatee died. (*In bonis Parker*, 1 Sw. & Tr. 523; but see Sugd. R. P. Stat. 393.)

This clause does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee, and therefore disposable by his will, notwithstanding his death in the lifetime of the testator. (*Johnson v. Johnson*, 3 Hare, 157.) It was considered doubtful by the Master of the Rolls whether the will of a predeceased legatee should be construed as if the legatee had survived the testator, or as if the testator had predeceased the legatee. (*Re Mason's Will*, 34 Beav. 494.) Where a married woman to whom a legacy was left by her father's will died in his lifetime leaving her husband surviving, who also died before the father, administration to the married woman's estate was granted as if she had died immediately after her father. (*Re Council*, L. R., 2 P. & M. 314.)

Subject of the gift becomes the absolute property of the predeceased devisee or legatee.

The provisions in this act against the lapse of legacies given to children render it necessary for a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will. (*Re More's Trust*, 10 Hare, 178.) A devise and bequest was made to all the testator's children living at his decease (without naming them). A subsequent codicil confirmed the gift, as mentioned in the will, "to his surviving children," naming all of them. One died in the testator's lifetime, leaving children who survived the testator: it was held, that the survivorship had relation to the testator's death and not to the date of the will, and that the representatives of the deceased child took nothing under this section. (*Fullford v. Fullford*, 16 Beav. 565.)

Where a testator gave a legacy to his daughter, with a gift over, in the event of her dying unmarried, to such of his other children as she should appoint, and in default of appointment to his other children equally, and the daughter died in the testator's lifetime, unmarried, and without having exercised the power of appointment: it was held, that the legacy had not lapsed, and that one of the other children was entitled to a share. (*Kellett v. Kellett*, I. R., 5 Eq. 298.)

The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at

Section does not apply to gifts to a class.

1 Vict. c. 26,  
s. 33.

Gifts in exercise  
of powers.

the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class, for according to the rule before the act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime. (*Olney v. Bates*, 3 Drew. 323; *Browne v. Hammond*, Johns. 215.)

This section applies to a testamentary appointment made under a general power (*Eccles v. Cheyne*, 2 K. & J. 676), but not under a special power. (*Griffiths v. Gale*, 12 Sim. 354; *Freeland v. Pearson*, L. R., 3 Eq. 663.)

The fictitious survivorship created by this section will not be extended beyond the limits necessary to carry out the purpose of the act. Therefore, where a married woman in whose settlement there was a covenant to settle property coming to her during the coverture, and to whom a legacy was left by her father's will, predeceased him, but by reason of her having issue, the legacy did not lapse; it was held that the legacy was not within the covenant (*Pearce v. Graham*, 11 W. R. 415); but probate duty is payable in the same manner as if the legatee had actually survived the testator. (*Executors of Perry v. Regina*, L. R., 4 Ex. 27.)

Act not to extend  
to wills made  
before 1838, nor  
to estates pur  
autre vie of per-  
sons who die  
before 1838.

34. This act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this act shall not extend to any estate pur autre vie of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight (m).

Revocation of  
wills prior to 1838  
by acts since 1837.

(m) The provisions of the statute as to the operation of a will and of the gifts in it do not apply to wills prior to 1838 (*Lord Langford v. Little*, 2 J. & Lat. 633); but with respect to the revocation of wills prior to 1838, acts of revocation done subsequently to 1837 must be considered with reference to the statute. (*Hobbs v. Knight*, 1 Curt. 768; *Benson v. Benson*, L. R., 2 P. & M. 172.)

Where a will was prepared and dated in Oct. 1837, but not executed until Feb. 1844, it was construed according to the rules laid down in this act. (*Randfield v. Randfield*, 9 W. R. 1.)

Republication.

Formerly wills of personalty might be republished by parol acts or declarations of the testator; and republication made a will speak from the date at which it was republished. (1 Wms. Exors. 198, 208.) But since this statute nothing short of a re-execution of a will itself, or the formal execution under the act of some document which directly or impliedly affirms it, can confer new or further testamentary validity upon it beyond that which it derived from its original execution. (*Noble v. Phelps*, L. R., 2 P. & M. 282; and see *Rolfe v. Perry*, 3 De G., J. & S. 481.)

"Republished."

From the occurrence of the word "republished" in this section, it was argued that republication as distinct from re-execution was still permissible in some cases; but the court explained the section to mean, that if a will had been made before the act and republished after, it was to be held to have been made after the act, and to require a formal execution. The object of the section was to get rid of republication as a method of conferring testamentary validity even as regards a will made before the date of the act, and not to extend the operation of republication to wills made since the act. (*Noble v. Phelps*, L. R., 2 P. & M. 276.)

Will re-executed  
by codicil.

Under this section of the act the effect of the re-execution of the will by the codicil is the same as if the testator had at the date of the codicil made a will in the words of the will so re-executed. (*Winter v. Winter*, 5 Hare, 306; *Anderson v. Anderson*, L. R., 13 Eq. 381.) A codicil, executed in 1839, to a will of 1818, was held to be a re-execution of that will, and to have the effect of bringing a bequest in the will to a deceased daughter



under the operation of the 33rd section of this act, as no intention to the contrary appeared on the face of either instrument. (*Skinner v. Ogle*, 1 Rob. 368.) Where a testator made his will before the act, and by a codicil made after the act ratified and confirmed his will except as altered by the codicil: it was held, that the will was so re-executed by the codicil as to come within the provisions of the act, and lands acquired subsequently to the date of the codicil were held to pass. (*Lady Langdale v. Briggs*, 3 Sm. & G. 246.)

1 Vict. c. 26,  
s. 34.

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**35.** This act shall not extend to Scotland (*n*).

Act not to extend  
to Scotland.

(*n*) As to the adoption of this act in the colonies, see 4 Davidson, Conv. 267, n. ; Hayes & Jarm. Wills, 59, 7th ed.

## THE WILLS ACT AMENDMENT ACT, 1852.

15 & 16 VICTORIA, C. 24.

*An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills."*  
[17th June, 1852.]

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15 & 16 Vict.  
c. 24, s. 1.

1 Vict. c. 26.

When signature  
to a will shall be  
deemed valid.

WHEREAS the laws with respect to the execution of wills require further amendment : be it therefore enacted as follows :

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence, and by his direction (*a*) : every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*b*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*c*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*d*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses, or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature ; and the enumeration of the above circumstances shall not restrict the generality of the above enactment ; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any

disposition or direction inserted after the signature shall be made (e).

15 & 16 Vict.  
c. 24, s. 1.

(a) 1 Vict. c. 26, s. 9, *ante*, p. 505.

(b) A will of an English lady, drawn up by a notary in France, was signed by her, not at the end of the will itself, but at the end of a notarial minute, which immediately followed the will, detailing the circumstances and facts under which the will was made: it was held, that such a signature was a compliance with this statute. (*Page v. Donovan*, 3 Jur., N. S. 220.)

Where a testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all six sheets, no part of the will was admitted to probate. (*Sweetland v. Sweetland*, 18 W. R. 504.) Signatures placed beside or opposite to the end of the will have been held good. (*Re Wright*, 4 Sw. & Tr. 35; *Re Jones*, 13 W. R. 414; *Re Williams*, L. R., 1 P. & M. 4; *Re Coombs*, *ib.* 302.) A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which had been previously wafered to the foot of the will. (*Cook v. Lambert*, 11 W. R. 401.) But there must be evidence that the paper was so attached at the time of signature. (*Re West*, 12 W. R. 89.)

Signature placed  
beside or opposite  
end of will,

on paper wafered  
to will.

(c) Wills have been held duly executed where blank spaces were left after the concluding words. (*Hunt v. Hunt*, L. R., 1 P. & M. 209; *Re Archer*, L. R., 2 P. & M. 252.)

Blanks.

(d) A. wrote out his own will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did. His name was not written at the foot or end otherwise than in the attestation clause: it was held, that, under this act, the execution was valid. (*In bonis Walker*, 2 Sw. & Tr. 354; see *Smith v. Smith*, L. R., 1 P. & M. 143; *Re Casmore*, *ib.* 653.)

Signature in  
attestation clause.

(e) Words written underneath and following the signature of the testator have been included in the probate (*Re Brompton*, 33 L. J., Prob. 153; *Re Woodley*, *ib.* 154; *Re Powell*, 13 W. R. 696; *Re Ainsworth*, L. R., 2 P. & M. 151; *Re Birt*, *ib.* 214), but a clause written underneath the signature, although before execution, has been excluded. (*Re Greator*, 2 Jur., N. S. 1172; *Re Dallow*, L. R., 1 P. & M. 189.) As also a clause added by testator after signing his name. (*Re Arthur*, L. R., 2 P. & M. 273.)

Words following  
signature,

inserted after  
signing.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

Act to extend to  
certain wills  
already made.

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria (f).

Interpretation of  
"will."

(f) 1 Vict. c. 26, s. 1, *ante*, p. 498.

4. This act may be cited as "The Wills Act Amendment Act, 1852."

Short title of  
act.

## WILLS OF PERSONALTY BY BRITISH SUBJECTS.

24 &amp; 25 VICTORIA, C. 114.

*An Act to amend the Law with respect to Wills of Personal Estate made by British Subjects.*

[6th August, 1861.]

24 & 25 Vict.  
c. 114, s. 1.Wills made out  
of the kingdom  
to be admitted if  
made according  
to the law of the  
place where made.

BE it enacted by, &amp;c., as follows :

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin (a).

(a) Before this act, a will must have been executed according to the law of the country where the testator was domiciled at the time of his death. (1 Wms. Exors. 352.) When a British subject dies abroad after the passing of this act, having a will executed in England, in accordance with the law of England, upon motion for probate it is not necessary to consider whether he had or had not acquired a foreign domicile. (*Re Rippon*, 3 Sw. & Tr. 177.) In determining what papers are testamentary under the provisions of this act, the court will have regard to the law of one country only, and will not mix up the legal precepts of different countries. (*Pechell v. Hilderley*, L. R., 1 P. & M. 673.)

Probate is conclusive that an instrument is testamentary, but does not determine the validity of the dispositions contained in it. (*Whicker v. Hume*, 7 H. L. C. 124; 6 W. R. 813.) It seems, therefore, that this act leaves the extent of the power of testamentary disposition over personal property in England to be determined by the law of the testator's domicile at his death, except in cases within sect. 3. (4 Davidson, Conv. 265, n.)

See further as to this statute, Sugd. R. P. Stat. 398 *et seq.*; Hayes & Jarm. Wills, 539 *et seq.*, 7th ed.

Wills made in  
the kingdom to be  
admitted if made  
according to  
local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same (*b*).

24 & 25 Vict.  
c. 114, s. 3.

Change of domicile not to invalidate will.

(*b*) A domiciled Scotchman made a will, and afterwards married in Scotland. He subsequently acquired an English domicile, which he retained until his death. Held, that as the will was valid as long as he remained in Scotland, it was not revoked by his subsequent change of domicile, and was entitled to probate in England. (*Re Reid*, L. R., 1 P. & M. 74.)

This section appears to mean not merely that the will is to remain a valid instrument, notwithstanding a change of domicile, but that as to property within the United Kingdom its operation is not to be curtailed. (4 Davidson, Prec. Conv. 265, n.)

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

Nothing in this act to invalidate wills otherwise made.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

Extent of act.



## WILLS AND DOMICILE OF BRITISH SUBJECTS ABROAD, &c.

24 & 25 VICTORIA, C. 121.

*An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within Her Majesty's Dominions.*  
[6th August, 1861.]

24 & 25 Vict.  
c. 121, s. 1.

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

WHEREAS by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid (a).

(a) It is believed that no such convention has yet been agreed to. See further, as to the probable operation of the act, Hayes & Jarm. Wills, 540, 7th ed.; Sugd. R. P. Stat. 398.

No foreign subject dying in Great Britain or

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be

lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

24 & 25 Vict.  
c. 121, s. 2.

Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

Who this act shall not apply to.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent, shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit (b).

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

(b) As to administration to a person, domiciled out of this country, of property here, see 1 Wms. Exors. 414; *Re Hill*, L. R., 2 P. & M. 89.

APPORTIONMENT OF RENTS AND PERIODICAL  
PAYMENTS.

4 & 5 WILLIAM IV. C. 22.

*An Act to amend an Act of the Eleventh Year of King  
George the Second, respecting the Apportionment of  
Rents, Annuities and other Periodical Payments.*

THE STATUTE 11 GEO. 2, C. 19, S. 15, RECITED AND  
EXTENDED.

4 & 5 Will. 4,  
c. 22, s. 1.

Recital of statute  
11 Geo. 2, c. 19,  
s. 15, by which  
rents were re-  
coverable from  
undertenants,  
where tenants for  
life died before  
the rent was pay-  
able.

WHEREAS by an act passed in the eleventh year of the reign of his Majesty King George the Second, intituled "An Act for the more effectual securing the Payment of Rents, and preventing Frauds by Tenants," it was enacted, that where any tenant for life should happen to die before or on the day on which any rent was reserved or made payable upon any demise or lease of any lands, tenements or hereditaments which determined on the death of such tenant for life, the executors or administrators of such tenant for life should and might, in an action on the case, recover of and from such undertenant or undertenants of such lands, tenements or hereditaments, if such tenant for life die on the day on which the same was made payable, the whole, or if before such day then a proportion of such rent according to the time such tenant for life lived of the last year or quarter of a year, or other time in which the said rent was growing due as aforesaid, making all just allowances, or a proportionable part thereof respectively: and whereas doubts have been entertained whether the provisions of the said act apply to every case in which the interests of tenants determine on the death of the person by whom such interests have been created, and on the death of any life or lives for which such person was entitled to the lands demised, although every such case is within the mischief intended to have been remedied and prevented by the said act; and it is therefore desirable that such doubts should be removed by a declaratory law; and whereas by law, rents, annuities and other payments due at fixed or stated periods are not apportionable (unless express provision be made for the purpose), from which it often happens that persons (and their representatives) whose income is wholly or principally derived from these sources by the determination thereof before the period of payment arrives, are deprived of means to satisfy just demands; and other evils arise from such

rents, annuities and other payments not being apportionable, which evils require remedy; be it therefore enacted and declared, that rents reserved and made payable on any demise or lease of lands, tenements or hereditaments which have been and shall be made, and which leases or demises determined or shall determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, shall, so far as respects the rents reserved by such leases, and the recovery of a proportion thereof by the person granting the same, his or her executors or administrators (as the case may be), be considered as within the provisions of the said recited act (a).

4 & 5 Will. 4,  
c. 22, s. 1.

Rents reserved on leases determining on the death of the person making them (though not strictly tenant for life), or on the death of tenant *pur autre vie*, to be considered as within the provisions of recited act.

(a) In all cases of apportionment occurring after the 1st August, 1870, reference must be made to the act 38 & 34 Vict. c. 35 (*post*). The following note refers to the law before that date.

Before the statute 11 Geo. 2, c. 19, if the lessor tenant for life died within the half year, at the end of which rent was due, the rent reserved upon a lease not made in execution of a power was lost, because the representatives could not recover a part. The principle was, that a contract cannot be apportioned, and that under a lease, with a periodical reservation of rent, the contract for the payment of each portion is distinct and entire. (1 Swanst. 338, n.) In some cases the law qualified this principle; but in no case with respect to time (Co. Litt. 292 b; 10 Rep. 128); and courts of equity did not admit an apportionment of rent in respect of time. (*Jenner v. Morgan*, 1 P. Wms. 392; *Hay v. Palmer*, 2 P. Wms. 502; *Bentham v. Alston*, 2 Vern. 204.)

Law before  
11 Geo. 2, c. 19.

The statute 11 Geo. 2, c. 19, s. 15, provided, that where a lessor tenant for life should die before the rent day, his executors might recover from the tenant a proportionate part of rent so growing due, making all just allowances. This statute was held to apply where leases had been made by a tenant in tail, which determined on his death, because not conformable to the statute 32 Hen. 8, c. 28, or on account of there being no issue inheritable under the entail; (*Whitfield v. Pindar*, cited 2 Br. C. C. 662; 8 Ves. 311; *Paget v. Gee*, Ambl. 198; 1 Swanst. 356;) and rent was apportioned between the representative of a tenant in tail, who died without issue, and the remainderman in tail. (*Vernon v. Vernon*, 2 Br. C. C. 659.) The same statute applied to those cases only where the lease was not binding on the remainderman or reversioner, and the rent would consequently have been lost both to him and the executor at common law. Therefore, before this act, if a tenant in fee made a lease, or tenant for life with a leasing power made a lease in conformity to it, and the lessor died in the interval between two periods of the rent being due, *i. e.* at any time before midnight of the rent day, the whole rent went to the heir or remainderman, and there could be no apportionment in favour of the executor. (1 Wms. Exors. 777, 6th ed.; *Norris v. Harrison*, 2 Madd. 268; 10 Rep. 127 b; *Duppa v. Mayo*, 1 Saund. 287; 1 P. Wms. 177; 2 Bl. R. 1075; 4 T. R. 173.)

11 Geo. 2, c. 19,  
s. 15.

A., on his father's death, became tenant in tail in possession of estates, with remainder to his younger brother in tail. After the father's death a suit was instituted on behalf of A. and his younger brother (both of whom were infants), and a receiver of the rents of the estates was appointed. The younger brother was made a party to that suit, as being entitled to a portion out of the estates. A. died under twenty-one, and without issue. At his death the estates were held, as they had been ever since his father's death, by yearly tenants under *parol demises*. It was held, that A.'s administratrix was entitled to a proportionate part of the rents which were accruing due at his death. (*Kevill v. Davies*, 15 Sim. 466.) Where a lessee under a lease which determined at the death of the lessor, but was not within the stat. 11 Geo. 2, c. 19, paid over the whole rent for the current quarter, or other integral period, to the person entitled in remainder, such person would have

4 & 5 Will. 4,  
c. 22, s. 1.

4 & 5 Will. 4,  
c. 22, s. 1.

Rent not appor-  
tioned under  
11 Geo. 2, c. 19,  
unless lease deter-  
mined on death  
of lessor.

Composition for  
tithes.

been compelled to account for a proportion of it to the lessor's representatives, though the latter had no remedy against the tenant for its recovery, on the principle that where a man pays money from equity and conscience, though not bound at law, such money shall be divided according to equity. (*Paget v. Gee*, Ambl. 198; *Hawkins v. Kelly*, 8 Ves. 308.)

The recital of 4 & 5 Will. 4, c. 22, s. 1, has been referred to in determining the construction of the statute. (*Brown v. Amyot*, 3 Hare, 181; *Wardroper v. Cutfield*, 12 W. R. 458.)

Lord Campbell, C. J., said this recital is strong evidence of what the law is, and the burden of proving that the legislature has fallen into a mistake is cast upon those who say so; but the rule thus laid down, instead of being liable to the imputation of error, is fortified by a long series of decisions. (*Reg. v. Lords of the Treasury*, 16 Q. B. 362.)

Sect. 1 does not appear to provide for the case of a lease made by a tenant in fee to a tenant for life reserving rent; and therefore, where such a lease, having been granted before the passing of the act, determines by the death of the lessee for life between two rent days, the rent is lost and cannot be apportioned. The act in this section appears to contemplate two cases only; viz. the case of a lease determining on the death of the lessor, and the case of a lease determining on the death of the life for which the lessor was entitled. And even if the lease were granted after the passing of the act, it may be doubted whether such a case falls within the 2nd section. (1 Wms. Exors. 780, 6th ed.)

Rent was not apportionable under 11 Geo. 2, c. 19, unless the lease determined on the death of the lessor. Therefore, where an equitable tenant for life, under a settlement of freehold leases for lives, obtained a renewal grant for lives to himself, and at his death the settled property was in the occupation of yearly tenants under parol demises from him; it was held that the rent were not apportionable. (*Mills v. Trumper*, L. R., 4 Ch. 320.)

A tenant in fee demised lands from year to year. He died, having devised the lands for life. The devisee for life received rent, but did not live long enough to have a right to determine the yearly tenancy. It was held, that the administrator of the tenant for life was not entitled to an apportionment of the rent under the stat. 11 Geo. 2, c. 19, s. 15. (*Botheroyd v. Woolley*, 5 Tyrw. 522; 1 Gale, 66.) A tenant from year to year has a lease for a year certain, with a growing interest, during every year thereafter, springing out of the original contract and parcel of it, and therefore where such a tenancy has been created by an owner in fee of lands who devises them to one for life, with remainders over, the interest of the tenant from year to year, unless terminated by the devisee for life by some act *inter vivos*, does not determine upon the decease of the tenant for life; and consequently the rent then accruing due is *not* apportionable under sect. 15 of the 11 Geo. 2, c. 19. (*Cattley v. Arnold*, 1 J. & H. 660.)

A testator devised realty to trustees on trust to permit his wife and her assigns to receive the rents for life, with remainders over. A receiver was appointed in an administration suit; and during the time he acted as such, the lands were held by tenants under parol agreements from year to year at rents payable half-yearly. In 1826 the widow died, and the receiver paid to her representative a sum of money representing rents which accrued between the rent day preceding the death and the day on which she died. The Lord Chancellor ordered her personal representative to refund the money to the remainderman. (*Brown v. Candler*, 9 L. J., Ch. 212.)

Where a tenant for life with a leasing power granted leases from year to year, some by parol, some in writing but not conformable to the power, on his death, before the expiration of the leases, the rents were apportioned. (*Clarkson v. Scarborough*, 1 Swanst. 354; *Symons v. Symons*, 6 Mad. 207; *Ex parte Smyth*, 1 Swanst. 337.)

A composition for tithes, received after the death of the incumbent by his successor, was apportioned with reference to the respective periods of enjoyment. (*Aynsley v. Wordsworth*, 2 Ves. & B. 331.) Although it had been held that if the successor continued to receive the next payment after the death of his predecessor, the former would only be accountable to the executors of the latter for such a portion as the value of the tithes, if paid



in kind, accruing due between the last composition received by the late incumbent and his death would have amounted to. (*Williams v. Powell*, 10 East, 269.) Where a rector agreed with an occupier of land for a certain sum of money in lieu of tithes, payable yearly at Michaelmas, and the rector died about a month before Michaelmas, it was decreed, that the agreement having been determined by the death of the rector, the successor should be entitled to tithes in kind from such death, and the executor of the last incumbent to a proportion, according to the agreement, until the death of the testator. (Bunb. 294.) A rector, who took a composition for his tithes every Michaelmas, died in January, 1841. The new rector was collated in the following April, and, before harvest time, he employed a surveyor to value the tithes. The surveyor furnished him with a report, stating what he considered ought yearly to be paid by each of the occupiers as a composition in lieu of tithes. In August, the new rector required the respective occupiers to pay him, as a compensation for their tithes, the amount mentioned by the surveyor. The occupiers accordingly, in November, 1841, made their payments according to the surveyor's report, for the whole year, from Michaelmas, 1840, to Michaelmas, 1841. It was held, that the representative of the late rector was entitled to be paid by the new rector a proportion, according to the time which elapsed from Michaelmas, 1840, to the late rector's death, of the composition which existed in the late rector's lifetime. It seems that a composition for tithes is within the statutes 11 Geo. 2, c. 19, s. 15, and 4 & 5 Will. 4, c. 22. (*Oldham v. Hubbard*, 2 Y. & Coll. N. C. 209.)

4 & 5 Will. 4,  
c. 22, s. 1.

The provisions of 4 & 5 Will. 4, c. 22, have been extended to all rent-charges for which tithes have been commuted under 6 & 7 Will. 4, c. 71. (6 & 7 Will. 4, c. 71, s. 86. See *Heasman v. Pearse*, L. R., 8 Eq. 599.)

Tithe rent-charge.

Upon the accounts of the receiver a point was made, whether a tenant for life, having died in the middle of the year, the land tax, quit-rents, and other charges, should be borne entirely by the estate of the son, the infant remainderman in tail, having actually become due after the death of the tenant for life, or whether there should be an apportionment: it was held, that however reasonable it might be to make a statute as to the apportionment of taxes between the tenant for life and the remainderman, the stat. 11 Geo. 2, c. 19, s. 15, had no reference to the case giving the tenant for life the benefit only as against the tenant, the under-lessee. (*Sutton v. Chaplin*, 10 Ves. 66.)

Land tax.

In the case of money directed to be laid out in the purchase of land to be settled on a person for life, with remainder over, and in the meantime to be invested in government securities, the personal representatives of the tenant for life, who died before the half-yearly day on which the dividends became due, were not entitled to any apportionment, but the whole went to the person in remainder. (*Sherrard v. Sherrard*, 3 Atk. 502; *Pearly v. Smith*, *Id.* 280; *S. C.*, Amb. 279.) Thus, where by articles money was to be laid out in the purchase of lands, and in the meantime to be invested in South Sea Annuities, and the profits to go in the same way as the rent of the land would, and the person who would have been tenant for life of the land died in the middle of the quarter: it was held, that the dividends on those annuities being made payable by act of parliament on certain days, like rent, were not to be apportioned, being distinguishable from the case of money secured by mortgage, which may be called in at any time. (*Wilson v. Harman*, 2 Ves. sen. 672; Amb. 279. See *Warden v. Ashburner*, 12 Jur. 784; 17 L. J., Ch. 440.) By a will dated in 1795, an estate was devised to A. for life, with remainder to B. The estate was purchased by a railway company, and the purchase-money was paid into court and invested. Upon the death of A. it was held, that the money in court could not be considered as land for the purpose of 11 Geo. 2, c. 19, s. 15; and that, therefore, A.'s executors took no part of the dividend becoming payable after his decease. (*Re Longworth's Estate*, 1 K. & J. 1.) Where a sum of stock, the produce of lands belonging to an ecclesiastical corporation, was standing in court for the benefit of successive incumbents,

Dividends on  
stock representing  
land.

4 & 5 Will. 4,  
c. 22, s. 1.

it was held, on a petition by the incumbent for the time being for the payment of accumulations of dividends, that the case was not within 11 Geo. 2, c. 19, s. 15, or the 4 & 5 Will. 4, c. 22, and that there was no apportionment between the successive incumbents. (*Ex parte The Bishop of London*, 9 L. T., N. S. 606; 3 N. R. 246.) And where lands, subject to a settlement made in 1829, were taken by a company under the Lands Clauses Act, and the dividends ordered to be paid to a tenant for life, it was held that the dividends were not apportionable, whatever were the nature and date of the leases under which the lands were held by the tenants. (*Re Lawton Estates*, L. R., 3 Eq. 469.)

On the other hand, where a widow became entitled to her dower, after which the lands were taken compulsorily by a public board, and one-third of the purchase-money paid into court, invested, and carried over to a separate account to answer the dower; it was held, that the widow's estate was entitled to an apportioned part of the dividends which accrued due after her death. Lord Romilly, M. R., said, that he must treat the money exactly in the same manner as if it had been land. (*Harrop v. Wilson*, 84 Beav. 166.)

14 & 15 Vict.  
c. 25, s. 1.

On determination  
of leases or  
tenancies under  
tenant for life,  
&c instead of  
emblems, the  
tenant to hold  
until expiration  
of current  
year, &c.

Where leases made by a tenant for life determine on his death, the lessee can hold until the expiration of the current year under 14 & 15 Vict. c. 25, s. 1, which is as follows:—Where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life or for any other uncertain interest, instead of claims to emblems, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit upon the terms of his lease or holding in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant, in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor, a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting; and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid, at the expiration of such current year: provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid.

Scotland.

The act 4 & 5 Will. 4 extends to Scotland. (*Fordyce v. Brydges*, 1 H. L. Ca. 1; 11 Jur. 157.) A Scotch tenant in tail, though in legal contemplation an owner or fiar, is nevertheless within this act. Lord Cranworth, C., had no doubt that the statute applies to a tenant in tail. The evil prior to this statute was, that if the tenant in tail died indebted and the rents were nearly accruing due, all those accruing rents would go to the successor. To remedy that evil the statute was passed. (*Baillie v. Lockhart*, 2 Macq. H. L. 258.)

Ireland.

The Irish Act, 23 & 24 Geo. 3, c. 46, provided for the recovery of a proportion of rent, in every case where by the determination of the estate of the tenant for life, or the failure of the interest granted, there was no person who could recover. (*Swan v. Bookey*, 4 Ir. C. L. R. 582. See also as to this statute, *Persse v. Persse*, Alc. & Nap. 35; *Kennan v. Brennan*, 7 Ir. C. L. R. 268; *Re Alexander*, 4 Ir. Ch. R. 257.) The Irish Act, 23 & 24 Geo. 3, c. 46, and the act 4 & 5 Will. 4, c. 22 (so far as it affects the relation of landlord and tenant in Ireland); and the act 14 & 15 Vict. c. 25, s. 1 (so far as it affects Ireland), have been repealed by s. 104 of 23 & 24 Vict. c. 154, by which act fresh provisions for the apportionment of rent in Ireland were made.

**PERIODICAL PAYMENTS WHICH ARE TO BE APPORTIONED,  
AND THE RECOVERY OF APPORTIONED PARTS.**

4 & 5 Will. 4,  
c. 22, s. 2.

2. From and after the passing of this act, all rents service reserved on any lease by a tenant in fee or for any life\* interest, or by any lease granted under any power (and which leases shall have been granted after the passing of this act), and all rents charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in the United Kingdom of Great Britain and Ireland, made payable or coming due at fixed periods under any instrument that shall be executed after the passing of this act (or being a will or testamentary instrument) that shall come into operation after the passing of this act (b), shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, pensions, dividends, moduses, compositions or other payments as aforesaid, or in the estate, fund, office, or benefice from or in respect of which the same shall be issuing or derived, or on the determination by any other means whatsoever of the interest of any such person (c), he or she, and his or her executors, administrators or assigns, shall be entitled to a proportion of such rents, annuities, pensions, dividends, moduses, compositions and other payments, according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, annuities, pensions, dividends, moduses, compositions and other payments being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, annuities, pensions, dividends, moduses, compositions and other payments, when the entire portion of which such apportioned parts shall form part shall become due and payable, and not before, as he, she or they would have had for recovering and obtaining such entire rents, annuities, pensions, dividends, moduses, compositions and other payments, if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, tenements and hereditaments comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons who if this act had not passed would have been entitled to such entire rents; and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act in any action or suit at law or in equity.

All rents, annuities and other payments coming due at fixed periods to be apportioned;

subject to all just deductions.

Remedies for obtaining the apportioned parts.

\* Sic, sed quære *less.*

(b) In all cases of apportionment occurring after the 1st August, 1870, reference must be made to 33 & 34 Vict. c. 35 (*post*). The following note refers to the law before that date.

4 & 5 Will. 4,  
c. 22, s. 2.

Cases under  
4 & 5 Will. 4, c. 22.

Act does not  
apply to rents not  
reserved by  
writing.

Act applies to all  
cases where  
either the lease  
reserving the rent  
or the instru-  
ment creating the  
life interest in  
it, has been  
executed since  
the act.

A lunatic's estates, of which he was seised in fee, were let by parol agreement from year to year, the rents payable half-yearly at Lady-day and Michaelmas. The lunatic died in June: it was held, that the proportion of the half-year's rents from the last Lady-day before the lunatic's death up to the day of his death, was not apportionable under this statute. Lord *Cottenham*, C., was of opinion that the statute does not apply to this case. First, it enumerates the most worthy subject, namely, rents service, that is, rents reserved under leases; then it proceeds to give an enumeration of various other subjects, concluding with a general clause, large enough to embrace every kind of payment coming due at fixed periods; and it requires that they should be under an instrument executed after the passing of the act. But there was no intention on the part of the legislature to make any distinction between the several matters which are the subject of the enactment, as to whether the payments should or should not be under an instrument in writing. Even in the case of the least worthy of the subject-matters which the section enumerates, it was intended that the instrument creating or evidencing the payment should be in writing; and *à fortiori*, that was so as to the most worthy, the only question being as to the time at which the instrument was to be executed. (*Re Markby*, 4 M. & Cr. 484; 3 Jur. 767; and see *Cattley v. Arnold*, 1 J. & H. 660; *Mills v. Trumper*, L. R., 4 Ch. 320.)

This act applies to all cases where either the lease reserving the rent, or the instrument creating the life interest in it, has been executed since the passing of the statute. Rent reserved by a lease granted after the act, under a power in a settlement executed before the act, was held to be apportionable between the executors of the tenant for life under the settlement and the remainderman. (*Plummer v. Whiteley*, Johns. 585; 5 Jur., N. S. 1416; 29 L. J., Ch. 247.) *Wood*, V.-C., said he considered that the first branch of the commencement of the 2nd section of this act refers to two classes of subjects, to each of which the enacting words are applicable; that in fact the section must be read thus: in the first place, that after the passing of the act all rents reserved by tenants in fee or for life, or by donees of powers of leasing, such leases being granted after the passing of the act, shall be apportioned; and in the next place, that all other rent-charges and other rents, &c., made payable or coming due at fixed periods under an instrument executed after the passing of the act, shall also be apportioned. According to this construction, the former portion of the section provides for interests existing at the passing of the act, whilst the latter looks to and provides for the future. *Wood*, V.-C., thought that this was a rational interpretation of the statute, and although open to the objection that to a certain extent it renders the statute *ex post facto* legislation, he thought it must have been the ground upon which *Lock v. De Burgh* (*post*) was decided; he therefore followed that decision in deciding the present case, and declared, that the rents in question ought to be apportioned. (*Plummer v. Whiteley*, Johns. 585; 5 Jur., N. S. 1416.)

Certain real estates were settled by deeds, dated in 1828, upon A. B. for life, with remainder over, and a power of leasing for twenty-one years was given to the tenant for life. After the passing of this act A. B. exercised as to some of the estates his power of leasing, and died in 1849, between two quarterly days of payment of rent: it was held by *Knight Bruce*, V.-C., that the case was within the act, and that his personal representative was entitled to a portion of the rent which accrued between the last day of payment and his death. (*Lock v. De Burgh*, 15 Jur. 961; 20 L. J., Ch. 2, 384; 4 De G. & Sm. 470.) In *Fletcher v. Moore* (5 W. R. 421), *Kindersley*, V.-C., came to a decision opposed to *Lock v. De Burgh*; but in a subsequent case, the same judge said that some of the reasoning in *Fletcher v. Moore* could not be supported consistently with the view he afterwards took of the act. (*Wardroper v. Cutfield*, 12 W. R. 459.)

The construction of the act adopted by *Wood*, V.-C., in *Plummer v. Whiteley*, seems now to be accepted in England. Where a lease was granted after the passing of the act under a power in a settlement executed prior to the act, Lord *Romilly*, M. R., held that the rent reserved by the lease

was apportionable between the tenant for life and remainderman under the settlement. (*Llewellyn v. Rous*, L. R., 2 Eq. 27.)

4 & 5 Will. 4,  
c. 22, s. 2.

Where under a will which came into operation before the act, A. was tenant for life of tithes, which after the act were commuted for a rent-charge under 6 & 7 Will. 4, c. 71; it was held by *Malins*, V.-C., that upon the death of A. the rent-charge was apportionable under the act. (*Heasman v. Pearse*, L. R., 8 Eq. 599.)

Where leases were granted before the act, and after the act the lessor died having devised his real estates, including the lands comprised in the leases to trustees in trust to pay part of the rents to his widow for life, it was held that the rents were apportionable. (*Knight v. Boughton*, 12 Beav. 312. See *Swan v. Bookey*, 4 Ir. L. R., N. S. 582.) Where a testatrix, under a power of appointment dated in 1821, appointed by will, dated in 1838, the dividends of certain stock to her husband for life, with remainders over, it was held that the dividends must be apportioned. (*Wardroper v. Cutfield*, 12 W. R. 458.)

A life estate in realty was created by deed in 1787. The estate was sold, and in 1821 invested in consols. The tenant for life died in 1841. It was held, that her executors were not entitled to an apportionment of the dividends, the settlement having been made before the act. (*Michell v. Michell*, 4 Beav. 459; and see *Re Lawton Estates*, L. R., 3 Eq. 469.)

For the construction placed upon this section by the Irish Courts, see *Swan v. Bookey*, 4 Ir. L. R., N. S. 582, and *Re Alexander*, 4 Ir. Ch. R. 266.

The question has been raised whether the "instrument" referred to in the second part of the first clause of this section means the instrument creating the periodical payments or the instrument creating the life interest therein. It seems that it means the latter. (*Knight v. Boughton*, 12 Beav. 312; *Plummer v. Whiteley*, Johns. 585; *Wardroper v. Cutfield*, 12 W. R. 458; but see *Heasman v. Pearse*, L. R., 8 Eq. 599.)

Meaning of  
"instrument."

An order of the Court of Chancery directing payment of dividends to a tenant for life is not an instrument within the meaning of the act. (*Re Lawton Estates*, L. R., 3 Eq. 469; *Jodrell v. Jodrell*, L. R., 7 Eq. 461.) By a will, which came into operation after the act, real estate was devised to A. for life, subject to impeachment for waste, with remainder to B. for life without impeachment for waste, with remainders over. With the sanction of the court, timber on the estate was cut down and sold, and the proceeds of sale invested, and the dividends were ordered to be paid to A. during his life. It was held, that upon A.'s death the dividends were not apportionable. (*Jodrell v. Jodrell*, L. R., 7 Eq. 461.)

Order of court  
not an instrument.

Where in 1838 a lease was granted which expired on the 23rd Nov. 1850, and in 1843 the defendant agreed to purchase the lease and pay an annual rent of 400*l.*, payable quarterly in March, June, September, and December, it was held, that (the case not being within the Apportionment Acts), the defendant was not bound to pay an apportionment of the rent from the 29th Sept. to the 23rd Nov. 1850. (*Peers v. Sneyd*, 17 Beav. 151.)

Agreement to  
purchase lease.

The provisions of this act have been extended to all rent-charges payable under 4 & 5 Vict. c. 35. (4 & 5 Vict. c. 35, s. 50.)

Rent-charges  
under 4 & 5 Vict.  
c. 35.

This act only applies to rents reserved at fixed periods, and does not apply to royalties in the nature of rents payable at uncertain periods, such as royalties payable upon the selling of ore from a mine. (*St. Aubyn v. St. Aubyn*, 1 Dr. & Sm. 611.)

Royalties.

The salary of an auditor and superintending manager of an estate, holding office during the joint lives of the employer and himself, is not apportionable under this section. (*Lowndes v. Stamford*, 18 Q. B. 425.)

Salary of  
auditor.

Interest on money secured on bond was, according to the old law, considered as accruing *de die in diem*, and though the condition of the bond reserved it half-yearly, it was apportioned. (*Banner v. Lowe*, 13 Ves. 135.) The interest of money secured on mortgage, although reserved half-yearly, was considered as accruing from day to day and not in the nature of rent: and on the death of a person entitled to the interest for life, the current interest was apportioned between his executors and the remainderman. (*Edwards v. Countess of Warwick*, 2 P. W. 151.) And

Interest.



4 & 5 Will. 4,  
c. 22, s. 2.

Annuities.

it has been held that interest payable on coupons to debentures, though payable half-yearly, accrues due *de die in diem*, and is therefore subject to apportionment. (*Re Rogers' Trusts*, 1 Dr. & Sm. 338.) But interest given by a will, in the nature of an annuity, was not apportioned in favour of the executor of the tenant for life. (*Franks v. Noble*, 12 Ves. 484.) The half-yearly interest on a share in a loan to the East India Company, redeemable after a certain period at the option of the Company, but not at that of the creditor, was held to be in the nature of an annuity and not of interest, and therefore not to be apportionable between tenant for life and remainderman. (*Warden v. Ashburner*, 2 De G. & Sm. 366.)

Though annuities were not apportionable before this act, yet in equity the maintenance of infants was always apportioned up to the day of their deaths, because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter. (*Hay v. Palmer*, 2 P. Wms. 501; *Reynish v. Martin*, 3 Atk. 330.) An annuity was given for maintenance, and charged upon land for a certain time, which ceased before the time of the year at which the annuity was payable: the annuitant was held entitled to an apportioned part of such annuity for the time between the last payment and the cessation of the charge. (*Sheppard v. Wilson*, 4 Hare, 395. See *Longmore v. Eloum*, 2 Y. & Coll. C. C. 368.) And upon the same principle, an annuity secured by bond for the separate maintenance of a *feme covert*, where the quarterly payments were not made in advance by way of maintenance for the ensuing quarter, but payable at the end of each quarter, was apportioned at the death of the wife. (*Howell v. Hanforth*, Bl. R. 1016. See 16 Q. B. 362, 363.) But an annuity given by will to a married lady, living with and maintained by her husband, for her separate use, payable half-yearly, was not apportioned. (*Anderson v. Dwyer*, 1 Sch. & Lef. 301.) Independently of 4 & 5 Will. 4, c. 22, annuities were not apportionable unless granted for the maintenance of infants or married women living separate from their husbands. (*Leathley v. French*, 8 Ir. Ch. R. 401.)

When the master of a charitable corporation was to receive the income for the support and maintenance of himself and five poor persons, it was held that the income was apportionable between the new master and the representatives of the deceased master. (*Att.-Gen. v. Smythies*, 16 Beav. 885.)

Where a bond expressed that an annuity was to be paid on the four usual quarter days, and the annuity was charged by the will of the obligor on his realty in aid of his personalty, an order was made for the payment of the annuity out of a fund in court half-yearly at Midsummer and Christmas. The annuitant died between Lady-day and Midsummer, and her representatives obtained an order for payment of the quarter to Lady-day. (*Webb v. Shaftesbury*, 11 Ves. 361.)

King William the Fourth, by indenture, in pursuance of the stat. 1 & 2 Will. 4, c. 11, granted to trustees, for his consort, Queen Adelaide, an annuity of 100,000*l.*, to commence on the decease of his Majesty, and "continue," "during the natural life of her Majesty," payable out of the consolidated fund, "at the four most usual days of payment in the year (that is to say), the 31st March, 30th June, 30th September and 31st of December, by even and equal portions, the first payment thereof to be made at such of the said days as shall first and next happen after the decease of his Majesty in case her Majesty should survive him." His Majesty died on the 20th June, 1837, and on the 30th of June, the trustees received a full quarter's payment of 25,000*l.* Her Majesty died on 2nd December, 1849. It was held, that the annuity was not apportionable; and Lord Campbell, C. J., observed, "Were it an annuity granted in similar terms between subject and subject, we conceive there can be no doubt upon the subject, and there certainly would have been no apportionment either in the first quarter or the last." (*Reg. v. Lords of the Treasury*, 16 Q. B. 357, see pp. 362, 363.)

Where an annuity was granted to A., during the joint lives of B. and C., charged upon the lands of Blackacre, and payable by two equal portions, on the 1st of May and 1st of November in each year, upon trust to pay the

same to B. during the joint lives of B. and C., and then to C. if she survived: it was held, that C. having survived B. and died on the morning of the 1st May, was entitled to the entire sum due upon that day. (*Robinson v. Robinson*, 2 Ir. L. R., N. S. 370.)

4 & 5 Will. 4,  
c. 22, s. 2.

A tenant for life granted a rent-charge, chargeable on lands, for the life of the grantor, provided the grantee should so long live, with a power of distress and a covenant for further assurance, to a relative as a suitable provision for her, with an apportionment clause in the event of the death of the grantee between two days of payment. The grantor died between the days of payment, leaving the grantee surviving: it was held, first, that, independently of this act, there could be no apportionment. (*Leathley v. French*, 8 Ir. Chanc. Rep. 401.) Secondly, that the court could not imply an intention that there should be an apportionment on the death of the grantor, having regard to the express apportionment clause on the death of the grantee in the lifetime of the grantor. (*Ib.*)

Where a testator gave an annuity for life and another for twenty-one years, both payable on the usual quarter days: it was held, that a proportional part of both the annuities was payable on the first quarter day after his death. (*Williams v. Wilson*, 5 N. R. 267.)

It has been doubted whether an annuity payable on certain days, as half-yearly or quarterly, determinable on the death of the grantor, would come within this act, which enables the annuitant to recover the apportioned parts, "*when the entire portions of which such apportioned parts form part shall become due and payable*," because if the annuity ceased by the death of the grantor on any other day than that appointed for payment, the *entire* portion would never become payable. It was, therefore, recommended that the usual apportionment clause in the grant of such an annuity should be retained. (9 Jarman's Prec. 578, n.) Lord Campbell, C. J., observed, the words in italics contemplate "a case where the party who has to pay will have to pay for the whole period to some one, and not a case where the payment entirely ceases with the determination of the interest of the person receiving the apportionment, and where the entire portion of which this forms a part never does become due or payable." (*Lowndes v. Earl of Stamford and Warrington*, 18 Q. B. 439.)

Whether the payment must be a continuing one.

A testator, who died in August, 1834, after directing a fund to be formed, by investing the rents of his estates in the purchase of bank annuities, charged it with the payment of 150*l.* a-year to his wife during her life: it was held, that, though the 150*l.* was not a continuing payment, the executors of the wife, who outlived the testator between seven and eight years, were entitled to a proportionate part of the 150*l.* a-year for the interval between the death of the wife and the last preceding yearly day of payment. The act creates an apportionment; but the time for making it does not arrive until another dividend becomes due. (*Carter v. Taggart*, 16 Sim. 447.) A testator gave an annuity to A. B. for life, no period of payment being mentioned. Under the decree of the Court of Chancery the first payment was directed to be made at the expiration of one year after the testator's death. The annuitant died eight days before the end of the year. It was held, that the annuity must be apportioned, although it was not continued to any other person after the death of the annuitant. (*Trimmer v. Danby*, 28 L. J., Ch. 979; 2 W. R. 380.)

This decision has been followed in Ireland, where a terminable annuity has been held to be apportionable under this act. (*Sutton v. Ennis*, 18 W. R. 882; I. R., 4 Eq. 325.)

Before the passing of this act, if a testator was entitled to the dividends of stock in the public funds for his life, and he died between the two days when they were due, his executors could not claim any apportionment, but the whole half-year's dividend went to the remainderman. (*Rashleigh v. Master*, 3 Br. C. C. 99; *Pearly v. Smith*, 3 Atk. 260; *Sherrard v. Sherrard*, 3 Atk. 502; *Wilson v. Harman*, 2 Ves. 672; Amb. 279.) But where a tenant for life of stock died on the day on which a half-year's dividend became due, it was held, that the dividend belonged to his estate. (*Paton v. Sheppard*, 10 Sim. 186.)

Dividends

Dividends out of profits, from time to time declared by a commercial

4 & 5 Will. 4,  
c. 22, s. 2.

Determination of  
interest under  
this section.

company are apportionable under this act. But a single sum of money, to be divided among the shareholders, is not so apportionable. (*Hartley v. Allen*, 27 L. J., Ch. 621; 6 W. R. 407.) For the purpose of apportionment, a dividend is to be taken as payable on the day on which it is actually payable, and not on the last day of the period during which it was earned. (*Ib.*)

Dividends declared by joint stock companies subject to the Companies Clauses Consolidation Act are not within this act. But in a company carried on under a deed of settlement and bye-laws, directing that the profits should be divided half-yearly, such dividends to be paid in two specified months; it was held, that such dividends were apportionable under the act with reference to the days on which they were made payable. (*Re Maxwell's Trusts*, 1 H. & M. 610.)

(c) A testator devised his real estates in strict settlement, with power for his trustees during the minority of any tenant for life to receive the rents and thereout apply an annual sum towards the maintenance of such minor, and invest and accumulate the surplus, and stand possessed of the investments upon certain trusts. It was held, that on a tenant for life attaining twenty-one the rents of the real estate and the dividends on the investments were apportionable. (*Shipperdson v. Tower*, 8 Jur. 485; approved in *Clive v. Clive*, L. R., 7 Ch. 433.)

A. by will directed that, for twenty-one years next after his death, his trustees should receive and accumulate the rents and profits of his real estate, and apply them towards payment of his debts and legacies, and, subject to that term, he gave the beneficial interest in the income of his estate to B. for life: it was held, under this act, that the rent which fell due after the expiration of the twenty-one years must be apportioned between those beneficially interested in the accumulations and the tenant for life, who was entitled on the expiration of the term. (*St. Aubyn v. St. Aubyn*, 1 Dr. & Sm. 611.) This decision in substance came to this, that wherever a person is in receipt of rents and profits and any change takes place whereby that person's interest ceases or is altered, and another interest begins, or a change of interest takes place, then an apportionment must be made. (Per *Bacon*, V.-C., *Donaldson v. Donaldson*, L. R., 10 Eq. 639.)

Where a testator gave the residue of his real and personal estate to trustees upon trust to receive and accumulate the rents and profits till his nephew should attain twenty-one, when he was to be put into possession of the estate for life, it was held that there must be an apportionment of the rents up to the period of the tenant for life attaining twenty-one. (*Wheeler v. Tootel*, L. R., 3 Eq. 571.)

A testator, who died in May, 1835, directed his executors to apply a competent part of the interest of a fund towards the maintenance and education of the testator's son during his minority, and to accumulate the rest; and, after his attaining twenty-one, to apply a moiety of the dividends for his support till he attained twenty-five, and to transfer the fund at twenty-five, with a gift over if he died between twenty-one and twenty-five. The son attained twenty-one between the periods of payment of the half-yearly dividends. It was held, that there should be no apportionment, and that he was entitled to the whole half-yearly dividends received after he came of age. (*Campbell v. Campbell*, 7 Beav. 482.) But where a settlor assigned securities to trustees upon trust after his own death during the minority of A. to pay part of the income for the maintenance of A.; and when A. attained twenty-one and thenceforth until he should attain thirty, to pay to A. out of the income an annual sum not exceeding 5,000*l.*, and accumulate the surplus, and hold the accumulations upon the trusts thereafter declared of the fund: and when A. should have attained thirty, to hold the funds and the annual produce thereof upon trust to pay unto and permit A. and his assigns to receive the whole of the dividends, &c., during his life, with limitations over. It was held, that upon A. attaining thirty, the current dividends were apportionable. (*Donaldson v. Donaldson*, L. R., 10 Eq. 635.)

It was said by *Coleridge*, J., that the act 4 & 5 Will. 4, c. 22, cannot apply to a person who has chosen to come in and determine his right to

receive rents. (*Oldersham v. Holt*, 12 Ad. & Ell. 590.) A., in 1836, let certain land to B. under a building agreement; the rent was to commence at Christmas, 1838, and A. was to have a right of re-entry in case of non-performance on the part of B. A. availed himself of this right of re-entry, and brought an ejectment, laying the demise on the 1st January, 1839. In September, 1838, he had re-let the land to C. at a rent to commence in 1840, which was equivalent in amount to that provided for by the first agreement. In an action by A. for breaking the first agreement, it was held, that the demise in the ejectment was to be taken as the date of the re-entry by A., and that he was not entitled to that portion of the rent between the previous Christmas and that day, under the provisions of this statute. (*Oldersham v. Holt*, 12 Ad. & Ell. 590; see *Packer v. Gibbins*, 1 Q. B. 421.)

4 & 5 Will. 4,  
c. 22, s. 2.

This statute applies to cases in which the interest of the person interested in such rents and payments is terminated by his death, or by the death of another person; but does not apply to the case of a tenant in fee, or provide for apportionment of rent between the real and personal representative of such person whose interest is not terminated at his death. (*Browne v. Amyott*, 3 Hare, 173; 13 L. J. (N. S.) Ch. 232.) It was urged against this construction of the act, that one consequence would be, that where tenant in fee simple devised to one as tenant for life, the devisee for life would take the entire periodical rent due at the first day of payment after the commencement of his estate, and his proportionable share up to the day of the determination of his life interest. The law would operate in his favour both at the beginning and the end of his life estate. *Wigram, V.-C.*, however, thought it was not an argument of any great force, upon the construction of the act, which did not affect to control the power of the tenant in fee to dispose of his estate, as between his devisees or real and personal representatives, as he may think proper. (*Browne v. Amyott*, 3 Hare, 173, see p. 183. See *Beer v. Beer*, 21 L. J., C. P. 124; 16 Jur. 223.)

No apportionment between real and personal representatives of person whose interest does not determine at his death.

Devise in trust for one for life, remainder for his first and other sons in tail, remainder for testator's own right heirs. The devisee for life proved to be heir at law of the testator, and died intestate and without leaving issue: it was held, that notwithstanding the interposition of an estate tail which might have arisen and prevented the remainder in fee from vesting absolutely, the death of the devisee was not a determination of his interest within the meaning of this act, and therefore the rents were not apportionable between his heir and his personal representative. (*Re Clulom*, 3 Kay & J. 689; 26 L. J., Ch. 513.) Where it can be predicated that the interest mentioned in the 2nd section has been determined, the rents and other payments there mentioned shall be apportioned; but where this cannot be predicated, the contest being between the heir and the executor, the heir shall take the whole, and there shall be no apportionment. (*Ib.*)

### EXCEPTION.

3. Provided always, and be it enacted, that the provisions herein contained shall not apply to any case in which it shall be expressly stipulated that no apportionment shall take place, or to annual sums made payable in policies of assurance of any description (*d*).

Act not to apply to certain cases.

(*d*) This statute requires, in order to exclude apportionment, either an express direction that there shall be none, or language so express in the terms of the gift that apportionment is clearly impossible consistently with it. Inference from the whole tenor and context of the will is not sufficient to exclude the operation of the statute. (*Tyrrell v. Clark*, 2 Drew. 86.)

As to the apportionment of rent-service and of conditions of re-entry in certain cases, see note to 22 & 23 Vict. c. 35, s. 3 (*post*). And as to the apportionment of rent-charges, see the note to 22 & 23 Vict. c. 35, s. 10 (*post*).

*Apportionment of Rents and Periodical Payments.*

4 & 5 Will. 4,  
c. 22, s. 3.

Apportionment  
between tenant  
for life and re-  
mainderman.

No apportionment of income will be made as between tenant for life and remainderman with reference to the variation in the price of stock, arising from the distance of a period of sale or investment from the last payment of dividend. (*Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Freman v. Whitbread*, L. R., 1 Eq. 266.)

The periodical payments of an annuity for which a testator was liable, were held payable by the tenant for life and remainderman under his will in proportion to the values of their respective interests in the estate; the property have been unproductive for some years. (*Yates v. Yates*, 28 Beav. 637.) See further as to questions between tenants for life and remaindermen, 1 Seton, 217 *et seq.*, 3rd ed.; *Maclaren v. Stainton*, L. R., 4 Eq. 448; 11 Eq. 382. And as to the liability of tenants for life and remaindermen to contribute to renewals of leases and admissions to copyholds, see 1 Seton, 518, 3rd ed.; *Bradford v. Brownjohn*, 16 W. R. 1178.



## APPORTIONMENT OF RENTS AND PERIODICAL PAYMENTS.

33 & 34 VICTORIA, c. 35.

*An Act for the better Apportionment of Rents and other Periodical Payments.* [1st August, 1870.]

WHEREAS rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second (chapter nineteen), and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth (chapter twenty-two), and in the session of Parliament held in the sixth and seventh years of his late Majesty King William the Fourth (chapter seventy-one), and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty (chapter twenty-five), and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty (chapter one hundred and fifty-four) :

83 & 34 Vict.  
c. 35, s. 1.

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences :

Be it therefore enacted by the Queen's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :

1. This act may be cited for all purposes as "The Apportionment Act, 1870."

Short title.

2. From and after the passing of this act all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly (a).

Rents and periodical payments shall accrue from day to day and be apportionable in respect of time.

(a) A testator gave his residuary personal estate, with the accumulations thereof, to trustees in trust for his two granddaughters, their shares to be vested at twenty-one or marriage, the income to be applied for their benefit during minority, and the surplus accumulated. He directed that in case either granddaughter married under twenty-one, the trustees should settle her share for her life for her separate use, with remainder to her children. Both granddaughters married under twenty-one, one in 1867, the other in November, 1870, and in both cases the income of the share was apportioned up to the time of the marriage. (*Clive v. Clive*, L. R., 7 Ch. 433, see *ante*, p. 552.)

Interest determining on marriage.

83 & 84 Vict.  
c. 35, s. 2.

Payment under  
order of court.

Payments out of  
profits of  
partnership.

Apportionment  
between vendor  
and purchaser.

Apportioned part  
of rent, &c. shall  
be payable when  
the next entire  
portion shall have  
become due.

Persons shall have  
the same remedies  
for recovering  
apportioned parts  
as for entire  
portions.

Where a sum of stock to which A. was entitled for life, with remainder over, was paid into court in 1849, and in 1855 an order of court was made under which A. became entitled to an annuity of 100*l.* a year out of the dividends : it was held, on A.'s death, that her administrator was entitled under this act to an apportioned part of the annuity. (*Re Thacker's Trusts*, 21 W. R. 285, see *ante*, p. 549.)

The payments mentioned in sect. 2 must run at fixed times from some antecedent obligation, and must be in the nature of income, that is to say, coming in from some kind of investment. A testator, as to his share and interest in the L. Company, bequeathed the dividends and income thereof to A. for life, and after his death he gave the said share and interest to his daughters, and his residue upon other trusts. The company was a private trading partnership, regulated by a deed of partnership, under which the accounts were made up in the January in each year, the profits of the previous year ascertained, and the accounts settled and signed by all the partners. The managing partner then decided what dividend should be paid to the partners, and such dividend was paid by instalments in the next few months : held, that the payments of dividend did not come within the words "dividends and other periodical payments" in sect. 2 ; that the company was not a "trading or other public company" within sect. 5, and that there was no apportionment under this act between A. and the residuary legatees. (*Jones v. Ogle*, L. R., 8 Ch. 192.) Lord *Selborne* doubted whether the act could affect the construction of a will previously made. (*Ib.*)

Land, subject to a head-rent, was sold by the Landed Estates Court in Ireland, and the purchase-money lodged in court. After the purchase, a half-year's rent became due, and the purchaser claimed to be repaid rent from the last gale-day until the purchase, on the ground that under this act rent accrues *de die in diem* : it was held, that the rent was not by this act made a charge on the estate until the gale-day, and that the purchaser's contract really was to get the estate subject to all future liabilities, which included the whole rent, payable on the next gale-day. (*Re Keillor's Estate*, L. R., 6 Eq. 329.)

Mr. Dart is of opinion that the act 4 & 5 Will. 4, c. 22, did not apply to the case of a sale. (V. & P. 745, 4th ed.) And it seems that where a conveyance is executed during the continuance of a tenancy, the purchaser thereupon becomes entitled to the accruing rents. (*Flight v. Bentley*, 7 Sim. 149 ; *Flinn v. Calow*, 1 Man. & Gr. 589.)

Where on a sale of leaseholds the conditions were that the purchaser should have possession on a certain day, "all outgoings up to that day being cleared by the vendors : " it was held, that the vendors were bound to pay an apportioned part of the current rent up to the specified date. (*Lanes v. Gibson*, L. R., 1 Eq. 135.)

3. The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

4. All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for re-

covering such entire portions as aforesaid if entitled thereto respectively ; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity.

83 & 84 Vict.  
c. 35, s. 4.

Proviso as to  
rents reserved in  
certain cases.

5. In the construction of this act—

Interpretation  
of terms.

The word “rents” includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word “annuities” includes salaries and pensions.

The word “dividends” includes (besides dividends strictly so called) all payments made by the name of dividend, bonus or otherwise out of the revenue of trading or other public companies (*b*), divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise ; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in respect of which the payment of the same revenue shall be declared or expressed to be made, but the said word “dividend” does not include payments in the nature of a return or reimbursement of capital.

(*b*) See *Jones v. Ogle*, *ante*, p. 556.

6. Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

Act not to apply  
to policies of  
assurance ;

7. The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.

nor where  
stipulation made  
to the contrary.

## LOANS ON REAL SECURITIES IN IRELAND.

4 &amp; 5 WILLIAM IV. c. 29.

*An Act for facilitating the Loan of Money upon Landed Securities in Ireland (a).* [25th July, 1834.]

MONEY DIRECTED TO BE LENT ON ENGLISH SECURITIES MAY  
BE ADVANCED ON REAL SECURITIES IN IRELAND.

4 & 5 Will. 4,  
c. 29, s. 1.

Power to lend  
money on real  
securities in Ire-  
land the same as  
in England, &c.

WHEREAS in last wills and other testamentary dispositions, and in marriage and other settlements of real and personal property, and in other deeds, agreements or writings, a direction, trust or power is often given, created or reserved to lay out or invest money at interest on real securities in England, Wales or Great Britain, or to sell and convert into money, real or leasehold estates, or government or parliamentary securities, or securities of foreign states or other property, and to lay out or invest the money arising from such sale and conversion on real securities: and whereas from the abundance of capital in Great Britain the interest of money is very much reduced, and the interest to be procured on money in Ireland is much higher than the interest to be procured on money in Great Britain: and whereas manifest improvement has taken place in the condition and security of landed property in Ireland, which it is desirable to encourage and advance: and whereas it would be highly beneficial to both Great Britain and Ireland if the loan of money on landed securities in Ireland was facilitated: be it therefore enacted, that from and after the passing of this act it shall be lawful for any person or persons who, under or by virtue of any direction, trust or power already given, created or reserved, or hereafter to be given, created or reserved as aforesaid, is or are or shall be authorized or directed to lend money at interest on real securities (b) in England, Wales or Great Britain, to lend the same or any part thereof at interest on real securities in Ireland, in the same manner in all respects as if such investment had been expressly authorized in or by such direction, trust or power as aforesaid; and such person or persons shall not, on account of his or their so lending money on real securities in Ireland, be considered in a court of equity guilty of any breach of trust, or held accountable further or otherwise than if the money had been laid out by him or them on real securities in England, Wales or Great Britain.

Object of this act.

(a) This act enables trustees and others to lend money on real securities in Ireland without committing a breach of trust, although the trust or power

authorizing the investment only directs the money to be laid out on real securities in England, Wales or Great Britain.

4 & 5 Will. 4,  
c. 29, s. 1.

It is perhaps hardly necessary to observe, that securities on lands in Ireland must be registered as required by the statutes for the registration of deeds in Ireland.

Registration.

(b) Real securities mean landed securities, that is, mortgages or other incumbrances affecting land. (*Attorney-General v. Bowles*, 3 Atk. 808; see 2 Ves. sen. 44; Ambl. 635.)

## DIRECTION OF COURT OF EQUITY REQUIRED IN CASE OF MINORS, &c.

2. Provided always, and be it further enacted, that all loans of money on real securities in Ireland under this act, in which any minor or unborn child or person of unsound mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any cause upon petition in a summary way (c).

Proviso for loans  
where minors,  
&c. are inter-  
ested.

(c) It was decided that the concluding part of this section must be read thus: "in any cause, or upon petition in a summary way," and that the proposed securities must be approved of by the master. (*Ex parte French*, 7 Sim. 510.)

Under this statute, a trust to invest money in real securities in England or Wales, or Great Britain, will authorize an investment on real securities in Ireland also; and though the money be already invested in Great Britain, the court will, on the application of the tenant for life of the fund, direct a reference to the master to inquire whether it will be for the benefit of all parties interested, that that investment should be changed for one at a higher rate of interest in Ireland. (*Ex parte Lord W. Pawlett*, 1 Phill. C. C. 570.) An order of reference, under this act, as to whether it would be for the benefit of the parties beneficially interested in a settled fund, to lend it on the security of freehold estates in Ireland, might be made *ex parte*, but the court would not confirm the master's report, finding that such a loan would be for the benefit of such parties, unless they all, as well those entitled in remainder as those entitled for life, had either been served with the petition or appeared before the master. (*In re Kirkpatrick's Trust*, 15 Jur. 941.)

A. B. being entitled under the will of her husband to the interest of a sum of money during her widowhood, with remainder to other parties, which sum the trustees named in the will were to be at liberty to invest in real securities in England and Wales, presented her petition under this statute, to have the money invested in real securities in Ireland: it was held, that, although an investment in Ireland might be for the advantage of the petitioner, on account of getting more interest for it, yet that, unless it appeared that it would be for the benefit of those in remainder, the court would not make an order sanctioning such an investment. (*Stuart v. Stuart*, 5 Jur. 3; 8 Beav. 430.)

For the practice on petitions, see 2 Daniell, Ch. Pr. 1451 *et seq.* Form of order under this act is given, 1 Seton, 525; and a form of petition under the act is given, Dan. Ch. Forms, 2161.

## PAYMENT OF MONEY LENT BY TRUSTEES OR PUBLIC BODIES ON SECURITIES IN IRELAND MAY BE DECREED IN ENGLISH COURTS OF EQUITY.

3. In all cases of trustees or public bodies lending money on real securities in Ireland under the authority of this act, it shall

Loans by trustees  
or public bodies.



4 & 5 Will. 4,  
c. 29, s. 3.

be lawful for any court of equity in England to make all such orders and decrees for enforcing payment of the principal and interest thereby secured, or any part thereof, as if the said lands and hereditaments were situate in England or Wales; and it shall be lawful for the party or parties obtaining such orders or decrees to cause a copy of such orders or decrees, under the seal of the court by which the same shall have been made, to be exemplified, and certified to the lord chancellor, lord keeper or lords commissioners of the great seal of Ireland for the time being, or to the barons of his Majesty's Court of Exchequer in Ireland, whereon the said lord chancellor, lord keeper or lords commissioners for the custody of the said great seal of Ireland, or the said barons of the said Court of Exchequer in Ireland, shall forthwith cause such copy of such order or decree, when it shall be presented to them respectively so exemplified, to be enrolled, either in the rolls of the Court of Chancery or in the said Court of Exchequer, as the case may be, and shall cause all such process to issue against the said lands and hereditaments comprised in the said securities, and the party or parties against whom such decrees or orders shall be obtained, and his, her or their real and personal estate, goods, chattels and effects, in Ireland, in order to enforce obedience to and performance of the same, in such manner and form, and with such force and effect, as if the cause wherein such order or decree shall have been made had been originally cognizable by and instituted in the said Courts of Chancery or Exchequer in Ireland; and it shall be lawful for the said lord chancellor, lord keeper or lords commissioners of the great seal in Ireland, or the said barons of the said Court of Exchequer in Ireland, to make such order or orders in respect of or consequent upon such process against the party or parties, or in respect of the said lands, or the real and personal estate, goods, chattels or effects of the said party or parties, as he or they shall from time to time think fit, or for payment of all or any of the monies levied or received by virtue thereof into the Bank of Ireland, with the privity of the accountant-general of the said Courts of Chancery and Exchequer in Ireland respectively, to the credit or for the benefit of the party or parties who shall have obtained such order or decree, or to the credit of the cause in which such order or decree shall have been made; and the governor and company of the Bank of Ireland are hereby authorized and required to receive and hold all such monies subject to the orders of the said Court of Chancery in Ireland: provided always, that no such monies shall be charged with or subject to poundage for the usher of the said Court of Chancery in Ireland, or otherwise, where the same shall be paid out by order of the said last-mentioned court: and provided always, that no security for costs shall be required to be given in Ireland by any party or parties enforcing in manner aforesaid the execution of such orders or decrees of any court of equity in England as hereinbefore mentioned (*d*).

(*d*) When a person residing out of the jurisdiction of the Court of Chancery in Ireland files a bill there, and the defendant appears, but does

not make any application to the court for time to answer, it is an order of course to direct the plaintiff to give security for costs, but the application for time is a waiver of the right to require security. (*Stackpole v. O'Callaghan*, 1 Ball & B. 566, and note. See Dan. Ch. Pr. 28.)

4 & 5 Will. 4,  
c. 29, s. 8.

#### CONSENT TO BE OBTAINED.

4. Provided always, and be it enacted, that every such loan shall be made with the consent of the person or persons, if any, whose consent may be required as to the investment of such money upon real securities in England, Wales, or Great Britain, testified in the manner required by such direction, trust or power (e).

Consent of persons interested to be had.

(e) If the consent of a married woman be required by the trust, and the husband and wife present a petition, with her concurrence, under the act, this does not fulfil the requisition of the wife's consent to the investment. She must appear distinctly and separately from the husband. (Lewin, Trusts, 266, 5th ed.; *Norris v. Norris*, 14 Beav. 291; *Fitzgerald v. Pringle*, 2 Moll. 584.)

The nature of the consent will depend upon the terms of the trust or power, which must be strictly pursued. Where power was given to trustees with the consent of A. under her hand, attested by two witnesses, to advance 1,500*l.* to her husband, which they lent without the consent of A., who, by a subsequent instrument, under her hand, attested by two witnesses, testified that the money was advanced with her consent: it was held, on a bill filed by A., that the trustees must refund the 1,500*l.* with costs, for the actual advance of the money to the husband created a pressure upon the judgment of A., which gave to her subsequent approbation a different character from the free consent required by the settlement. (*Bateman v. Davis*, 8 Madd. 98.)

Where by a marriage settlement the interest of a trust fund is limited to a wife for life to her separate use, with power to the trustees upon her consent in writing to advance the trust fund to her husband, upon the security of his bond; if the trustees, with the consent of the wife, advance the fund to the husband, but without her written consent, and without the husband's bond, and if the trust fund be lost by his subsequent bankruptcy, the trustees are not entitled to be indemnified to the extent of the wife's interest. (*Cocker v. Quayle*, 1 Russ. & M. 585. See *Cholmoley v. Paxton*, 5 Bing. 48; Lewin, Trusts, 259, 5th ed.)

#### EXCEPTION.

5. Provided also, and be it enacted, that the provisions of this act shall not apply to any case in which such direction, trust or power as aforesaid doth or shall or may contain any express restriction against the investment of such money as aforesaid on securities in Ireland (f).

To what cases act not to extend.

(f) Upon the assumption that, in the absence of express instructions, it was not intended to authorize investment on real securities in Ireland, after the passing of this act it became the practice of conveyancers expressly to prohibit investments on Irish securities, by authorizing the trust money to be lent on real securities in England or Wales, but not in Ireland. In the modern practice, however, having regard to the larger range of investment now usually given, the reverse assumption is more commonly made. And as it is mostly considered expedient to leave the exercise of the power of investment to the trustees, without calling in the more or less expensive or

4 & 5 Will. 4,  
c. 29, s. 5.

dilatory interference of the Court of Chancery, which the act requires, where there are *cestui que trusts* under disability (that is, in the great majority of cases), the draftsman framing a trust for investment does not rely on the act, but gives express power to invest on real securities in England, Wales, or Ireland. (3 Davidson, Conv. 24, 2nd ed.)

#### TRUSTEES TO BE RESPONSIBLE FOR TITLE.

Act not to relieve persons intrusted with trust or power from responsibility as to title, &c.

6. Provided always, and be it further enacted, that nothing contained in this act shall relieve or be construed to relieve any person or persons intrusted or clothed with such direction, trust or power as aforesaid from any responsibility as to title, security or otherwise, either at law or in equity, save that of having lent and advanced such money as aforesaid on real securities in Ireland instead of having invested such money on real securities in England, Wales or Great Britain (*g*).

(*g*) It is the duty of a trustee, who executes a power, to show that he has complied with the exigencies required by it. So, where he varies the investment of the trust fund, the burden of proof lies on him to show that it is a fit and proper investment. (*Norris v. Wright*, 14 Beav. 291.) This act only relieves a trustee from any liability in respect of an investment in Ireland instead of England, and therefore, where, upon petition under this act, the court sanctioned an investment which was made without proper evidence of value and without the consent of the necessary parties, and there was a loss, the trustees were held liable for a breach of trust. (*Ib.*) Pending a suit to make trustees liable for the improper investment of trust monies on an Irish estate, the property was put up for sale under the Encumbered Estates Act, and an order was made giving the trustees liberty to buy, which they did: it was held, that the order did not relieve the trustees from any liability in the cause, although it was not expressed to be made "without prejudice." (*Ib.*)

As to what securities are authorized by a power to invest trust moneys on real security in Ireland, see *Macleod v. Annesley*, 16 Beav. 600.

**ENACTMENTS RELATIVE TO JUDGMENTS  
AFFECTING REAL AND PERSONAL  
PROPERTY, .**

CONTAINED IN THE 1 & 2 VICT. c. 110; 2 & 3 VICT. c. 11;  
3 & 4 VICT. c. 82; 18 & 19 VICT. c. 15; 23 & 24 VICT.  
c. 38, ss. 1—5; 27 & 28 VICT. c. 112; 32 & 33 VICT. c. 62,  
ss. 24—28.

—◆—  
1 & 2 VICT. c. 110.

*An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England.*  
[16th August, 1838.]

—◆—  
**OF THE EXECUTION OF WARRANTS OF ATTORNEY.**

9. And whereas it is expedient that provision should be made for giving every person executing a warrant of attorney to confess judgment or a *cognovit actionem* due information of the nature and effect thereof; be it enacted, that from and after the time appointed for the commencement of this act [1 October, 1838], no warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, shall be of any force unless there shall be present some attorney of one of the superior courts on behalf of such person, expressly named by him and attending at his request, to inform him of the nature and effect of such warrant or *cognovit*, before the same is executed; which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney (a).

1 & 2 Vict.  
c. 110, s. 9.

Warrants of attorney and *cognovit actionem* to be executed in the presence of an attorney on behalf of the party.

(a) This section has been repealed from the 1st January, 1870 (32 & 33 Vict. c. 83, s. 20.) And by the Debtors Act, 1869, it is enacted, that after the 1st January, 1870, a warrant of attorney to confess judgment in any personal action, or *cognovit actionem* given by any person, shall not be of any force unless there is present some attorney of one of the superior courts on behalf of such person, expressly named by him, and attending at his request, to inform him of the nature and effect of such warrant or *cognovit* before the same is executed, which attorney shall subscribe his name as a witness to the due execution thereof, and thereby declare himself to be attorney for the person executing the same, and state that he subscribes as such attorney. (32 & 33 Vict. c. 62, s. 24.)

32 & 33 Vict.  
c. 62, s. 24.

In order to make a *cognovit* valid, its execution must be attested by an attorney attending on behalf of the defendant, *other than* the attorney

1 & 2 Vict.  
c. 110, s. 9.

By whom war-  
rants of attorney  
to be attested.

acting for the plaintiff. (*Mason v. Riddle*, 5 Mees. & W. 513; 4 Jur. 89; *Rising v. Dolphin*, 4 Jur. 193; 8 Dowl. P. C. 309.) The country agent of an attorney is not a competent witness to the execution of a *cognovit*, though expressly named by the defendant. (*Mason v. Riddle*, 8 Dowl. P. C. 207.) A warrant of attorney is not vitiated by the fact that the name of the attorney who attests on behalf of the defendant was first suggested by the plaintiff's attorney, if he was expressly adopted by the defendant as his attorney for that purpose. (*Taylor v. Nicholls*, 6 Mees. & W. 91; 8 Dowl. P. C. 242; 4 Jur. 271. See *Kemp v. Matthem*, 8 Scott, 399; *Hale v. Dale*, 8 Dowl. P. C. 599; 4 Jur. 988; *Pease v. Wells*, 8 Dowl. P. C. 626; 4 Jur. 679.) But where the attorney acting for the defendant is named by the plaintiff, the defendant must have a full opportunity of exercising his discretion as to the adoption, otherwise the *cognovit* will be bad. (*Barnes v. Pendrey*, 8 Dowl. P. C. 747.) It is not necessary that the party executing a *cognovit* should first name the attorney to attest the execution thereof, nor is it necessary that such attorney should be the regular attorney of the party giving the *cognovit*; it is sufficient if he be merely employed for the occasion, provided the person giving the *cognovit* shall ultimately exercise a free discretion in the adoption of him. (*Pease v. Wells*, 8 Dowl. P. C. 626; 4 Jur. 679.)

It is not necessary that the defendant should actually nominate the attorney attesting a warrant of attorney on his behalf; it is sufficient if, of his own free will, he adopts an attorney suggested by the plaintiff. Nor is it necessary that the attorney should be cognizant of the facts under which the warrant of attorney is given, or that he should consult with the defendant in private previous to signing; it is enough if the attorney be there, willing to give the defendant the advice if he asks it; and he cannot complain afterwards that his interests were not protected, if he withhold from the attorney the necessary information. (*Joel v. Dicker*, 5 Dowl. & L. 1; Law J. 1847, Q. B. 359; 11 Jur. 589.)

Attorney cannot  
act for both par-  
ties.

An attorney in those cases cannot act for both parties; (*Morley v. Davis*, 5 Jur. 246;) as where the attorney being in the first instance the attorney of the defendant generally, and being so particularly in respect of a warrant of attorney which he subscribes for him, and also superadds, in reference to this instrument, the character of attorney for the plaintiff, such attestation is invalid. (*Rising v. Dolphin*, 8 Dowl. P. C. 309; 4 Jur. 193.) But one attorney may act for each of three defendants, who freely recognize the attorney as acting for each of them respectively. (*Haigh v. Frost*, 7 Dowl. P. C. 743.) When on the execution of a warrant of attorney there was but one attorney present, who had previously acted for the plaintiff, and who on that occasion made out his bill to the plaintiff, but delivered it to the defendant, and was paid by him: it was held, that he was not such an attorney acting on behalf of the defendant as required by 1 & 2 Vict. c. 110, s. 9. (*Sanderson v. Westley*, 8 Dowl. P. C. 412; 6 Mees. & W. 98; 4 Jur. 942.) An attestation of a warrant of attorney on behalf of the defendant, by an attorney, who, besides practising on his own account, was acting at the time as clerk to another attorney, and the latter was acting as attorney both for the plaintiff and defendant in the transaction, was held insufficient. (*Durrant v. Blurton*, 9 Dowl. P. C. 1015; 5 Jur. 825.) The attorney who subscribed the execution of a warrant of attorney for the defendants was the attorney of the plaintiffs: it was held, that though the defendants were fully aware of the nature of the instrument, yet, as the attorney was not wholly uninterested, this was not a sufficient attestation. (*Deverell v. Thring*, 3 Jur. 1193.)

A warrant of attorney was attested by an attorney introduced by the plaintiff, and who had on one former occasion acted professionally for the plaintiff, and who afterwards acted as the plaintiff's attorney in entering up judgment and issuing execution upon the warrant of attorney. The court set it aside. (*Cooper v. Grant*, 12 C. B. 154.) In such a case the court will not impose on the defendant the terms of bringing no action. (*Ib.*)

A warrant of attorney to confess judgment, as a security for advances, was attested in due form by an attorney acting for the defendant, and as his attorney and at his request, but who also acted in the transaction for the



plaintiff. The defendant was informed that the attorney had been consulted by the plaintiff. The warrant was executed on 6th March, 1847, judgment was signed on 19th July, 1847, and a *fi. fa.* shortly after issued but was not executed. The plaintiff, after the judgment was signed, gave fresh credit to the defendant in the way of his trade. On 28th June, 1850, a levy was made. None of these facts were concealed. The defendant was adjudged a bankrupt on 29th July, 1850. A rule to set aside the warrant of attorney and all subsequent proceedings was obtained in Trinity Term, 1851. It was held, that the attorney acting for the plaintiff could not act as attorney for the defendant, and that the objection being made must prevail; it was also held, that the circumstances above stated did not preclude the assignees of the bankrupt defendant from raising the objection. It seems questionable, whether lapse of time after execution levied, and other circumstances showing that the plaintiff was knowingly allowed to alter his position on the faith of the judgment thus obtained, may preclude the defendant or his representatives from raising the objection. (*Hirst v. Hannah*, 17 Q. B. 383.)

1 & 2 Vict.  
c. 110, s. 9.

Where the attorney, who attested the execution of a warrant of attorney, was London agent to the plaintiff's attorney (who mentioned the name and address in town), and acted as such in filing the instrument, and made charges against the country attorney, with which he was debited: it was held, that the attorney so attesting was in substance the plaintiff's attorney, and that he could not, therefore, stand in that independent situation which was required by 1 & 2 Vict. c. 110, s. 9. (*Pryor v. Swaine*, 2 Dowl. & L. 37; 13 L. J., N. S., Q. B. 214; 8 Jur. 423. See *Mason v. Riddle*, 5 Mees. & W. 513; *Pease v. Wells*, 8 Dowl. P. C. 626; *Walton v. Chandler*, 1 C. B. 306.)

Where a cognovit had been attested on behalf of the defendant by an attorney who accompanied the plaintiff's son to the defendant's residence, and who subsequently carried the instrument to the Queen's Bench office to be filed, and there subscribed his name upon the back of it, as the plaintiff's attorney's agent, the court set aside the instrument under 1 & 2 Vict. c. 110, ss. 9, 10. (*Rice v. Linstead*, 7 Dowl. P. C. 153; 6 Scott, 895.)

An attestation in this form, "Witness G. E. defendant's attorney, named by him, and attending at his request," is not sufficient without the attorney's proceeding to declare that he subscribed as such attorney. (*Pool v. Hobbs*, 8 Dowl. P. C. 113; *Potter v. Nicholson*, 8 Mees. & W. 294; 9 Dowl. P. C. 808; 5 Jur. 511.) A warrant of attorney to confess judgment was attested by an attorney as follows: "Signed by the above-named G. C. P., in the presence of us, of whom the said J. H. S. is the attorney expressly named by him, and acting at his request, and by whom the above written warrant of attorney was read over, and the nature and effect thereof explained, to the said G. C. P., before the execution thereof by him." "Signed, J. H. S., attorney, Leeds, J. R." It was held, an insufficient attestation for want of a statement that J. H. S. subscribed as attorney for G. C. P. (*Everard v. Poppleton*, 5 Q. B. 181.) If an attesting witness to a cognovit described himself as an "attorney expressly named for the defendant, and that he declares and subscribes himself as such," this is a sufficient attestation; and it is not necessary to state in the attestation that he has been appointed such attorney by the defendant. (*Oliver v. Woodroffe*, 3 Jur. 12.) It is not requisite that the attorney to the defendant, in the attestation of a cognovit, should state himself to be an attorney named by the defendant; it is sufficient if he declares himself to be an attorney for the defendant; nor need the attorney be originally named by the defendant; it is sufficient if the latter adopts the attorney named by the plaintiff. (*Oliver v. Woodroffe*, 7 Dowl. P. C. 166; 4 Mees. & W. 650; 3 Jur. 59.) And if the nature and effect of the instrument be explained to the defendant, it is immaterial that it has not been read over to him. (*Ib.*) An infant cannot bind himself by a cognovit. (*Ib.*) It has been held in recent cases, that the attestation need not follow the precise words of the statute, if the requisites of it are expressed plainly. (*Pope v. Kershaw*, 2 C. B. 198; *Lewis v. Lord Kensington*, 2 C. B. 463;

Form of attestation.

1 & 2 Vict.  
c. 110, s. 9.

3 Dowl. & L. 687; Law J. 1846, C. P. 100; *Lindley v. Girdler*, 1 Dowl. & L. 699; Law J. 1844, Q. B. 53; 8 Jur. 61; *Lewis v. Tankerville*, 2 C. B. 463; *Gay v. Hall*, 5 Dowl. & L. 522; 18 Law J., Q. B. 12; *Phillips v. Gibbs*, 16 Mees. & W. 209; 4 Dowl. & L. 275; Law J. 1847, Exch. 48.) The attestation to a warrant of attorney was in the following form:—"Signed, sealed and delivered by the said H. H. (the defendant), in my presence; and I declare myself to be attorney for the said H. H., and that I subscribe my name as such attorney. (Signed) G. O., solicitor." It was held, that this was a sufficient compliance with the terms of 1 & 2 Vict. c. 110, s. 9. It was held, also, that it need not appear on the face of the attestation, in express words, that the attorney attesting the defendant's signature attended at the defendant's request, and that he was named by him. (*Gay v. Hall*, 5 Dowl. & L. 422; 2 C. B. 322; 13 Law J. 124; 18 Law J., Q. B. 12.)

The attestation to a warrant of attorney must contain words which show with certainty that the subscribing attorney is the attorney of the person executing it, and that he attests or subscribes the execution thereof as the attorney of such person. The following attestation was held to be insufficient:—"Witnessed by me as the attorney of the said W. B., attending at the execution hereof at his request and expressly named by him." (*Hibbert v. Burton*, 10 Mees. & W. 678; 2 Dowl. N. S. 434.) The last case has been recently cited as establishing the rule, that if the act is not exactly followed, the words used must by necessary implication show that all the three requisites of the declaration required by the statute have been complied with. A warrant of attorney was attested as follows:—"Signed, sealed and delivered in the presence of me, H. C., who, at the request and in the presence of the parties executing the warrant of attorney, have set and subscribed my name as the attorney on their behalf, attesting the execution hereof, having first read over and explained to them, and each of them, the nature and contents thereof." It was held (with the dissent of *Erle, J.*), that the attestation was invalid, on the ground that the witness did not by necessary implication declare himself the attorney for the persons executing the warrant of attorney as required. (*Pocock v. Pickering*, 21 Law J., Q. B. 365; 18 Q. B. 789.)

Application to set  
aside the warrant.

An application to set aside a warrant of attorney, on the ground of its not having been duly attested in compliance with the statute, can only be made by the party himself, or by an attorney employed and authorized by him for that purpose. (*Lewis v. Lord Tankerville*, 11 Mees. & W. 109.) A judgment was entered up on a warrant of attorney, executed by principal and sureties. One surety being arrested, paid the debt, and recovered a proportional part from his co-surety, who afterwards discovered that the warrant had been attested by a person not qualified to act as an attorney, contrary to this section. It was held, that the co-surety, not being the party who had paid the debt, could not move the court that the warrant should be set aside for the defective attestation, and the amount of his contribution repaid him by the plaintiff; and a rule nisi, obtained by the co-surety for this purpose, was discharged without costs. *Patteson, J.*, expressed an opinion, that, under 1 & 2 Vict. c. 110, s. 9, a party who had introduced an unqualified person as qualified, to attest the execution of a warrant of attorney, could not afterwards move to set it aside, because attested by such person. (*Price v. Carter*, 7 Q. B. 838.) A defendant may apply to set aside a warrant of attorney and judgment thereon, on the ground of a non-compliance with the statute, although he has become a bankrupt since the execution of the warrant. (*Taylor v. Nicholls*, 6 Mees. & W. 91; 4 Jur. 271.)

Cases not within  
the act.

A consent to a judge's order for judgment and execution was not within 1 & 2 Vict. c. 110, s. 9, and therefore the order was valid, though neither the defendant nor his attorney attended before the judge. (*Bray v. Manson*, 8 Mees. & W. 668; 9 Dowl. P. C. 748.) A writ of summons having been issued, but not served on the defendant, he signed a document entitled in the cause, and prepared by the plaintiff's attorney, whereby the defendant consented to a judge's order for the payment of the debt and costs, with liberty for the plaintiff's attorney to enter an appearance for him, and sign judgment and issue execution *instantly*. No attorney attended on

behalf of the defendant when this consent was given. A judge's order was afterwards obtained on this consent, final judgment signed, and execution issued. It was held, on motion to set aside the judge's order and subsequent proceedings, that this consent did not require the presence of an attorney for the defendant at its execution, and that unless fraud were shown, the court would not interfere. (*Thorne v. Neal*, 2 Q. B. 726; 2 Gale & D. 48. See *Baker v. Flower*, 8 Mees. & W. 670.) A judge's order for staying proceedings upon payment of debt and costs on a given day, otherwise judgment, is not within the act. (*Brookes v. Hodgson*, 8 Scott, N. R. 223.)

1 & 2 Vict.  
c. 110, s. 9.

The act 1 & 2 Vict. c. 110, s. 9, applied to a *cognovit actionem* in an action of ejectment. (*Doe d. Rees v. Howell*, 4 Jur. 1035; *Doe d. Kingston v. Kingston*, 6 Jur. 105; 1 Dowl. P. C., N. S. 268.) The act did not apply to a defendant who was himself an attorney. (*Chipp v. Harris*, 5 Mees. & W. 430.)

If a warrant of attorney executed abroad be intended to be enforced in this country it must be attested by an attorney in the form required by the act. (*Davis v. Trevanion*, 2 Dowl. & L. 743; Law J. 1845, Q. B. 138; 9 Jur. 492.)

See further, as to the attestation of warrants of attorney, Chitty's Archbold, 953 *et seq.*, 12th ed.

10. A warrant of attorney to confess judgment or *cognovit actionem*, not executed in manner aforesaid, shall not be rendered valid by proof that the person executing the same did in fact understand the nature and effect thereof, or was fully informed of the same (c).

Warrant, &c. not  
formally executed  
invalid.

(c) This section has been repealed from the 1st Jan. 1870 (32 & 33 Vict. c. 83, s. 20), but has been re-enacted by sect. 25 of 32 & 33 Vict. c. 62, which came into operation on the same date.

By 3 Geo. 4, c. 39, ss. 1, 5, warrants of attorney in personal actions are to be filed within twenty-one days. The officer of the court is to keep a book containing particulars of each warrant of attorney and *cognovit*. In addition to the book directed to be kept by 3 Geo. 4, c. 39, another book or index shall be kept of names, &c., of persons to whom warrants of attorney are given, which shall be open to inspection. (6 & 7 Vict. c. 66.) A judge's order obtained by consent given by any trader defendant was void under 12 & 13 Vict. c. 106, unless the same, or a copy thereof, was filed within twenty-one days, in like manner as warrants of attorney and *cognovit actionem*. (12 & 13 Vict. c. 106, s. 136, repealed by 32 & 33 Vict. c. 83, s. 2.) The twenty-one days for filing a warrant of attorney under 3 Geo. 4, c. 29, s. 1, are to be reckoned exclusively of the day of execution; so that a warrant executed on 9th December, and filed on 30th December, is in time. (*Williams v. Burgess*, 12 Ad. & Ell. 685.) The 3 Geo. 4, c. 39, s. 1, is extended to every bill of sale of personal chattels made after 10th July, 1854. (17 & 18 Vict. c. 36, s. 1.)

3 & 4 Geo. 4,  
c. 39.

Sections 26—28 of the Debtors Act, 1869 (32 & 33 Vict. c. 62), which came into operation on the 1st Jan. 1870, are as follows:—

32 & 33 Vict.  
c. 62, ss. 26—28.

26. Where in an action a warrant of attorney to confess judgment or a *cognovit actionem* is given, and the same, or a true copy thereof, is not filed with the officer acting as clerk of the dockets and judgments in the Court of Queen's Bench within twenty-one days next after the execution thereof as required by the act of the third year of the reign of King George the Fourth (chapter thirty-nine), "for preventing frauds upon creditors by secret warrants of attorney to confess judgment," the same shall be deemed fraudulent and shall be void; and if any such warrant of attorney or *cognovit actionem* so filed was given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment with the warrant or *cognovit* before the filing thereof, otherwise the warrant or *cognovit* shall be void.

Filing of warrant  
of attorney and  
*cognovit*  
*actionem*.

27. Where a judge's order made by consent is given by a defendant in a personal action whereby the plaintiff is authorized forthwith or at any

Filing of judge's  
order to enter up  
judgment.

1 & 2 Vict.  
c. 110, s. 10.

Application of  
3 Geo. 4, c. 89,  
and 6 & 7 Vict.  
c. 96, to judge's  
orders.

future time to sign or enter up judgment, or to issue or to take out execution, whether such order is made subject to any defeasance or condition or not, then if the action is in the Court of Queen's Bench the order, and if the action is in any other court, a true copy of the order, shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the docquets and judgments in the Court of Queen's Bench within twenty-one days after the making of the order, otherwise the order and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be void.

28. The provisions of the said act of the third year of King George the Fourth, and of the act of the session of the sixth and seventh years of her Majesty's reign (chapter sixty-six), "to enlarge the provisions of an act for preventing frauds upon creditors by secret warrants of attorney to confess judgment," for liberty to file a warrant of attorney or *cognovit actionem*, or a copy thereof, with the clerk of the docquets and judgments, and for that clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search, and filing and taking office copies, shall extend and be applicable to every such judge's order.

### WRIT OF ELEGIT.

Sheriff empowered to deliver execution of lands to judgment creditor.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law; be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such

Proviso as to  
copyhold lands.

party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued; and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: provided also, that as against purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed (*d*).

1 & 2 Vict.  
c. 110, s. 11.

Proviso as to purchasers, mortgagees and creditors.

(*d*) This act has extended the remedy of the judgment creditor against the *whole*, instead of one *moiety* of the debtor's lands, including copyholds, which were not subject to execution under the old law. (See *ante*, p. 482.)

What may be extended.

By the old law, if an estate tail were extended, the issue might avoid it after the death of the tenant in tail. (*Ashburnham v. Lord St. John*, Cro. Jac. 85; Gilb. on Executions, 106.) As tenants in tail, where there is no protector, have a disposing power, without the assent of any other person, it is conceived that in such a case the issue will be bound by judgments entered up against the tenant in tail. The 13th section expressly declares, that a judgment shall be binding as against the issue of the body and other persons whom, without the assent of any other person, the debtor might have barred. (See *Lewis v. Duncombe*, 20 Beav. 398, *post*.)

Estates tail.

It seems that lands settled to such uses as the judgment debtor shall appoint, is within this section. As to the old law on this point, see *Skeels v. Shearby*, 3 M. & Cr. 112.

Land subject to a power.

Lands, of which a man is seised in right of his wife, are liable to execution. (Dalt. Sher. 136; Coote on Mortgages, 67.)

Trust estates are liable to execution under the 11th section of the act, which extends to lands and hereditaments, of which the debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards. Under the Statute of Frauds (29 Car. 2, c. 3, s. 10), it was held, that where a trustee conveyed land before execution sued, though he was seised in trust for the defendant at the time of the judgment, the lands could not be taken in execution. (*Hunt v. Coles*, 1 Com. 226; see *Steele v. Phillips*, Beatty, 193; *Hickson v. Aylward*, 3 Molloy, 25.) Judgments entered up since the 29th July, 1864, do not effect lands until delivered in execution. (27 & 28 Vict. c. 112, *post*.)

Trust estates.

It was decided, that a trust created by a defendant in favour of himself and another person, is not a trust within the 29 Car. 2, c. 3, s. 10, that clause being confined to cases where the trustees are seised or possessed in trust for a defendant alone, and not jointly with another person, the trust within that statute being one of a clear and simple nature for the benefit of the debtor. (*Doe d. Hull v. Greenhill*, 4 B. & Ald. 684. See *Harris v. Booker*, 4 Bing. 96.)

The Statute of Frauds did not render liable to execution an equity of redemption in freeholds (*Plunket v. Penson*, 2 Atk. 290), or in leaseholds. (*Lyster v. Dolland*, 1 Ves. jun. 431.) An equitable interest in a term could not be taken in execution under the Statute of Frauds. (*Scott v. Scholey*, 8 East, 467; see *Re Duke of Newcastle*, L. R., 8 Eq. 700.) And it seems



1 & 2 Vict.  
c. 110, s. 11.

Leaseholds.

that the law is not altered by 1 & 2 Vict. c. 110. (See *Mayor of Poole v. White*, 15 M. & W. 571; *Re Duke of Newcastle*, L. R., 8 Eq. 705.)

Leaseholds may either be extended under an *elegit*, or taken under a *fi. fa.* as part of the personalty. (*Fleetwood's case*, 8 Rep. 171.) Where the lease is taken in execution by the sheriff the term remains in the original lessee until an actual assignment by the sheriff to the purchaser. (*Playfair v. Musgrove*, 14 Mees. & W. 239; *Giles v. Grover*, 9 Bing. 128; 2 M. & Scott, 197.) Where a sheriff sells a term taken in execution under a *fi. fa.* to the execution creditor, but executes no assignment in writing of the term, the estate remains in the debtor, and the execution creditor has no defence to an ejectment at his suit. (*Doe d. Hughes v. Jones*, 9 Mees. & W. 872.) After verdict and before judgment had been entered up, the defendant sold his leasehold by auction: it was held, that under this statute the plaintiff could not levy execution on the purchase-money. (*Brown v. Parrott*, 4 Beav. 585.) In *Causton v. Machlew* (2 Sim. 242), a person who was possessed of a term for years in a house, had allowed judgments to be entered up against him. The term having been sold, the purchaser objected to the title, on the ground that continuances might have been entered, and there might by possibility be writs in the hands of the sheriff, but the objection was overruled. (See *Williams v. Cradock*, 4 Sim. 318.)

As to extending leaseholds, see, further, Chitty's Archb. 690, 12th ed.; and as to selling leaseholds under a *fi. fa.*, see *Ib.* 654. As to the effect of 2 & 3 Vict. c. 11, s. 5, in the case of purchasers of leaseholds without notice, see *Westbrook v. Blythe*, 3 El. & Bl. 737, *post*.

Rent.

Where rent became due after the delivery of a writ of *elegit* to the sheriff, but before the inquisition was taken thereon, it was held, that the execution creditor was not entitled to the rent. (*Sharp v. Key*, 8 Mees. & W. 379; 9 Dowl. P. C. 770.) As to the property which may be extended under a writ of *elegit*, see, further, the notes to *Underhill v. Devoreux*, 2 Wms. Saund. (ed. 1871), 197; Chitty's Archb. 685, 12th ed.

In an inquisition on an *elegit* taken since this act, it is not necessary to set out the land by metes and bounds; it is sufficient to describe it in such a manner as would be sufficient to identify it in a conveyance. (*Doe d. Roberts v. Parry*, 13 Mees. & W. 356; 8 Jur. 963.)

A creditor taking out execution is not precluded from becoming the purchaser of the property seized under it. (*Stratford v. Twynam*, Jacob, 418.)

Where a party dies after verdict, and before judgment, his lands are bound in the hands of his heir by a judgment entered up within two terms after verdict under the stat. 17 Car. 2, c. 8, s. 1, made perpetual by 1 Jac. 2, c. 17, s. 4. (*Saunders v. M'Gowran*, 12 Mees. & W. 221.)

A sale of property for good consideration is not, either at common law or under stat. 13 Eliz. c. 5, fraudulent and void, merely because it is made with the intention to defeat the expected execution of a judgment creditor. (*Wood v. Dixie*, 7 Q. B. 892.)

Sheriff's  
poundage.

The stat. 3 Geo. 1, c. 15, s. 16, which, for ascertaining the fees for executing of writs of *elegit*, so far as they affect real estate, enacts, that the poundage to be taken by sheriffs "by reason or colour of their office," or "by reason or colour of their executing of any writ or writs of *habere facias possessionem aut seisinam*," shall not exceed a certain proportion of the yearly value of any lands "whereof possession or seisin shall be by them or any of them given," applies to the execution of writs of *elegit*, though not expressly named in the enacting part; and the sheriff taking more than the limited poundage for such execution is liable to the penalties imposed by stats. 8 Geo. 1, c. 25, s. 5, and 29 Eliz. c. 4, s. 1. (*Nash v. Allen*, 4 Q. B. 784.) The stat. 29 Eliz. c. 4, against extortion by sheriffs, is not repealed by 1 Vict. c. 55, but the only effect of the latter statute is to exempt from the penalties of the former statute the cases in which the sheriff shall take no larger fees than shall be allowed by the order of the judges. (*Pilkington v. Cooke*, 16 Mees. & W. 615.) In an action of debt by a sheriff against an execution creditor for poundage, the defendant



claimed to set off the expenses, which he had paid, of a bill of sale and appraisement, preparatory to an assignment in trust for the creditors of the party whose goods were seized: it was held, that, without further evidence on the defendant's part, the payment in respect of such a sale could not be considered as made for the sheriff and could not be set off. (*Marshall v. Hicks*, 10 Q. B. 15. See *Watson's Sheriff*, 305—316, 2nd ed., as to writ of *elegit*.)

1 & 2 Vict.  
c. 110, s. 11.

WRIT OF FIERI FACIAS.

12. By virtue of any writ of fieri facias to be sued out of any superior or inferior court, after the time appointed for the commencement of this act, or any precept in pursuance thereof, the sheriff or other officer, having the execution thereof, may and shall seize and take any money or bank notes (whether of the governor and company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of fieri facias shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of fieri facias directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived, and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange, promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become

Sheriff empowered to seize money, bank notes, &c., and to pay money or bank notes to execution creditors, and to sue for amount secured by bills of exchange and other securities.

Proviso as to indemnity of sheriff.

1 & 2 Vict.  
c. 110, s. 12.

liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action (e).

Effect of section.

(e) The effect of this section is, to place bank notes and money seized under a *fi. fa.* upon the same footing as goods, and, therefore, bank notes so seized are not to be treated as the property of the execution creditor, so as to be available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person. *Maule, J.*, observed, "The intention of the statute was to subject money, &c. to seizure, in the same way as any other chattels were before, except that where money is seized it is not necessary that the form of a sale should be gone through. But, although the sheriff may, and ought, if the execution creditor desires it, to hand over the money to him, it does not follow that it becomes by *the seizure* the property of the execution creditor. It is not convenient or necessary that the things for the first time made seizable by this act should be placed in a different position from goods which were seizable before." (*Collingridge v. Paxton*, 11 C. B. 683.)

What can be  
taken in  
execution.

Where the sheriff has seized goods under a *fi. fa.* and holds a balance of money, the proceeds of the sale, such money is not liable to seizure under a *fi. fa.* against the execution creditor, under this section, as money belonging to such creditor, unless the sheriff has appropriated and set apart specific money for the balance to be paid under the first *fi. fa.* (*Wood v. Wood*, 4 Q. B. 397.) The statute applies only to the case of money set apart and earmarked, and the property specifically of the party against whose effects the *fi. fa.* issues, and which the sheriff may seize as he would any other goods belonging to the defendant; and was intended to remedy the defect which formerly existed in the execution of a *fi. fa.*, it being considered that nothing could be seized that could not be sold, and that money was not the subject of a sale. (*Ib.* 401.)

The surplus of the proceeds of property sold under a *fi. fa.* remaining in the hands of the sheriff after satisfying the execution creditors, is a debt due from the sheriff to the debtor, and cannot be taken in execution under a *fi. fa.* at the suit of a third party, against the defendant in the former suits. (*Harrison v. Paynter*, 6 Mees. & W. 387; 8 Dowl. P. C. 349; 4 Jur. 488.)

A party privileged from arrest having been taken on a *ca. sa.* by the sheriff of G., paid the money to the sheriff and obtained a judge's order to have it refunded. When the town agent was about to do so, the money was claimed by the sheriff of M. under a *fi. fa.* directed to him: it was held, that the money could not be taken under the *fi. fa.* (*Masters v. Stanly*, 8 Dowl. P. C. 169; 4 Jur. 28, Exch.)

This section gives no power to seize money in execution while in the hands of a third person, as trustee for the defendant; and therefore money deposited in court in one action, pursuant to 43 Geo. 3, c. 46, s. 2, and the 7 & 8 Geo. 4, c. 71, s. 2, cannot be paid out to an execution creditor in a second action, in satisfaction of his claim. (*France v. Campbell*, 6 Jur. 105.)

When the goods of a defendant, who alleges that he holds them solely as trustee, are taken in execution, the defendant, in his character of trustee, may in general dispute the seizure; and the sheriff in such case is entitled to the benefit of an interpleader rule under sect. 6 of stat. 1 & 2 Will. 4, c. 58. But it was questioned whether this would be so if the defendant had possessed the goods for a long time under circumstances inconsistent with the trust. (*Fenwick v. Laycock*, 2 Q. B. 108.)

Personal chattels bequeathed to a single woman for her separate use, but without the intervention of any trustee, cannot be seized in execution by a judgment creditor of an after-taken husband. (*Newlands v. Paynter*, 4 My. & Cr. 408.)

Property held by way of lien cannot be taken in execution under a *fi. fa.* either at common law or since this section. (*Legg v. Evans*, 6 Mees. & W. 36; 8 Dowl. P. C. 177; 4 Jur. 197.)

Funds in  
chancery.

A judgment creditor, on ascertaining that a sum of money was about to be paid in a cause to his debtor, applied by petition to the Court of Chan-

cery, that the sheriff might be at liberty to seize in the accountant-general's office a cheque, by means of which the sum of money was to be paid out to the debtor: it was held, that under this section the cheque was liable to seizure, and that, inasmuch as the cheque was in the hands of the accountant-general, the application to the court was proper. (*Watts v. Jefferyes*, 3 Mac. & G. 422; 15 Jur. 485.) It was observed by the Lord Chancellor, that this section does not in terms comprise the particular case of money standing in the name of the accountant-general, but the 3 & 4 Vict. c. 82, was passed with the view of rendering all the property of a debtor which was so situated as not to be reached under this act, available for the purpose of satisfying the debts of the judgment creditor. (*Ib.*) A cheque of the accountant-general in favour of A. B., but not delivered out, is not A. B.'s property, so as to be liable to be seized by the sheriff under this section. Leave to seize such a cheque was refused, but a stop order was granted. (*Courtoy v. Vincent*, 15 Beav. 486. See *Warburton v. Hill*, Kay, 470, *post.*)

1 & 2 Vict.  
c. 110, s. 12.

There is no doubt that by a conveyance, whether to a purchaser or to a mortgagee, fixtures annexed to the freehold will pass, unless there be some words in the deed to exclude them. (*Colegrave v. Dios Santos* (2 B. & Cr. 76; 3 D. & R. 255) is an authority to that effect in the case of a purchaser, and *Longstaffe v. Meagoe* (2 Ad. & Ell. 167) in the case of a mortgagee. (See *Steward v. Lombe*, 1 Brod. & B. 506; *Boydell v. M<sup>r</sup> Michael*, 1 Cr. M. & R. 177.) The deed may be so qualified as not to pass fixtures. (*Hare v. Horton*, 5 B. & Ad. 715.) Fixtures cannot generally be treated as goods and chattels until detached from the freehold. (*Nutt v. Butler*, 5 Esp. 176; *Lee v. Risdon*, 2 Marsh. 495; *Niblett v. Smith*, 4 T. R. 504.) In a *fi. fa.* against a lessee, who may himself remove them, they may be taken. (*Place v. Fagg*, 4 Man. & R. 277, per Bayley, J.; *Winn v. Ingilby*, 5 B. & Ald. 625; 1 D. & R. 247; *Pitt v. Shaw*, 4 B. & Ald. 206; *Evans v. Roberts*, 5 B. & C. 841; 8 D. & R. 611; Shelford's Law of Bankruptcy, pp. 260—266, 407, 3rd ed.) But lessor and lessee may enter into an agreement reserving tenant's fixtures to the lessor as against an execution creditor of the lessee. (*Dumergue v. Rumsey*, 2 H. & C. 777; 12 W. R. 205.) Fixtures annexed to the freehold cannot be taken under a *fi. fa.* (Watson's Sheriff, 252, 2nd ed.)

Fixtures.

The sheriff is not bound to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor (having notice) first satisfies the landlord's rent. (*Cocker v. Musgrove*, 15 L. J., N. S., Q. B. 465; 10 Jur. 922; 9 Q. B. 228; *Risely v. Ryle*, 11 Mees. & W. 16.) If a sheriff under a *fi. fa.* levies on and removes goods which are not the property of the judgment debtor, and has notice of rent due before the removal, he is liable to the landlord under stat. 8 Anne, c. 14, s. 1, although he has paid over the whole proceeds of the levy to the owner of the goods. (*Fbrster v. Cookson*, 1 Gale & D. 58; 5 Jur. 1083; 1 Q. B. 419.) The plaintiff having issued a *fi. fa.*, the sheriff seized goods, the proceeds of which were exhausted by payment of a year's rent to the landlord under stat. 8 Anne, c. 14, s. 1, the expenses, and the sum due upon another writ of *fi. fa.* previously delivered to the sheriff. It was held, that a return of *nulla bona* to the plaintiff's writ was proper, and that the sheriff, in an action against him for falsely making such return, might show the above facts, under a plea that the original defendant had no goods whereof the sheriff could levy the damages in the declaration mentioned. (*Kintle v. Freeman*, 11 Ad. & Ell. 539.)

Landlord's rent.

As to execution against corporations and companies, see Chitty's Archb. 1147 and 1176, 12th ed. The rolling stock and plant of a railway company are now protected from being taken in execution. But a receiver, and if necessary a manager, may be appointed on the petition of the judgment creditor. (80 & 81 Vict. c. 127, s. 4.)

Corporations and companies.

Where a sheriff, who had seized and sold certain goods under a writ of *fi. fa.*, kept the money in his hands in consequence of a suit in equity between the parties respecting the amount due to the plaintiff: it was held, that the writ must be considered as wholly executed, and ought not, on the

1 & 2 Vict.  
c. 110, s. 12.

Persons acquiring  
title to goods be-  
fore they have  
been seized or  
attached under a  
writ against the  
seller protected.

sheriff's going out of office, to be transferred to his successor under 3 & 4 Will. 4, c. 99, s. 7. (*Ib.*; see *Woodland v. Fuller*, 11 Ad. & El. 859.)

Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between two and three in the afternoon of the same day, the court set aside the execution as irregular. (*Chick v. Smith*, 8 Dowl. P. C. 387; 4 Jur. 86.)

See, further, as to execution by *fi. fa.*, Chitty's Archb. 646 *et seq.*

No writ of *fi. fa.* or other writ of execution, and no writ of attachment against the goods of a debtor, shall prejudice the title to such goods acquired by any person *bona fide* and for a valuable consideration before the actual seizure or attachment thereof by virtue of such writ; provided such person had not, at the time when he acquired such title, notice that such writ or any other writ, by virtue of which the goods of such owner might be seized or attached, had been delivered to and remained unexecuted in the hands of the sheriff, under-sheriff or coroner. (19 & 20 Vict. c. 97, s. 1.)



### THE EFFECT OF A JUDGMENT.

Judgment to  
operate as a  
charge on real  
estate.

13. A judgment already entered up, or to be hereafter entered up against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seised, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments (*f*); and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment (*g*); or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act, until after

Charge not to be  
enforced until  
after expiration  
of a year.

the expiration of one year from the time appointed for the commencement of this act, nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have been entered up unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed: provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.

1 & 2 Vict.  
c. 110, s. 13.

Proviso as to  
purchasers.

(f) As to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38, *post*. And as to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112, *post*.

Judgments  
entered up since  
23rd July, 1860.

In considering whether judgment creditors were necessary parties since 27 & 28 Vict. c. 112, to suits to foreclose mortgaged lands, *Malins, V.-C.*, said that the last-mentioned act sufficiently showed the intention to repeal 1 & 2 Vict. c. 110, s. 13. (*Earl of Cork v. Russell*, L. R., 13 Eq. 216; *Re Bailey*, 17 W. R. 393.) And in dealing with a case under 27 & 28 Vict. c. 112, where the property of the judgment debtor was incapable of being taken in execution, Lord *Romilly* said, there were serious doubts whether 1 & 2 Vict. c. 110, s. 13, had not been repealed. (*Re Duke of Newcastle*, L. R., 8 Eq. 706.) See, however, the remarks of *Wood, V.-C.*, *Re Cambridge R. Co.*, L. R., 5 Eq. 416.

Effect of 27 & 28  
Vict. c. 112, on  
this section.

The charge and right of suit in equity given by this act to those who obtain decrees of the Court of Chancery cannot be treated as part of the powers, jurisdiction and authority of that court for enforcing its decrees. Therefore, 20 & 21 Vict. c. 77, s. 28, which enacts that the Court of Probate shall have the like powers for enforcing its orders as are vested in the Court of Chancery in relation to suits depending therein, does not constitute an order of the Probate Court for payment of money, a charge on land within this section. (*Pratt v. Bull*, 1 De G., J. & S. 141.)

Cases under this  
section.

Order of  
Probate Court.

A decree of the Divorce Court for permanent alimony having been entered on the register, the Court of Common Pleas declined on motion to order it to be expunged, leaving it to the Court of Chancery to decide whether the remedy was available or not. (*Ex parte Holden*, 13 C. B., N. S. 641; 11 W. R. 437.)

Decree of  
Divorce Court.

No judgments could by virtue of this act affect any lands until registered as prescribed by sect. 19, *post*. (See also 2 & 3 Vict. c. 11, s. 8, *post*.) And it was necessary to repeat the registration every five years. (2 & 3 Vict. c. 11, s. 4; 18 & 19 Vict. c. 15, s. 6, *post*.) Where these conditions were not complied with, a purchaser was not bound although he had notice. (3 & 4 Vict. c. 82, s. 2; 18 & 19 Vict. c. 15, ss. 4, 5, *post*.) And even where judgments were duly registered, it was enacted, that they should not affect purchasers and mortgagees without notice, further than a judgment of one of the superior courts would have done before the act 1 & 2 Vict. c. 110; where such judgment had been duly docketed according to the law then in force. (2 & 3 Vict. c. 11, s. 5, *post*.)

Provisions as to  
registration.

In an ejectment for land in Middlesex on a case stated, it appeared that A., being possessed for a term of ninety-nine years in the lands, conveyed them by way of mortgage to the plaintiff on the 19th June, 1852. The mortgage was registered in Middlesex on the 28th June. The defendant, on the 5th June, 1852, obtained a judgment in the Queen's Bench against A. On the same day the judgment was registered in the Common Pleas; it was never registered in Middlesex. On the 8th September, 1852, an elegit

Effect of  
2 & 3 Vict. c. 11,  
s. 5, in the case  
of judgments  
against lease-  
holds.



1 & 2 Vict.  
c. 110, s. 18.

Lands in  
Middlesex.

issued and the lands were delivered to the defendant: it was held, that the judgment was a charge on lands in general under this section, from the time it was registered in the Common Pleas, but that by stat. 2 & 3 Vict. c. 11, s. 5 (see *post*), it had no further effect against a *bonâ fide* purchaser for value and without notice than a docketed judgment before this statute. That a docketed judgment would not before this act have bound a term for years until execution, and consequently that the plaintiff, being a *bonâ fide* purchaser of this term of years before the execution, was entitled to the lands as against the defendant the judgment creditor. It was also held, that these lands being in Middlesex, the judgment, though registered in the Common Pleas, did not bind the lands till the memorial was registered in Middlesex, under stat. 7 Anne, c. 20, s. 18, which enacts, that no judgment shall affect or bind any lands in Middlesex, but only from the time that a memorial of such judgment shall be entered at the registry office. Here the judgment was not entered at the registry office for Middlesex. The leaseholds in this case were comprised within that act, as the only leaseholds excepted by the 17th section are leases at rack rent and leases not exceeding twenty-one years, whereas the lease in this was not at rack rent and exceeded twenty-one years. It was contended, that the section requiring registration of a judgment in Middlesex was in effect repealed by this section, enacting that a judgment shall charge the land from the time of registration in the Common Pleas, as if a charge had been executed by the tenant. But the Court of Queen's Bench thought the two statutes could be read together, and carried into effect by holding that a judgment registered in the Common Pleas will have the effect of a charge upon land in Middlesex, only from the time that the judgment has been also registered in the registry for Middlesex. (*Westbrook v. Blythe*, 3 El. & Bl. 737. See *Hughes v. Lumley*, 4 El. & Bl. 274.)

The priority, as against lands in Middlesex, of a judgment registered in the Middlesex Registry over a judgment which though earlier in date is later in order of registration on the Middlesex Registry, is not lost by reason of the judgment creditor's having notice of such earlier judgment at the time when his judgment is entered up. (*Benham v. Keane*, 1 J. & H. 685; 3 De G., F. & J. 818.) The same rule does not prevail in the case of mortgagees. (*Rolland v. Hart*, L. R., 6 Ch. 678.)

Lands in  
Yorkshire.

A judgment creditor, whose judgment was registered pursuant both to the Registry Act, 5 & 6 Anne, c. 18 (West Riding, Yorkshire), and this statute, filed a bill to redeem a prior mortgage of lands in the West Riding, and to foreclose the mortgagor. The mortgagor had confessed other judgments and the conusees had registered them pursuant to this act, *but not under the West Riding Act*. It was held, that those conusees were not necessary parties to the suit. (*Johnson v. Holdsworth*, 1 Sim. N. S. 106. See 16 Ves. 419.)

A. registered a judgment in Yorkshire. B. subsequently registered a judgment both in Yorkshire and the Common Pleas. A. afterwards registered his judgment in the Common Pleas. Held, that A.'s judgment was entitled to priority as to lands in Yorkshire. (*Nere v. Flood*, 33 Beav. 666.)

What lands are  
affected by judgments under this  
section.

Sir *E. Sugden* observes, "These provisions (1 & 2 Vict. c. 110, s. 13) render it now immaterial whether the seller has an equitable or a legal estate, for they are placed on the same footing; and the period of inquiry as to an equitable ownership is no longer the time of execution sued, but of the entering up of the judgment or any time afterwards; and therefore the transfer of the legal estate after the judgment, and before execution sued, is no longer material; nor is it important whether the seller has an estate with or without a general power, for in either case the judgment is equally binding, or whether the seller has *only* a general power, for that is for this purpose treated as an estate, and the judgment creditor has no longer a general lien, but an actual charge on the estate, to which a court of equity is bound to give effect. (Sugd. V. & P. 663, 11th ed.)

By this section the legislature meant that a judgment was to operate on all lands and interest in lands over which the debtor might have a disposing power for his own benefit without committing a breach of duty, that is, over

which he had a right at law or in equity to consider himself the beneficial owner. The introduction of such words as "honestly" or "without committing a breach of duty" appears to be superfluous, for they are necessarily to be understood as forming a part of the clause. (*Kinderley v. Jervis*, 22 Beav. 1; 2 Jur., N. S. 602; 25 L. J., Chanc. 538; 2 Jur., N. S. 603.)

1 & 2 Vict.  
c. 110, s. 13.

Where lands of the judgment debtor were comprised in a prior voluntary settlement, it was held, that a judgment creditor was not a purchaser within the meaning of 27 Eliz. c. 4, and had, therefore, no title on that ground to set aside the settlement. It was further held, that this section did not confer on the judgment creditor any right against the persons claiming under the settlement. The power of defeating a voluntary settlement, by a subsequent sale for valuable consideration, is not a "disposing power" upon which a judgment against the settlor can operate under this section; for a voluntary settlor cannot for his own benefit and without the assent of any other person defeat his own settlement. (*Beavan v. Lord Oxford*, 6 De G., M. & G. 507, 522.)

Lands comprised  
in prior voluntary  
settlement.

Where a bond was given by a municipal corporation before 5 & 6 Will. 4, c. 76, it was held, that judgment subsequently entered up on the bond operated under this section as a charge upon all lands of the corporation whether acquired before or after 5 & 6 Will. 4, c. 76. The court was of opinion that, even if the latter act would have prevented the judgment creditor from charging after-acquired lands (which, *semble*, it would not), that objection was removed by 6 & 7 Will. 4, c. 104, s. 1. The power given by the last-mentioned section to municipal corporations of charging their lands to secure repayment of debts contracted by them before 5 & 6 Will. 4, c. 76, is a power which they may exercise for "their own benefit" within the meaning of 1 & 2 Vict. c. 110, s. 13. The words "for his own benefit" mean no more than "for his own use," "not as trustee." (*Arnold v. Mayor of Gravesend*, 2 K. & J. 574.)

Lands of municipal  
corporation.

In a mortgage suit by a judgment creditor of a tenant in tail in possession, the latter was ordered to execute a disentailing deed, in order to give full effect to the plaintiff's charge under this section. (*Lewis v. Duncombe*, 20 Beav. 398.)

Estate tail.

A judgment entered up, in 1845, against a beneficed clergyman for a debt was duly registered: it was at first held, that, under this section, it was a charge upon his benefice, and that the creditor was entitled to have a receiver of the profits of the benefice appointed (*Hawkins v. Gathercole*, 1 Sim., N. S. 63), but it was decided on appeal that such judgment did not create a charge upon the benefice. (*S. C.*, 6 De G., M. & G. 1.) A judgment creditor of a beneficed clergyman is prevented by the stat. 13 Eliz. c. 20, which renders void charges on benefices, with cure, from suing in equity to have his judgment made a charge under this statute. (*Bates v. Brothers*, 2 Sm. & Giff. 509.) A rector, who was also the patron of a living, gave warrants of attorney to various creditors who had mortgages on the advowson, subject to an agreement that the judgment to be entered up by the first mortgagee should have priority over the rest whenever execution should be issued: it was held, that the agreement pointed so particularly to making the judgments charges on the living, that the court could not give effect to it by granting an injunction and a receiver. (*Long v. Storie*, 8 De G. & S. 308. See *Metcalf v. Archbishop of York*, 1 My. & Cr. 547.)

Benefice.

Where real estate was devised upon absolute trust for sale, and the proceeds of the sale were directed to be divided among testator's sons, it was held, that the interest of such sons in such proceeds of sale did not come within this section. (*Thomas v. Cross*, 2 Dr. & Sm. 423.)

Land devised on  
trust for sale.

A. was entitled to an annuity which was secured by a covenant and by an assignment of leaseholds to her in trust to sell: it was held, that her interest under the deed might be made available under this section, for payment of a judgment debt due from her. (*Harris v. Davison*, 15 Sim. 128.)

Land charged in  
favour of judgment  
debtor.

A., by articles of agreement, covenanted to pay B. 5,000*l.*, and it was thereby agreed and declared that the 5,000*l.*, and interest, should be and

1 & 2 Vict.  
c. 110, s. 13.

Lands of which  
judgment debtor  
is mortgagee.

Nature of the  
charge created by  
this section.

was thereby charged on land: it was held, that by virtue of this section a judgment creditor of B. had a charge upon such land, and was a proper party to a suit for foreclosure. (*Russell v. McCulloch*, 1 Kay & J. 313; 1 Jur., N. S. 157. See *Younghusband v. Gisborne*, 1 De G. & S. 209.)

Where, under a power to invest on real or government securities, a trust fund is invested on mortgages, a judgment creditor of one of the *cestuis que trust* is entitled to a charge on his interest to the extent of all monies which may be payable to him out of the rents and profits of the mortgaged property, or otherwise by virtue of such mortgage. But the share of the judgment debtor in the interest paid to the trustees by the mortgagor, and not taken out of the rents and profits, is not subject to a charge under this section, the covenant to pay being a security which falls under the 12th section. (*Arison v. Holmes*, 1 Johns. & H. 580; 7 Jur., N. S. 722; 30 L. J., Chanc. 564; 9 W. R. 550.) See, further, 18 & 19 Vict. c. 15, s. 11, *post*; Dart, V. & P. 432, 4th ed.

In a suit by a judgment creditor against his debtor, to give effect to a charge under this statute, on the interest of the debtor in an estate of which he was mortgagee, which was vested in trustees for sale to satisfy incumbrances, and pay the surplus to the mortgagor, a sale of the estate was directed; and, the purchase-money proving insufficient to satisfy the charges thereon, the plaintiff was held entitled to be paid his debt and costs in priority to the costs of the mortgagor or mortgagee of the estate, or any other of the defendants, except the trustees for sale. (*Clare v. Wood*, 4 Hare, 81.)

That which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, now by force of the express directions of this section becomes a specific charge; words cannot be more express. If a man has power to charge certain lands, and agrees to charge them, in equity he has actually charged them; and a court of equity will execute the charge. When the act of parliament says, that every judgment creditor shall have the same remedies in a court of equity as he would be entitled to in case the person, against whom the judgment has been entered, had agreed to charge the lands with the amount of that judgment debt, whether that charge be legal or equitable, the judgment becomes, in the view of a court of equity, an equitable estate. We are no longer dealing with a general lien, but with a specific incumbrance. (*Rolleston v. Morton*, 1 Drury & War. 171, 195; 1 Con. & L. 252; Sugd. V. & P. 663, 11th ed.)

The judgment creditors of an insolvent plaintiff, whose estates were sold by the order of the court, were held to be necessary parties to the conveyance to the purchaser. (*Hotham v. Somerville*, 9 Jur. 702; 9 Beav. 63.)

A. devised his estate at H. to his second son, who survived him, and afterwards died intestate: whereupon the estate descended to N., his elder brother. Pending a suit instituted by A.'s creditors judgments were entered up against N., which remained unsatisfied when the estate at H., together with the testator's other estates, was sold under the decree in the suit for payment of his debts. It was held, that N.'s judgment creditors were necessary parties to the conveyance of the estate at H., as they could issue execution against his estate, and as they could not be compelled to join in the conveyance, because they were not parties to the suit, that a good title could not be made to the estate. (*Craddock v. Piper*, 14 Sim. 310.)

Vendors contracted to sell land, and the purchasers paid part of the purchase-money, and were let into possession, but were unable from insolvency to complete the contract. The vendors filed a bill for specific performance, and in default for a re-sale. There were at that time registered judgments against the purchasers, but they were not made parties to the suit. The vendors obtained a decree for sale, and the land was sold by auction. A. bought one lot and required that the judgment creditors should release their interest as they were not parties to the suit: it was held, reversing the decision of *Stuart, V.-C.*, that the original purchasers by entering into possession had accepted the title and had become owners in equity of the property, and that the judgment debts of their creditors

attached under this section. (*Grey Coat Hospital (Governors) v. Westminster Improvement Commissioners*, 26 L. J., Chanc. 848; 3 Jur., N. S. 188; 1 De G. & J. 581.)

1 & 2 Vict.  
c. 110, s. 13.

Notwithstanding this statute, which gives to a judgment the effect of an equitable charge upon the land of the debtor, an equitable mortgagee retains his right in equity to enforce his security against the title of a creditor under a subsequent judgment, although the latter may have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the mortgage. (*Wiltworth v. Gauguin*, 1 Phill. C. C. 728; 1 Cr. & Ph. 225; *Langton v. Horton*, 1 Haro, 561. See the cases as to charging orders quoted under sect. 14, *post*, p. 585.)

Equitable mortgage entitled to priority over subsequent judgment creditor.

Where lands in Middlesex were mortgaged in 1838, and in 1841 a judgment was recovered against the mortgagor, which was duly registered in 1842, and in 1846 the mortgage was registered, it was held by Stuart, V.-C., that a judgment was not such a charge on land as would, by means of registration (apart from this act), take precedence of a mortgage, though unregistered. (*Chitrow v. Eade*, 1 Sm. & Giff. 423.)

(g) Before this act a judgment creditor, who desired to enforce his security against his debtor's equitable interest in a freehold estate by a bill in equity, must previously have sued out an *elegit*, and if his bill did not allege that he had done so, it was demurrable. (*Neale v. Duke of Marlborough*, 3 Mylne & Cr 407.) And since this act it has been held, that a bill filed by a judgment creditor, before the expiration of twelve months from the date of the judgment, to foreclose a fee simple estate of the judgment debtor, cannot be supported, unless he has issued an *elegit*. (*Godfrey v. Tucker*, 83 Beav. 280.)

Where a judgment creditor has sued out an *elegit* without effect, he is entitled independently of this act to equitable relief, although the twelve months have not expired. (*Partridge v. Foster*, 84 Beav. 1.) A creditor, having sued out execution on a judgment at law, and finding the interest of his debtor in a term of years to be an equitable interest, has a lien upon it in equity without the aid of this statute; and where, after such execution, the leasehold estate of the debtor had been sold, it was held, that the execution creditor had a lien on the proceeds of the sale. (*Gore v. Bowyer*, 3 Sm. & G. 1; 1 Jur., N. S. 392; 24 L. J., Chanc. 316; affirmed on appeal, 24 L. J., Chanc. 440—L. J.)

The court only interferes in aid of the legal right when the party has proceeded at law to the extent necessary to give him a complete title, and therefore, where the plaintiff had obtained judgment, but had not sued out the *elegit*, it was held, that he was not entitled to the aid of the court as against the freehold estate of the debtor; that he did not, under this section of the statute, become entitled to such aid until the expiration of one year from the time of entering up his judgment, and that this being an objection that the plaintiff's title was incomplete, was therefore not removed by a resort to the jurisdiction of the court to relieve against fraud in respect to the freehold estate. The court will interpose to remove legal impediments out of the way of judgment creditors, or for the preservation of the property pending disputes at law as to the rights of judgment creditors, but the court does not supply or extend legal rights. (*Smith v. Hurst*, 10 Haro, 30.)

Under this section, after twelve months a judgment creditor may enforce his equitable charge against the real estate, although twelve months have not elapsed since its registration. (*Derbyshire, &c. R. Co. v. Bainbridge*, 16 Beav. 146.)

Under this section the court, upon a bill filed by a creditor to enforce his judgment, declined to appoint a receiver of the real estate of the debtor, within the year limited by the statute. (*Smith v. Hurst*, 1 Coll. C. C. 705.)

A judgment creditor, though unable to proceed in equity to obtain the benefit of his charge before the expiration of a year under this section, is nevertheless entitled to have the life interest of his debtor in lands at once impounded for his protection. (*Yacombe v. Leador*, 28 Beav. 80; 5 Jur. N. S. 780; 26 L. J., Ch. 876.) The court will within the twelve months impound and protect the property charged by a judgment from destruction.

1 & 2 Vict.  
c. 110, s. 13.

(*Partridge v. Foster*, 34 Beav. 1; and see *S. C.*, as to the judgment debtor's leaseholds.)

Upon a bill for foreclosure filed by a mortgagee after the bankruptcy of his mortgagor, it was held, that a judgment creditor, who had entered up his judgment against the mortgagor less than one year previously to the bankruptcy, was properly made a defendant, although he was not until the expiration of such year entitled to proceed in equity to obtain the benefit of his charge. (*Harrison v. Pennell*, 6 W. R. 712; 4 Jur., N. S. 682.)

In a suit by a judgment creditor, who had been in possession under an *elegit*, to have the real estates of the debtor sold under this act, the plaintiff must account in the same manner as a mortgagee in possession. (*Bull v. Faulkner*, 1 De G. & S. 685; 12 Jur. 83.)

A judgment creditor, having registered his judgment under this act, was not entitled to a decree for foreclosure, but to an order for sale. (*Footner v. Sturgis*, 5 De G. & S. 736. See *Ford v. Wastell*, 6 Hare, 229; 2 Phill. C. C. 591.) But in *Jones v. Bailey* (17 Beav. 582), where the plaintiff had obtained a charge on the defendant's real estates by virtue of a judgment, in 1852, under this statute: it was held, that the plaintiff had that which is equivalent to an agreement to execute a legal mortgage, and that if that were done the plaintiff would only be entitled to a foreclosure.

Judgment creditors were not allowed successive periods of three months each to redeem, but one period of three months was given to them or any of them. (*Radcliff v. Salmon*, 4 De G. & S. 526; *Stead v. Banks*, 5 De G. & S. 560; *Bates v. Hillcoat*, 16 Beav. 139.) As to proceedings by a tenant by *elegit* to redeem a mortgage, see *Barnes v. Thrupp*, 3 Jur., N. S. 1242; 6 W. R. 48.

Equitable charge  
of judgment on  
a fund enforced  
in equity.

An agreement that a certain judgment debt and interest thereon should be paid to the plaintiff out of any monies which might be recovered by the defendant in respect of certain claims which he had against a third person, was held to create a valid equitable charge upon these monies when recovered. The defendant having recovered the monies so due to him in an action, and the same having been paid into the Court of Common Pleas, the Court of Chancery, in a suit by the judgment creditor to establish his equitable charge on the fund, granted an injunction to restrain the defendant from receiving it until he should have paid the judgment debt and interest, and the costs of the suit. (*Riccard v. Prichard*, 1 Kay & J. 277.) As to what constitutes an equitable charge on a fund, see *Rudick v. Gandell*, 1 De G., M. & G. 763; and the note to *Ryall v. Rowles*, 2 L. C., Eq. 774 *et seq.*

Contribution.

If part of an estate subject to a judgment is sold, leaving the remainder in the hands of the conusor, and execution is taken out against the original debtor or his heir, he will not be entitled to contribution against the purchaser; but if the execution had been against the purchaser only, he will be entitled to contribution against the owner of the residue of the estate. (3 Rep. 11 b; *Hartly v. O'Flaharty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5.) A party seised of several real estates, and indebted by judgment, settles one of the estates for valuable consideration, with a covenant against incumbrances, and subsequently acknowledges other judgments: it was held, that the prior judgments should be thrown altogether on the unsettled estates, and that the subsequent judgment creditors had no right to make the settled estates contribute. (*Averall v. Wade*, Lloyd & G. temp. Sugd. 252. See *Handcock v. Handcock*, 1 Ir. Ch. R., N. S. 444, *post.*)

#### CHARGE UPON STOCK, &c.

Stock and shares  
in public funds  
and public com-  
panies belonging  
to the debtor and  
standing in his

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities (*h*), or any stock or shares of or in any public company



in England (whether incorporated or not) (*i*) standing in his name in his own right, or in the name of any person in trust for him (*k*), it shall be lawful for a judge of one of the superior courts (*l*), on the application of any judgment creditor, to order that such stock, funds, annuities or shares or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor (*m*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*n*).

1 & 2 Vict.  
c. 110, s. 14.

own name to be  
charged by order  
of a judge.

(*h*) A judgment debtor was entitled as sole executor and legatee under the will of D. to the arrears of a government annuity granted for the life of D. He was also entitled as such executor and legatee to a government annuity in the name of D., but granted for his own life. Held, that neither the arrears nor the annuity could be charged under this section. (*Taylor v. Turnbull*, 4 H. & N. 495.)

Annuities.

A judge at chambers having made an order under this section, and 3 & 4 Vict. c. 82, s. 1, charging an annuity "payable out of the suitors' fund" by order of the Lord Chancellor, in pursuance of the provisions of the 46 Geo. 3, c. 128, the Court of Exchequer, considering it doubtful whether or no the judge's order was valid, refused to set it aside, as by so doing they would deprive the party of the right of appeal. It seems doubtful whether the Court of Exchequer has jurisdiction over an order of that description. (*Witham v. Lynch*, 1 Exch. R. 391.)

The East India Company granted to the defendant a pension in consideration of his distressed state and the services of his father. It was held, that this could not be charged with a judgment debt by a judge's order under the 14th and 15th sections of this statute. (*Morris v. Manesty*, 7 Q. B. 674.)

Pension from  
East India Com-  
pany cannot be  
charged.

(*i*) A banking co-partnership, which made returns to the Stamp Office, pursuant to 7 Geo. 4, c. 46, was held to be a public company not incorporated within the meaning of this section. (*Macintyre v. Connell*, 1 Sim., N. S. 225; 20 L. J., Ch. 284.) The defendant held shares in the Union Bank of London, and judgment having been obtained in an action against him, a judge at chambers made an order under this section, charging such shares with the judgment debt. On application to set aside such order, it appeared that the bank consisted of a great number of shareholders, and was carried on pursuant to the terms of a deed of settlement, by which it was provided, that the shares should not be transferred except by the consent of the directors, and also that if any order or decree was made against any proprietor, by which his shares became charged, they were to be forfeited to the company. The company was not registered under 7 & 8 Vict. c. 110, but was entitled to sue and be sued by a public officer under 7 & 8 Vict. c. 113, s. 47, and 7 Geo. 4, c. 46. It was held by *Parks*, B., and *Alderson*, B., that it being doubtful whether the company was a public company or not, the order ought not to be set aside. (*Graham v. Connell*, 19 L. J., Ex. 361.) It is doubtful whether a mining company on the cost-book principle is a public company within the meaning of this section. (*Nicholls v. Rosewarne*, 6 C. B., N. S. 480; 7 W. R. 612.)

Public companies  
within this  
section.

(*k*) The provisions of this section are to apply whether the interest of the judgment debtor be in possession, remainder or reversion, and whether it be vested or contingent, and also where he is entitled to the dividends, &c. of any such stocks, funds, annuities or shares. And where the stocks, funds, annuities or shares are standing in the name of the paymaster-general on behalf of the Court of Chancery, a charging order may be

Provisions of  
this section  
extended by  
3 & 4 Vict. c. 82,  
s. 1.

1 & 2 Vict.  
c. 110, s. 14.

What interest  
of judgment  
debtor can be  
charged.

made in the same way as if the same had been standing in the name of a trustee of the judgment debtor. (3 & 4 Vict. c. 82, s. 1, *post.*)

Orders have been made absolute which charged the contingent equitable interest of a judgment debtor in stock or shares. (*Baker v. Tynte*, 2 E. & E. 897; 29 L. J., Q. B. 233; *Cragg v. Taylor* (2), L. R., 2 Ex. 131.) But where a testatrix gave her estate and effects (which included stock and shares) to trustees on trust to pay debts and legacies, and as to the residue upon trust for the defendant and two others, and directed a conversion: it was held, that the defendant having no interest in the stock and shares, but only an interest in their produce, they could not be charged with his judgment debt. (*Dixon v. Wrench*, L. R., 4 Ex. 154.)

The defendant, a registered owner of shares in a joint stock company, deposited the certificate with E. as a security for money advanced. The defendant afterwards borrowed a further sum from an insurance office, and executed to C., one of his sureties on that occasion, with the consent of E., who was the other surety, a transfer of the shares, accompanied by a declaration of the terms of the transfer, and delivered both instruments to C. The money not having been paid to the insurance office, they claimed it from E. and C., when C. requested the insurance office to transfer the shares into his name, which they refused to do, on the ground that they had been previously served with a judge's order *nisi* to charge the shares: it was held, that the shares were properly charged as shares standing in the defendant's name in his own right, within the meaning of this section. (*Fuller v. Earle*, 7 Exch. 796; 21 L. J., Ex. 314.)

Certain stock, the subject-matter of a deed of settlement executed under the sanction of the Court of Chancery, having been charged by the order of a judge, under the 14th and 15th sections of this statute, the trustees moved to discharge the order, on the ground that the judgment debtor had forfeited all interest under the settlement, by taking the benefit of the provisions relating to insolvent debtors. The motion was opposed, upon a suggestion that the settlement was fraudulent and void as against creditors, and that a suit was pending in the Court of Chancery to avoid it. The court declined to interfere, even if they had jurisdiction, *Tindal*, C. J., observing, "If we were to entertain this motion, we should in effect be entering into a complicated chancery suit. Assuming, therefore, that we have jurisdiction, this is not a case in which it can be exercised." (*Rogers v. Holloway*, 6 Scott, N. R. 274; 5 Man. & G. 292.)

Where the plaintiff obtained a charging order on shares standing in the name of the defendant in a limited company formed under 25 & 26 Vict. c. 89, and the defendant applied that the order might be rescinded on the ground that the shares were held by him in trust for another, the court refused the application. (*Cragg v. Taylor*, L. R., 1 Ex. 148.)

But where an action was brought against a company for permitting the transfer of shares after notice of a charging order *nisi*, it was held, that a plea showing that the judgment debtor, in whose name the shares stood, had no beneficial interest in them, was a good equitable defence to the action. (*Gill v. Continental Gas Co.*, L. R., 7 Ex. 332.)

Where a testator by his will directed that certain stock should stand in the names of his executors, and the dividends should be paid to G. C. during his life, and on his death to E. C., his widow, "she to lay it out for the good of his children:" and that when the youngest child should come of age, the fund should be sold out and divided amongst the children. It was held, in an action in which E. C. (after the death of G. C.) was a defendant, that an order might be made, under the 14th and 15th sections of this act, for charging "so much of the dividends as were payable to E. C. for her own use and benefit." (*Fowler v. Churchill*, 11 Mees. & W. 57.)

Money deposited by the vendee of land in the hands of a third party, for the use of the defendant, cannot be attached under this section. (*Robinson v. Pearce*, 7 Dowl. 93; 2 Jur. 896.)

A judgment creditor cannot obtain a charging order in equity on an equitable debt by analogy to an attachment of a legal debt under the

Equitable debt  
cannot be  
charged.

garnishee clauses of the C. L. P. Act, 1854. (*Horsley v. Cox*, L. R., 4 Ch. 92.)

1 & 2 Vict.  
c. 110, s. 14.

(1) Where the charging order is to give effect to the judgment of a court of common law, a common law judge at chambers, and not the court, has authority under this section to make the order. If he makes an absolute order, the court has jurisdiction to set it aside if wrongly made; but if he only makes an order *nisi*, the court has no authority to entertain the question, although the judge expresses his desire to refer it to the court. (*Brown v. Bamford*, 9 Mees. & W. 42; and see *Graham v. Connell*, 19 L. J., Ex. 361; *Nicholls v. Rosewarne*, 28 L. J., C. P. 278.) An application to enter on the judgment roll orders charging stock in execution under this section, for the purpose of having them reviewed by a court of error, was refused. (*Newton v. Boodle*, 6 C. B. 532; 18 L. J., C. P. 73.) It is no objection to an order *nisi* to charge stock pursuant to the 14th and 15th sections of this act, that it calls upon a judgment creditor to show cause on a day certain. (*Robinson v. Burbidge*, 9 C. B. 289.) Nor is it a good objection that such order purports to be made in pursuance of the 1 & 2 Vict. c. 110 alone, and not also of the 3 & 4 Vict. c. 82. A judgment was entered in the master's book, as in a cause of A. v. B., the plaintiff obtained an order to charge stock of the defendant standing in the name of the accountant-general, which order was entitled A. v. C. sued as B. A rule to rescind it having been obtained, on the ground that it did not follow the judgment in its title, the plaintiff produced the judgment paper, which was intituled in the same way as the order. It was held, that the order was properly intituled. It seems that such an order is in the nature of a writ of execution, and ought to follow the judgment in its title. The words "C. sued as" appear to have been interlined: it was held by *Wilde*, C. J., that such interlineation must be presumed to have been made before the judgment paper was sealed by the court. (*Robinson v. Burbidge*, 1 Prac. Rep. 94.) A charging order under this section will be made absolute, notwithstanding proceedings against the trustees of the fund by creditors, and there is no other fund for payment of costs. (*Smith v. Youde*, 2 F. & F. 376—Willes.)

Charging orders  
giving effect to  
common law  
judgments.

Where a debtor on a common law judgment is entitled to funds in the Court of Chancery, an order charging such funds cannot be made by a judge of the Court of Chancery. The application should be made to one of the common law judges of the Superior Courts at Westminster. (*Miles v. Presland*, 2 Beav. 300; 4 M. & Cr. 431.)

Where judgment  
debtor is entitled  
to fund in the  
Court of  
Chancery.

Stock standing in the accountant-general's name to the separate account of a party against whom judgment at law has been recovered, may be charged under this statute; but the charging order must be made, not by a judge in equity, but by a judge at common law; and although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and therefore does not interfere with the rights of prior incumbrancers. A court of equity will make a stop order as auxiliary to the charging order. A party intending to apply for a stop order must give notice of his application to all other persons having like orders on the funds. (*Hulkes v. Day*, 10 Sim. 41; *Courtoy v. Vincent*, 15 Beav. 486.) A judgment having been obtained against a party, to whom a sum standing to the credit of the cause had been ordered to be paid, the court, on the application of the judgment creditor, stayed the delivery to the debtor of the accountant-general's cheques. (*Robinson v. Wood*, 5 Beav. 388.)

Where a judgment creditor has got a charging order at law upon the interest of the judgment debtor in a fund in the Court of Chancery, the proper course is to apply for a stop order. (*Re Nowell*, 11 W. R. 896.) For form of stop order, see Seton, 952.

A judgment at law being given to be dealt with by a court of equity, it was held, that a charging order ought not to be obtained on such judgment without the leave of the Court of Equity. (*Spence v. Briscoe*, 26 Beav. 509.)

See, further, as to charging orders giving effect to judgments of common law courts, Chitty's Archbold, 543 *et seq.*, 12th ed.

1 & 2 Vict.  
c. 110, s. 14.

Charging orders  
giving effect to  
decrees and  
orders in  
Chancery.

Where the charging order is to give effect to a decree or order of the Court of Chancery, the order can be made by a chancery judge. (*Stanley v. Bond*, 7 Beav. 386; *Westby v. Westby*, 5 De G. & Sm. 516; *Wills v. Gibbs*, 22 Beav. 204.) Courts of equity will carry into execution their orders for decrees and costs, by charging the government stock of the debtor under the provisions of this statute; and for that purpose it is not necessary to give further proof of application for payment than is contained in the notice of the intended application to make the order for the charge absolute. (*Blake v. White*, 3 Y. & Coll. 434; 3 Jurist, 749.) But the decree or order must be for the payment of money. A decree for payment of what shall be found due to the plaintiff upon an account directed by the decree, does not entitle him to a charging order. (*Chadwick v. Holt*, 8 De G., M. & G. 584; see the words of sect. 18, *post.*) The jurisdiction to make the order belongs to every judge of the Court of Chancery, and is not confined to this particular branch of the court, by which the order to pay the money is made, and it is sufficient to entitle the order in the matter of the acts. (*Marquis of Hastings v. Bearan*, 4 De G., F. & J. 316.)

As to the practice, on applying in chancery for a charging order, see Dan. Ch. Pr. 901, 5th ed.; and as to stop order, see *ib.* 902, 1543; Morgan, Ch. Acts and Orders, 506, 4th ed.; for forms of charging orders, see Seton, 954.

Effect of  
charging order.

(*m*) After the order obtained by a judgment creditor, for charging the interest of his debtor in government stock standing in the name of trustees, has been made absolute under the 15th section of this statute, the Bank of England is still bound to pay the dividends to the trustees, being the legal hands to receive them; and the trustees are to apply the dividends according to the equitable interests of the parties. (*Bristed v. Wilkins*, 3 Hare, 235.)

A charging order under this section creates such an incumbrance as will determine a life interest limited to a person, until he executes some assignment or act whereby the interest may be encumbered. (*Montefiore v. Behrens*, L. R., 1 Eq. 171.)

Charge operates  
from date of  
order nisi.

A charging order, when made absolute, operates from the making of the order nisi. Where an order nisi had been made, and before it was made absolute, a decree was made for the administration of the judgment debtor's estate, the court refused the plaintiff's application for an injunction to restrain further proceedings by the judgment creditor. (*Haly v. Barry*, L. R., 3 Ch. 452.)

This section gives to a charging order absolute upon stock held in trust for the judgment creditor the same effect as a charge under his hand, and the object of the 15th section is only to prevent any new charge being effected after the charging order nisi has been obtained and before it is made absolute. When the charging order is made absolute, the 15th section has performed its functions; but if the judgment debtor had assigned the stock before the date of the order nisi, the assign might obtain a stop order before the order nisi was absolute, notwithstanding the 15th section, for the real charge under a charging order is only acquired when it is made absolute. If a person, having notice of a previous assignment of a trust fund, take an assignment to himself of the same fund, he cannot obtain priority over the previous assign, whether the trustee had notice or not, and therefore if a judgment creditor, at the time of making his charging order absolute, have similar notice, he is likewise unable to obtain priority. Where the fund is standing in the name of the accountant-general, the practice of the office is to enter a memorandum of every charging order left at the office, but such notice is not treated as any restraint nor as equivalent to a stop order. No entry is made of notice of any other assignment. The accountant-general is not a trustee of the funds committed to him, but merely the agent of the court. The trustees who have paid the funds into court are the trustees of it until the court has in some way dealt with it, and then the court becomes the trustee. Therefore, notice to the accountant-general of an assignment of funds in his hands is of no avail against a stop order afterwards obtained by a subsequent purchaser without notice. (*Warburton v. Hill*, Kay, 470.)

A testator left real and personal property to trustees to be sold and divided among children. One of the children, by assignment, for valuable consideration, created charges on his portion, and notice of each of these assignments was, immediately after its execution, given to the trustees of the will. A judgment was recovered against the assignor; a sale was ordered of the real estates, and the proceeds were vested in the Three per Cents. The judgment creditor obtained a charging order under this section upon the share of the assignor. The question then arose which should be preferred, the assignees or the judgment creditor: Vice-Chancellor *Knight Bruce* decided in favour of the assignees. They had perfected their equitable security long before the charging order, and a new charge then created by the debtor could not have affected their securities. If the parties had equal equities, priority of date was to determine the preference between them. (*Brearclyff v. Dorrington*, 4 De G. & S. 122.) In *Dunster v. Lord Glengall* (3 Ir. Ch. R. 47), the Master of the Rolls in Ireland decided that an equitable mortgagee by deposit of railway shares is entitled to priority over a prior judgment creditor, who, subsequently to the mortgage, has obtained an order charging the shares.

1 & 2 Vict.  
c. 110, s. 14.

It was decided by Lord *Campbell*, C. J., *Wightman*, J., and *Crompton*, J., that the order of a judge, charging stock, standing in the name of a trustee in trust for the judgment debtor, with a judgment debt, gave priority to the judgment creditor over a prior mortgagee of such stock; the mortgagee not having given notice to the trustee of his mortgage, and the judgment creditor not having notice of the mortgage, and the stock still remaining in the name of the trustee. But *Erle*, J., was of opinion that a judgment creditor, with a charging order on stock, does not become entitled to it against a prior mortgagee, although he has given no notice of his mortgage to the trustee of the stock. (*Watts v. Porter*, 3 Ell. & Bl. 743.)

Effect as against  
mortgagees of  
stock.

*Watts v. Porter*.

The opinion of *Erle*, J., has been followed in the Court of Chancery by Lord *Cranworth*, and L. J. *Turner* (*Beavan v. Lord Oxford*, 6 De G., M. & G. 492, 524, 532); by Sir *J. Romilly* (*Kinderley v. Jervis*, 22 Beav. 28); and *Wood*, V.-C., held that a judgment creditor must be postponed to a subsequent mortgagee of an equitable interest in stock, notwithstanding such creditor had, since the mortgage, but before notice thereof to the trustee of the fund, obtained a charging order. (*Scott v. Lord Hastings*, 4 K. & J. 633.) The opinion of *Erle*, J., in *Watts v. Porter* (*sup.*), has since been approved by the Court of Common Pleas (*Pickering v. Ilfracombe R. Co.*, L. R., 3 C. P. 235), and by *Bramwell*, B., who considered the rule to which the cases point to be that the judgment creditor cannot by his charging order get any more than the debtor could honestly give him. (*Gill v. Continental Gas Co.*, L. R., 7 Ex. 338.)

It has been held, in the Court of Common Pleas, that a prior equitable assignment of railway shares in the hands of a garnishee, is a bar to an attachment from the Mayor's Court, London, notwithstanding that no notice of such assignment has been given to the garnishee. It was said, that the opinion of the majority of the Court of Queen's Bench in *Watts v. Porter* (*sup.*) was no longer law. (*Robinson v. Nesbitt*, L. R., 3 C. P. 264.)

Where a fund in court had been recovered by the exertions of a solicitor, he was held entitled (in respect of his lien for costs) to priority over a judgment creditor of his client, who had obtained both a charging order and a stop order. (*Haymes v. Cooper*, 83 Beav. 431.)

Effect as against  
solicitor's lien.

(n) The proviso contained in this section does not prevent the creditor from obtaining the stop order to restrain the debtor from receiving dividends of stock accruing within the six months. (*Watts v. Jefferyes*, 3 Mac. & G. 372; 15 Jur. 783; 20 Law J., Chanc. 659.) The correct construction of the proviso is, that although no steps can be taken to enforce immediate payment of the debt by realizing the security, yet that the judgment creditor may in the meantime, by force of the order, prevent the security given him by the statute from being defeated or diminished *pro tanto*, by stopping payment to the debtor of part of his security. (*Ib.* See *Bristed v. Wilkins*, 3 Hare, 235.)

Final proviso.



1 & 2 Vict.  
c. 110, s. 15.

Order of judge to be made in the first instance *ex parte*, and on notice to the bank or company to operate as a *distringas*.

#### OPERATION OF JUDGE'S ORDERS.

15. And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted, that every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance *ex parte*, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain the governor and company of the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and that if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and that no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, that unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit (o).

(o) See the note to preceding section.

Writ of *distringas* to be issued from Court of Chancery according to form in first schedule to act 5 Vict. c. 5.

The 5 Vict. c. 5, s. 5, enacts that, in the place and stead of the writ of *distringas*, as the same has been heretofore issued from the Court of Exchequer, a writ of *distringas*, in the form set out in the first schedule to that act, shall, on and after the 15th day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the subpoena office, and that the force and effect of such writ, and the practice under or relating to the same, shall be such as was then in force in the said Court of Exchequer: provided, nevertheless, that such writ, and the practice under or relating to

the same, and the fees and allowances in respect thereof, shall be subject to such orders and regulations as may, under the provisions of that act, or of any other act then in force, or under the general authority of the Court of Chancery, be made with reference to the proceedings and practice of the said Court of Chancery. (See Order of Court, 17th November, 1841, as to *distringas*.) The statute 5 Vict. c. 5, s. 4, has conferred on the court no new summary jurisdiction with respect to granting injunctions; but the remedy provided thereby was intended only for limited and interim purposes, viz., to protect stock until the party having a claim to it can have time to assert that claim by bill. (*In re Suisse*, 6 Jur. 597.) It seems that the remedies given by the 4th and 5th sections of the act 5 Vict. c. 5, are cumulative, and consequently that a party who has sued a *distringas*, under the 5th section, is not thereby precluded from afterwards applying for an injunction under the 4th section. (*Ex parte Marquis of Hertford*, 1 Phill. 129; 1 Hare, 584. See Lewin on Trusts, pp. 719—724, 5th ed.; Dan. Ch. Pr. 1540, 5th ed.; Morgan, Ch. Acts and Orders, 508, 4th ed.)

1 & 2 Vict.  
c. 110, s. 15.

“Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, defender of the faith, to the sheriffs of London, greeting: We command you that you omit not by reason of any liberty, but that you enter the same and distrain the governor and company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you; and that you answer us the issues of the said lands, so that they do appear before us in our High Court of Chancery on the — day of —, to answer a certain bill of complaint lately exhibited against them and other defendants before us in our said Court of Chancery by —, complainant; and further to do and receive what our said court shall then and there order in the premises, and that you then leave there this writ. Witness ourself at Westminster, the — day of —, in the — year of our reign. “DEVON.”

Form of writ.

The following is the form of the affidavit which has been substituted by the judges of the Court of Chancery by an Order dated 10th December, 1841, for the form set out at the foot of the Orders of the 17th November, 1841:

A. B. [*the name of the party or parties in whose behalf the writ is sued out*] v. The Governor and Company of the Bank of England.

I, — of —, do solemnly swear, that, according to the best of my knowledge, information and belief, I am [*or if the affidavit is made by the solicitor, “A. B., of —, is”*] beneficially interested in the stock hereinafter particularly described, that is to say [*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons, or body politic or corporate, in whose name or names the same shall be standing*].

### EFFECT OF TAKING THE BODY.

16. If any judgment creditor, who under the powers of this act shall have obtained any charge, or be entitled to the benefit of any security whatsoever, shall afterwards, and before the property so charged or secured shall have been converted into money or realized, and the produce thereof applied towards payment of the judgment debt, cause the person of the judgment debtor to be taken or charged in execution upon such judgment, then and in such case such judgment creditor shall be deemed and taken to have relinquished all right and title to

Securities not realized to be relinquished if the person be taken in execution.

1 & 2 Vict.  
c. 110, s. 16.

the benefit of such charge or security, and shall forfeit the same accordingly (*p*).

(*p*) In *Wells v. Gibbs* (3 Beav. 399), a question was raised whether an order to pay money into court to the credit of a cause is an order within the meaning of the 18th section of this act; and if so, whether a taking under an attachment for contempt would, under this section, invalidate a charge obtained under the 13th section. The court said, it certainly is not the same thing as a taking under a *ca. sa.* at law; nor is this court bound by the decisions of courts of law, which in some cases prohibit a party proceeding against the property and person at the same time. (See *Hide v. Pettitt*, 1 Ch. Ca. 91.)

A creditor recovered a judgment in this country, and obtained a charge on his debtor's lands, &c., under this act. He afterwards arrested the debtor in Jersey upon mesne process for the same debt. It was held, that the charge on the lands here was not thereby forfeited under this section. (*Houlditch v. Collins*, 5 Beav. 497.)

The seizure of the person of the debtor for contempt of court is not a release of the debt against the debtor's property. (*Roberts v. Bull*, 3 Sm. & Giff. 168.)

A solicitor's lien for his costs, upon costs ordered to be paid to his client by the opposite party in a suit, remains notwithstanding that such solicitor has taken the client's body in execution under a judgment against him for the amount of his costs. (*O'Brien v. Lewis*, 3 De G., J. & S. 606.)

As to imprisonment for debt, see now 32 & 33 Vict. c. 62: and as to enforcing the decrees and orders of the Court of Chancery by attachment and sequestration, see Dan. Ch. Pr. 906 *et seq.*, 5th ed.



### INTEREST ON JUDGMENTS.

Judgment debts  
to carry interest.

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment, or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*q*).

(*q*) Formerly a judgment did not carry interest, but interest might be recovered at law in the shape of damages by an action on the judgment. (*Gaunt v. Taylor*, 3 Myl. & K. 302.)

A judgment given for securing an annuity carries interest under this section. (*Knight v. Bowyer*, 4 De G. & J. 619.)

Interest runs on a judgment debt, under this section, from the time of the entry of the *incipitur*, and not merely from the final completion of the judgment after the taxation of costs. (*Newton v. Grand Junction R. Co.*, 16 Mees. & W. 139.) Under this section a plaintiff is entitled to interest upon a judgment from the day on which it is signed, the words "entered up" in that clause having reference to the entry of the *incipitur* in the master's book; and this right is not varied by an abbreviation mark in the amount at a subsequent period, upon a review of the taxation. (*Fisher v. Dudding*, 3 Scott, N. R. 516; 9 Dowl. P. C. 979.)

The judgment carries interest until satisfaction. As to when a judgment at law is satisfied for the purpose of carrying interest, see *Sinclair v. Great Eastern R. Co.*, L. R., 5 C. P. 391.

This section, allowing interest on judgments, applies as well to judgments for costs as for the subject-matter of the action. Therefore, where it was sought to set aside a writ of *ca. sa.*, upon the ground that it commanded the sheriff to levy the amount of the defendant's costs upon a nonsuit with interest: it was held, that the motion could not be sustained. (*Pitcher v. Roberts*, 12 L. J., Q. B. 178. See *Newton v. Conyngham*, 17 L. J., C. P. 288.)

1 & 2 Vict.  
c. 110, s. 17.

Costs.

Under the 17th and 18th sections of this statute, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate. (*Attorney-General v. Nethercote*, 10 Sim. 529.)

As to interest where error is brought at common law, see Chitty's Archbold, 580, 12th ed.; and as to interest where the judgment of a colonial court is reversed by the privy council, see *Rodger v. The Comptoir d'Escompte de Paris*, L. R., 3 P. C. 465.

Under the Common Law Procedure Act, 1852, the following rules have been made as to the recovery of interest on writs of execution:—76. Every writ of execution shall be endorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable, and sought to be recovered, under the judgment, stating the amount, and also to levy interest thereon, if sought to be recovered, at the rate of four pounds per centum per annum from the time when the judgment was entered up, or if it was entered up before the 1st of October, 1838, then from that day; provided that, in cases where there is an agreement between the parties that more than four per cent. interest shall be secured by the judgment, then the endorsement may be accordingly to levy the amount of interest so agreed. 77. In cases of an assessment of further damages, pursuant to the statute of 8 & 9 Will. 3, it shall be stated in the body of the writ of execution that the sheriff, or other officer or person to whom the writ is directed, is to levy interest on the damages assessed and costs taxed in that behalf, at the rate of four pounds per centum per annum from the day on which execution was awarded, unless execution was awarded before the 1st of October, 1838, and in that case from that day. (Reg. Gen. Hil. T. 1853; 1 Ell. & Bl. App. xv.)

Rules as to recovery of interest.

## DECREES AND ORDERS IN EQUITY.

18. All decrees or orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such monies or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts, shall and may be exercised by courts of equity with respect to matters therein depending, and by the Lord Chancellor and the court of review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any monies or costs, charges or ex-

Decrees and orders of courts of equity, &c. to have effect of judgments.

1 & 2 Vict.  
c. 110, s. 18.

penses are by such orders or rules respectively directed to be paid (r).

Orders in  
matters of  
bankruptcy.

(r) This section is extended to the common palatinate courts and to the equity court of Durham. (18 & 19 Vict. c. 15, s. 2.)

The provisions of the act 1 & 2 Vict. c. 110, so far as the same relate to orders of the Lord Chancellor, or of the court of review therein referred to in matters of bankruptcy, and the powers given by the same act to the Lord Chancellor and the said court of review in matters of bankruptcy, were extended to orders of the Lord Chancellor and of the court of appeal in chancery, sitting in bankruptcy, under the Bankruptcy Act, 1861. (24 & 25 Vict. c. 134, s. 214.) A provision to the same effect was contained in 12 & 13 Vict. c. 106, s. 248; and see 14 & 15 Vict. c. 83, s. 7. The Bankruptcy Repeal and Insolvent Court Act, 1869, has now repealed 12 & 13 Vict. c. 106; 14 & 15 Vict. c. 83, s. 7, and so much of 1 & 2 Vict. c. 110, s. 18, as relates to orders of the Lord Chancellor or of the court of review in matters of bankruptcy (32 & 33 Vict. c. 83, s. 20). The Bankruptcy Act, 1869, enacts that the orders of the chief judge in bankruptcy shall be of the same force as if they were judgments in the superior courts of common law, or decrees in the High Court of Chancery. (32 & 33 Vict. c. 71, s. 65.)

Decrees and  
orders in equity.

It was held that (notwithstanding 1 & 2 Vict. c. 110, s. 18) the obligation to pay a sum of money under an order of a court of equity was merely an equitable debt, and could not be made the ground of a petition for adjudication in bankruptcy under the Bankruptcy Act, 1861. (*Ex parte Blenoe*, L. R., 1 Ch. 393.)

A decree directing payment to the credit of a cause does not constitute the plaintiff a judgment creditor of the defendant under this act. (*Ward v. Shakeshaft*, 8 W. R. 335; 1 Dr. & Sm. 269; *Ward v. Docker*, 5 Jur., N. S. 1287; comp. *Re Leeds Banking Co.*, L. R., 1 Ch. 150; *Johnson v. Burgess*, L. R., 15 Eq. 398, *post*; see, however, *Gibbs v. Pike*, 8 M. & W. 223; 9 M. & W. 351.)

A decree for specific performance with a reference to the master to compute interest and tax costs, and ordering the defendant to pay the purchase-money and interest and costs when ascertained, was held to constitute a judgment debt. (*Duke of Beaufort v. Phillips*, 1 De G. & Sm. 321.) But a decree which orders an account against a defendant's estate and directs the plaintiff to join and prove for the amount found due by a previous decree, and continues the account, does not operate so as to create a judgment debt. (*Garner v. Briggs*, 6 W. R. 378.)

A decree for an account of what is due to a person and payment of what shall be found due, is not a decree for the payment of money within this section (*Chadwick v. Holt*, 8 De G., M. & G. 584); nor is the chief clerk's certificate, finding money to be due to a party, though adopted by the judge. (*Earl Mansfield v. Ogle*, 4 De G. & J. 38.)

Where a plaintiff, whose bill was dismissed with costs, died after the date of the order but before the costs had been taxed, it was held that the order was a judgment against the plaintiff's estate for an amount which could not be ascertained except by taxation; and as there could be no revivor for costs only, the judgment could not be worked out. (*Troup v. Troup*, 16 W. R. 573.)

An order for payment of costs operates only as against purchasers, mortgagees and creditors from the registration of the certificate of taxation. (*Hargrave v. Hargrave*, 23 Beav. 484.)

Writs of execution upon decrees and orders of courts of equity, under this section, must issue out of the court in which such decrees and orders are made, and cannot be awarded by a court of common law. (*Stanford v. Robinson*, 3 Mann. & G. 407; *Re Stanford*, 4 Scott, N. R. 28.)

An order of the Court of Chancery for the payment of money, though a judgment debt within this section, cannot be attached under the garnishee clauses in the C. L. P. Act. 1854. (*Re Price*, L. R., 4 C. P. 155. See *Re Frankland*, L. R., 8 Q. B. 18.)

Rules of courts of  
common law.

A. B. had obtained an order in the Exchequer for payment of costs, against a party to a suit in Chancery, who was tenant for life of certain property



over which a receiver had been appointed, with directions to pay her the rents. Such an order having the effect of a judgment under this section, Lord *Langdale*, M. R., gave leave to A. B., notwithstanding the appointment of a receiver, to sue out and execute such writs as he might be advised. (*Grooch v. Hayworth*, 3 Beav. 428.)

1 & 2 Vict.  
c. 110, s. 18.

A bill in equity to charge lands under the 13th and this section, with sums payable by virtue of a rule of court of common law, was held to be demurrable on the ground that the party filing the bill was not the person to whom the money was payable under the rule, but only the person for whose benefit such money was payable. (*Crowther v. Crowther*, 2 Jur., N. S. 274; 25 L. J., Ch. 511; 4 W. R. 351.)

A rule for taxation of costs, and an allocatur of the master, do not amount to a judgment within this section. (*Sham v. Neale*, 6 H. L. C. 581; 6 W. R. 635; 20 Beav. 157.)

After verdict in ejectment, the successful party may sue out execution on the consent rule for the amount of his taxed costs, under this section, without any previous rule, calling upon the opposite party to pay such amount. (*Doe d. Pennington v. Barrell*, 10 Q. B. 531.) It seems that where a rule has the force of a judgment, under this section, it is not necessary that a rule should be served, calling on the party in default to show cause why he should not pay the amount mentioned in the rule. (*Doe d. Harrison v. Hampson*, 5 Dowl. & L. 484; 4 C. B. 745.) A rule calling on a party to pay money pursuant to an award, with a view to execution under this statute, is a rule nisi only; and the court refused to make such rule absolute without personal service, where it appeared that such service might be effected. (*Winwood v. Holt or Hoult*, 3 Dowl. & L. 85; 14 Mees. & W. 197; 15 Law. J., Exch. 10.)

A judge's order for payment of money obtained *ex parte* cannot be made the foundation of an execution under this section. (*Richards v. Patterson*, 1 Dowl. P. C., N. S. 52; 8 Mees. & W. 313; 5 Jur. 894. See *Neale v. Postlethwaite*, 8 Dowl. P. C. 100.) A party to whom a sum of money has been made payable by a rule of court is entitled under this section to sue out execution for the amount without any leave obtained from the court for that purpose. (*Wallis v. Sheffield*, 3 Jur. 1002.)

A judge at the assizes made an order to postpone a cause to the next assizes, the defendant forthwith to pay to the plaintiff the costs of the day, to be taxed. This order was afterwards made a rule of court, before which, however, the suit having abated by the defendant's death, the court refused to order the costs to be taxed, with a view to the plaintiff's issuing execution under this section. (*Hill v. Brown*, 11 Jur. 290; 16 Mees. & W. 796.)

A judge's order under the 6 & 7 Vict. c. 73, s. 43, ordering judgment to be entered up for the amount found by the master's allocatur to be due on an attorney's bill of costs, has the same force as a rule of court for the payment of money under this section. No action, therefore, need be brought on such order, and if brought, the costs of the writ, declaration and appearance will not be allowed. (*Griffiths v. Hughes*, 11 Jur. 313; 16 Law J., Exch. 176; 16 Mees. & W. 809; 4 Dowl. & L. 719.)

The words of this section, "monies or costs, charges or expenses," mean money decreed or ordered to be paid, together with the costs, &c., to be ascertained on taxation by the officer of the court, and no order to pay costs is requisite. (*Jones v. Williams*, 8 Mees. & W. 349; 9 Dowl. P. C. 702; 5 Jur. 895.) Costs having been taxed upon a rule of court, the court refused to make an order upon the party to pay the ascertained amount, to found an execution under this section. (*Hodgson v. Patterson*, 5 Scott, N. R. 76; see *Richards v. Patterson*, 8 Mees. & W. 313; *Jones v. Williams*, 8 Mees. & W. 349; 9 Dowl. 702; *Neale v. Postlethwaite*, 1 Ad. & E., N. S. 243; *Doe v. Aney*, 8 Mees. & W. 365.)

A party entitled to costs under an interpleader order is not bound to take out execution under the Interpleader Act, 1 & 2 Will. 4, c. 58, s. 7, but may make the order a rule of court, and take out execution under this section. (*Cetti v. Bartlett*, 9 Mees. & W. 840.) Where an order of court was made for payment of costs of a motion to set aside an award, and a

1 & 2 Vict.  
c. 110, s. 18.

*ca. sa.* was sued out more than a year and a day after the allocatur, the arrest was held to be regular under this section, without *scire facias* or motion in court. (*In re Spooner and Payne*, 11 Q. B. 136.)

Under an agreement of reference a sum was awarded to be paid by the plaintiff to the defendant; and afterwards the agreement was made a rule of court. It was held, that the plaintiff could not, by virtue of the rule of court, issue execution for the sum under this section, that clause being applicable, for such purpose, only where the money payable by the rule is expressed in the rule itself. (*Jones v. Williams*, 11 Ad. & Ell. 175; 4 P. & Dav. 217.) Where there is a doubt as to the validity of an award, the court will not grant a rule under this section, calling upon the party to pay the sum awarded. (*Dickenson v. Allsop*, 13 Mees. & W. 722. See *Famcott v. Eastern Counties R. Co.*, 6 Dowl. & L. 54.)

The court will not make an order for payment of money directed by an award to be paid so as to enable the party entitled to receive it to avail himself of this section, except where the case is clear and free from doubt. (*Mackenzie v. Sligo and Shannon R. Co.*, 9 C. B. 250.) An attachment does not lie against a corporation, *e. g.* an incorporated railway company, for nonperformance of an award. *Ib.* (See 23 & 24 Vict. c. 126, s. 33.) The Court of Common Pleas refused a rule for payment of money under an award where it appeared that the unascertained costs of certain proceedings in chancery were payable to the other party under the award. (*Lambe v. Jones*, 9 C. B., N. S. 478.)

A rule of court for the payment of money upon a condition *only* cannot be the foundation of a proceeding under this section. In an action by the plaintiffs as churchwardens to recover possession of a book belonging to the parish, a verdict was taken for the plaintiffs, subject to a special case. Upon the argument of the case the court directed a nonsuit. The case was afterwards turned into a special verdict, and upon argument it was agreed, "that the judgment of the court below should stand and the select vestry be at an end, the costs of both sides to be paid out of the parish funds." This agreement was embodied in an order of *Erle*, J., which was afterwards made a rule of court. Difficulties arising in carrying out this order, the court of error awarded a *venire de novo*, and upon the cause again coming on for trial an order of *nisi prius* was drawn up by consent, referring it to *Williams*, J., to determine the cause and all matters relating to it, with power to direct in what manner the order (and rule thereon) of *Erle*, J., was to be carried into effect. In August, 1852, *Williams*, J., made an order directing the defendants to pay the plaintiffs on the 1st March, 1853, the amount at which the plaintiffs' costs had been taxed "unless in the meantime the sum be paid to the plaintiffs out of the funds of the parish." This last-mentioned order having been made a rule of court, and the money not having been paid, the plaintiffs issued an execution thereon under this section. It was held, that the order of *Williams*, J., was not an award, but a judge's order, and made with competent authority, but that being conditional it was not one upon which an execution could at once issue in pursuance of this statute. (*Gibbs v. Flight*, 18 C. B. 803.)

The form (No. 10) of the writ of execution, where a matter of account is referred to and decided on by an arbitrator, officer of the court or county court judge, as settled by the judges by the rule of Michaelmas Term, 1854, does not dispense with the signing of judgment or obtaining a rule or order under this section. (*Kendell v. Merrett*, 18 C. B. 173. See 17 & 18 Vict. c. 125, s. 3.)

To constitute a proper service of an award, a copy must be delivered to the party, and the original must, at the same time, be shown to him. Where the copy was personally delivered to the party on the 21st of October, and a demand of performance made on the 23rd, the original being then for the first time shown: it was held, that this was not such a service as to form the foundation either of an attachment or of a rule under this section. (*Lloyd v. Harris*, 8 C. B. 63.)

Where all matters in difference in a cause are referred by a judge's order, the court will enforce the payment of the sum awarded by a rule of court under this act, although the time for moving to set aside the award has not

expired. An award ordering the defendant to pay the sum awarded to the plaintiff or his attorney S. is good, without any power of attorney to S. to demand the money. (*Hare v. Fleay*, 20 L. J., C. P. 249; 15 Jur. 1038.)

A direction in an award, that one party shall pay money to a stranger, is good, if it does not appear impossible that such payment can be made for the benefit of a party to the award. (*Adcock v. Wood*, 20 L. J., Ex. 435.)

It is competent to a bankrupt, if he will, to become a party to a reference concerning a matter which has passed to his assignees, and if he is ordered by the arbitrator to pay costs the court will enforce the payment by a rule under this section. (*Re Milnes*, 15 C. B. 451; 18 Jur. 1108; 24 L. J., C. P. 29.)

As to enforcing rules of courts of common law for payment of money, &c., under this section, see Chitty's Archbold, 1594 *et seq.*, 12th ed.; and as to enforcing performance of awards under this section, see *ib.* 1700 *et seq.*

1 & 2 Vict.  
c. 110, s. 18.

### NEW REGISTER.

19. No judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy (*s.*), shall by virtue of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and the court and title of the cause or matter in which such judgment, decree, order or rule, shall have been obtained or made, and the date of such judgment, decree, order or rule, and the account of the debt, damages, costs or monies thereby recovered or ordered to be paid (*t.*), shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled for any such entry to the sum of 5*s.*; and all persons shall be at liberty to search the same book on payment of the sum of 1*s.*

No judgment, decree, &c. to affect real estate otherwise than as before the act, until registered.

(*s.*) This section is extended to the common law palatinate courts, and to the equity court of Durham. (18 & 19 Vict. c. 15, s. 12, *post.*)

(*t.*) The date when the memorandum is left with the master is also to be entered (2 & 3 Vict. c. 11, s. 8), and the registration must be repeated. (2 & 3 Vict. c. 11, s. 4; 18 & 19 Vict. c. 15, s. 6, *post.*)

As to the registration necessary where the lands are in a register county, see the cases quoted under 1 & 2 Vict. c. 110, s. 18, *ante.*

Cases under this section.

By a decree, A. was ordered to pay the defendant's costs of a suit. After the decree, but before a registry, A. sold his real estate, which was the whole of his property, to C., who had notice of the suit. The purchase-money was received by B., who was A.'s solicitor, and who retained a considerable part of it to pay his costs in the suit. On a bill by the defendant in the former suit against A., B. and C., to set aside the sale and to charge the costs on the estate: it was held, that the sale was not fraudulent within the 13 Eliz. c. 5, and that the decree not having been entered pursuant to the provisions of this section till after the sale, the court had no jurisdiction to make the costs of the former suit a lien on the estate. (*Nortcliffe v. Warburton*,

1 & 2 Vict.  
c. 110, s. 19.

8 Jur., N. S. 854; 31 L. J., Chan. 777; 10 W. R. 635; 4 De G., F. & J. 449. See 18 & 19 Vict. c. 15, s. 4, *post.*)

A decree in equity for the payment by the defendant to the plaintiff of a sum of money on or before a certain day was held, in reference to the provisions of this act, not to confer any priority as against a deed executed by the defendant conveying his freehold estate in a register county to trustees for the benefit of his creditors, or as against a vesting order made on the defendant's insolvency, the deed having been executed and the vesting order having been made previously to the registration of the decree. (*Lee v. Green*, 6 De G., Mac. & G. 155; 2 Jur., N. S. 170; 25 L. J., Chan. 269.) It was held, also, that the non-registration of the deed and of the vesting order until after the registration of the decree was immaterial, it being proved that the plaintiff had notice of the deed and of the vesting order when he registered the decree. (*Ib.*)

Judgment at law was obtained in an action in which the defendant was sued in a wrong christian name, but the judgment was registered against the debtor in his true christian name, adding the title of the cause with the wrong christian name: it was held, that this registration complied with this act, and that the judgment was good against the debtor and valid against his other creditors. (*Bearan v. Oxford (Earl)*, 3 Sm. & G. 11; 1 Jur., N. S. 154; 24 L. J., Ch. 311.)

An order was made in a suit in equity that one G. should pay in, to the name of the accountant-general (in trust in the cause), a certain sum of money admitted by his answer to be the amount of a sale of a trust fund, and the solicitor for the defendant registered it under this section, and G. was in consequence prevented from disposing of his lands: it was held, that the registering of the order was not *per se* a wrongful act, and that no action was maintainable without proof of malice. It seems that the order was within the equity of 1 & 2 Vict. c. 110, s. 18. (*Gibbs v. Pike*, 9 Mees. & W. 851; 12 L. J., Ex. 257.)

The Court of Chancery has no jurisdiction to order the master of the Common Pleas to vacate a memorandum entered under this act, of an order of the former court. (*Wells v. Gibbs*, 3 Beav. 399.)

The Court of Common Pleas has no jurisdiction over the senior master, as to the entry of particulars of a judgment for the purpose of charging lands under this section. The master must act upon his own discretion. (*Ex parte Ness*, 5 C. B. 155.) The court declined to strike out a decree of the Divorce Court from the register. (*Ex parte Holden*, 13 C. B., N. S. 641, *ante*, p. 575.)

The plaintiff, after making an entry of a judgment obtained against the defendant in the book of the senior master of the Common Pleas, pursuant to this section, with a view of charging the defendant's real estate, took him in execution under the same judgment. The defendant became insolvent, and his assignee contracted to sell his real estate. The purchaser refused to complete the purchase in consequence of the entry of the judgment which charged the property. The plaintiff having refused to consent to an entry of satisfaction being made in the book, the court, on the application of the assignee, granted a rule, ordering the plaintiff's attorney to attend before the senior master of the Common Pleas, and consent to an entry being made that the plaintiff had taken the defendant in execution under the judgment, after having made the entry. (*Lewis v. Dyson*, 1 B. C. C. 33; 16 Jur. 222; 21 L. J., Q. B. 194.) See, further, as to when the court will order satisfaction to be entered up when the judgment debtor has been taken in execution, *Lambert v. Parnell*, 15 L. J., Q. B. 55; *Catlin v. Kernott*, 27 L. J., C. P. 186; *Hallett v. Dyne*, 2 H. & C. 696; 12 W. R. 159.

As to judgments entered up between the 23rd July, 1860 and the 29th July, 1864, see 23 & 24 Vict. c. 38, *post.* And as to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112, *post.*

Judgments  
entered up after  
23 July, 1860.

NEW WRITS.

1 & 2 Vict.  
c. 110, s. 20.

New writs to be framed.

20. Such new or altered writs shall be sued out of the courts of law, equity and bankruptcy, as may by such courts respectively be deemed necessary or expedient for giving effect to the provisions hereinbefore contained, and in such forms as the judges of such courts respectively shall from time to time think fit to order; and the execution of such writs shall be enforced in such and the same manner as the execution of writs, of execution is now enforced, or as near thereto as the circumstances of the cases will admit; and that any existing writ, the form of which shall be in any manner altered in pursuance of this act, shall nevertheless be of the same force and virtue as if no alteration had been made therein, except so far as the effect thereof may be varied by this act (u).

(u) This section is extended to the common law and palatinate courts, and to the equity court of Durham. (18 & 19 Vict. c. 15, s. 2, *post.*)

Forms of writs of execution are contained in the schedule to the Reg. Gen. Hil. T. 1853, made in pursuance of the Common Law Procedure Act, 1852, which forms may be used in cases to which they are applicable, with such alterations as the nature of the action, the description of the court in which the action is depending, the character of the parties, or the circumstances of the case may render necessary; but any variance therefrom, not being in matter of substance, shall not affect their validity or regularity. (1 Ell. & Bl. App. pp. xxix, xxxiv—lv. See orders for the regulation of the practice and proceedings of the Court of Chancery, with the forms of writs of *fiery facias*, *elegit* and *venditioni exponas*, 9 May, 1839; 4 My. & Cr. Appendix; 3 Jur. 410. See Morgan's Ch. Acts, 516, ix. *et seq.*, 4th ed.) The forms of writs in bankruptcy are prescribed by the Bankruptcy Rules, 1870, rule 229, Sched. forms 129—136.

COURTS OF LANCASTER AND DURHAM.

21. All the remedies, authorities and provisions of this act applicable to her Majesty's superior courts of common law at Westminster, and the judgments and proceedings therein, shall extend to and be applicable to the Court of Common Pleas of the county palatine of Lancaster and the Court of Pleas of the county palatine of Durham, within the limits of the jurisdiction of the same courts respectively; and the judgments of each of the said last-mentioned courts shall, within the limits of the jurisdiction of the same courts respectively, have the same effect in all respects as the judgments of any of her Majesty's said superior courts at Westminster, under and by virtue of this act; and all powers and authorities hereby given to the judges or any judge of her Majesty's superior courts at Westminster, with respect to matters depending in the same courts, shall and may be exercised by the judges or any judge of the said Court of Common Pleas at Lancaster or the justices or any justice of the said Court of Pleas at Durham, with respect to matters therein depending, and within the jurisdiction of the same courts respectively: provided always, that no judgment of either of the same last-mentioned courts shall by virtue

Powers, &c. of this act applicable to the courts and judges at Westminster, to be applicable to courts of Lancaster and Durham.



1 & 2 Vict.  
c. 110, s. 21.

of this act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name and the usual or last known place of abode, and title, trade or profession of the plaintiff and defendant, the date when such judgment was signed, and the amount of the debt, damages and costs thereby recovered, shall be left with the prothonotary or deputy prothonotary, or some other officer to be appointed for that purpose by the said courts respectively, who shall forthwith enter the same particulars in a book in alphabetical order by the name of the person whose estate is to be affected thereby; and such officer shall be entitled for every such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book on payment of the sum of one shilling: and provided also, that no order or other proceeding under this act, made by any justice or justices of the said Court of Common Pleas of the county palatine of Lancaster or the Court of Pleas in the county palatine of Durham, shall be valid or effectual except made in open court on one of the court or return days of the same court, except such justice or justices shall be also a judge or judges of one of the said courts at Westminster: provided also, that no order directing any person or persons to be held to bail under this act, nor any order for discharging out of custody any person or persons arrested under this act, shall be made by any justice or justices of the Court of Pleas in the county palatine of Durham, who shall not be a judge or judges of one of the said courts of common law at Westminster.

#### JUDGMENTS OF INFERIOR COURTS.

For removal of  
judgment of  
inferior courts.

22. In all cases where final judgment shall be obtained in any action or suit in any inferior court of record, in which at the time of passing this act a barrister of not less than seven years' standing shall act as judge, assessor or assistant in the trial of causes, and also in all cases where any rule or order shall be made by any such inferior court of record as aforesaid whereby any sum of money or any costs, charges or expenses shall be payable to any person, it shall be lawful for the judges of any of her Majesty's superior courts of record at Westminster, or, if such inferior court be within the county palatine of Lancaster, for the judges of the Court of Common Pleas at Lancaster, or for any judge of any of the said courts at chambers, either in term or vacation, upon the application of any person who at the time of the commencement of this act shall have recovered, or who shall at any time thereafter recover such judgment, or to whom any money or costs, charges or expenses shall be payable by such rule or order as aforesaid, or upon the application of any person on his behalf, and upon the production of the record of such judgment, or upon the production of such rule or order, such record or rule or order, as the case

may be, being respectively under the seal of the inferior court, and the signature of the proper officer thereof, to order and direct the judgment, or as the case may be, the rule or order of such inferior court, to be removed into the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be, and immediately thereupon such judgment, rule or order shall be of the same force, charge and effect as a judgment recovered in or a rule or order made by such superior court, and all proceedings shall and may be immediately had and taken thereupon or by reason or in consequence thereof, as if such judgment so recovered or rule or order so made had been originally recovered in or made by the said superior court, or into the Court of Common Pleas at Lancaster, as the case may be; and all the reasonable costs and charges attendant upon such application and removal shall be recovered in like manner as if the same were part of such judgment or rule or order: provided always, that no such judgment or rule or order, when so removed as aforesaid, shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, any further than the same would have done if the same had remained a judgment, rule or order of such inferior court, unless and until a writ of execution thereon shall be actually put into the hands of the sheriff or other officer appointed to execute the same (x).

1 & 2 Vict.  
c. 110, s. 22.

(x) The proviso at the end of this section is repealed by 18 & 19 Vict. c. 15, s. 7, *post*.

Where a judgment is removed from an inferior court for execution under this act, the court will only enforce the judgment, and will not inquire into the regularity of previous proceedings below. (*Simons v. Count de Wintz*, 8 Dowl. P. C. 646.) A final order or decree of the vice-warden of the Stannary Courts, on the equity side, may be removed into the Court of Queen's Bench, the defendant having gone out of the jurisdiction, in order to issue execution pursuant to this section. (*Harvey v. Gilbard*, 7 Dowl. P. C. 616; 3 Jur. 316.) Under this statute such an order or decree may be made a rule of the Court of Queen's Bench by a rule absolute in the first instance. (*Ib.*, see 7 Dowl. P. C. 525.) See, further, 1 Chitty's Archbold, 1332 *et seq.*, 12th ed.

Removal of judgments.

The judgment of a county court constituted under the 9 & 10 Vict. c. 95, is not removable into a superior court for the purpose of execution, either under the 19 Geo. 3, c. 70, s. 4, or this section. (*Moreton v. Holt*, 10 Exch. 707; 1 Jur., N. S. 215; 24 L. J., Ex. 169; see *Re Turner*, 12 W. R. 837.)

Judgments of county courts.

The Court of Chancery will aid a judgment of a county court, which cannot be enforced at law against the equitable chattel estate of the defendant. (*Bennett v. Powell*, 3 Drew. 326.)

Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced; and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not. (*Parke, B., Williams v. Jones*, 14 Mces. & W. 633.) As to actions brought upon foreign judgments, see *Doe v. Oliver*, 2 Smith, L. C. 726 *et seq.*, 6th ed. And as to making judgments obtained in England, Scotland, Ireland, effectual in other parts of the United Kingdom, see 31 & 32 Vict. c. 54.

In order to acknowledge satisfaction of a judgment, it shall be required only to produce a satisfaction piece in form as hereinafter mentioned, and

Entry of satisfaction on roll.

1 & 2 Vict.  
c. 110, s. 22.

such satisfaction piece shall be signed by the party or parties acknowledging the same, or their personal representatives, and such signature or signatures shall be witnessed by a practising attorney of one of the courts at Westminster, expressly named by him or them and attending at his or their request, to inform him or them of the nature and effect of such satisfaction piece, before the same is signed, and which attorney shall declare himself in the attestation thereto to be the attorney for the person or persons so signing the same, and state he is witness as such attorney [provided that a judge at chambers may make an order dispensing with such signature under special circumstances, if he thinks fit], and in cases where the satisfaction piece is signed by the personal representative of a deceased, his representative character shall be proved in such manner as the master may direct.

#### FORM OF SATISFACTION PIECE.

"In the —.

"Monday the — day of —, A.D. 187—.

"— to wit. Satisfaction is acknowledged between — plaintiff, and — defendant in an action — for — and —. And — do hereby expressly nominate and appoint —, attorney-at-law, to witness and attest — execution of this acknowledgment of satisfaction.

"Judgment entered on the — day of —, in the year of our Lord 187—. Roll No. —.

"Signed by the said —, in the presence of me, —, of —, one of the attorneys of the Court of —, at Westminster: and I hereby declare myself to be attorney for and on behalf of the said —, expressly named by h—, and attending at h— request, to inform h— of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h—); and I also declare that I subscribe my name hereto as such attorney."

— —,  
The above-named  
plaintiff.  
(Date.)

(1 Ell. & Bl. App. p. xvi, Rule 80.)

Entry of satisfaction on judgments.

Upon a satisfaction piece, duly signed and attested in accordance with R. 80 of Reg. Gen. H. T. 1853, being presented to the clerk of the judgments of the masters in the court in which the judgment has been signed, he shall file the same, and enter satisfaction in the judgment book against the entry of the said judgment, and no roll shall be required to be carried in for the purpose of entering satisfaction on a judgment. (Reg. Gen. E. T. 23rd April, 1857; 3 Jur., N. S., Part II., p. 176; 2 C. B., N. S. 92.) The court or a judge will compel a plaintiff, who has received satisfaction of his judgment, to execute the proper satisfaction, in order to have the entries on the registers duly vacated. (*Fish v. Tindal*, 10 W. R. 801, Exch.) See, further, 1 Chitty's Archbold, 721, 12th ed.

#### 2 & 3 VICTORIA, c. 11.

*An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens and Fiats in Bankruptcy (a).*  
[4th June, 1839.]

2 & 3 Vict.  
c. 11, s. 1.

#### DOCKETS TO BE CLOSED.

No judgment to be hereafter docketed under the provisions of

WHEREAS it is desirable that further protection should be afforded to purchasers against judgments, crown debts and lis pendens; be it therefore enacted, that no judgment shall here-

after be docketed under the provisions of an act passed in the fourth and fifth years of the reign of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas and Exchequer, at Westminster," but that all such dockets shall be finally closed immediately after the passing of this act, without prejudice to the operation of any judgment already docketed and entered under the said recited act, except so far as any such judgment may be affected by the provisions hereinafter contained (b).

2 & 3 Vict.  
c. 11, s. 1.

4 & 5 Will. &  
M. c. 20.

(a) This act is repealed so far as relates to the protection of purchasers against secret acts of bankruptcy and fiats in bankruptcy. (12 & 13 Vict. c. 106, s. 1.)

(b) By stat. 4 & 5 Will. & Mary, c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3, judgments were directed to be docketed in alphabetical order; and it was declared that no judgments should affect lands or tenements as to *bonâ fide* purchasers, unless docketed and entered according to the act. Docketing the issue is not a sufficient docketing of a judgment within the provisions of the above act. (*Braithwaite v. Watts*, 2 Cr. & J. 318; 2 Tyr. 293. See *Brandling v. Plummer*, 3 Jur., N. S. 401; 26 L. J., Ch. 326.)

#### DOCKETED JUDGMENTS TO BE ENTERED PURSUANT TO STAT. 1 & 2 VICT. c. 110.

2. No judgment already docketed and entered under the said recited act of their late Majesties King William and Queen Mary shall, after the first day of August, one thousand eight hundred and forty-one, affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until such memorandum or minute thereof as is prescribed in an act passed in the first and second years of her present Majesty Queen Victoria, intituled "An Act for abolishing Arrest on Mesne Process and Civil Actions, except in certain cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England," shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings (c).

As to judgments  
already docketed.

1 & 2 Vict. c. 110.

(c) See *ante*, s. 19, p. 593. An outstanding docketed judgment not registered pursuant to 1 & 2 Vict. c. 110, s. 19, and this act, is not a valid objection to the title of the vendor on the sale of realty. (*Bedford v. Forbes*, 1 Carr. & K. 33.)

#### DATE OF MINUTE.

3. In addition to the entry by the said last-mentioned act or by this act required to be made in a book by the senior master of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or

The date when  
the memorandum  
of judgment is  
left to be entered  
in a book.

2 & 3 Vict.  
c. 11, s. 3.

order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him (*d*).

(*d*) The 3rd, 4th, 5th and 7th sections of this act are extended to the courts of counties palatine. (18 & 19 Vict. c. 15, s. 3.)

#### JUDGMENTS TO BE REGISTERED PERIODICALLY.

Judgments, after five years from entry, to be void, unless a fresh memorandum is left.

4. All judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which since the passing of the said recited act of the first and second years of the reign of her present Majesty have been registered under the provisions therein contained, or which shall hereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements and other hereditaments, as to purchasers, mortgagees or creditors, unless a like memorandum or minute as was required in the first instance is again left with the senior master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years, before the right of such creditors accrued, and so, toties quoties, at the expiration of every succeeding five years; and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled for any such re-entry to the sum of one shilling (*e*).

(*e*) As to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38 (*post*). And as to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112 (*post*).

Creditors within this section.

The provision in 2 & 3 Vict. c. 11, s. 4, that the judgment is to be void as against creditors, refers only to creditors who have some right or interest in such lands, tenements or hereditaments, as, for example, by virtue of a creditor's decree directing a sale of such property. Creditors of a deceased debtor have not on his death a right against his leasehold property in the hands of his executor or administrator within the meaning of this act. It was questioned if they have even after a creditor's decree any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors. (*Simpson v. Morley*, 2 Kay & J. 71.)

General effect of this section as to registration.

It was held under this section that the circumstance that a re-registration is not within five years from the previous registration does not make it ineffectual as against subsequent purchasers, mortgagees and creditors. (*Beavan v. Earl of Oxford*, 6 De G., M. & G. 492.) And see 18 & 19 Vict. c. 15, s. 6 (*post*).

The effect of the provisions of this section is to deprive the judgment creditor who omits to register within five years of protection against subsequent purchasers, mortgagees and creditors; but not to alter his position as to previous purchasers, mortgagees and creditors. A., B. and C. were judgment creditors of D.; A. and B. having priority to C. A. and B. subsequently omitted to register their judgments within five years from their previous registration; C. duly registered within the five years: it was



held, that A. and B. did not thereby lose their priority to C. (*Beavan v. Earl of Oxford*, 6 De G., M. & G. 492.)

2 & 3 Vict.  
c. 11, s. 4.

Under this act, if A. has a judgment registered under the 1 & 2 Vict. c. 110, s. 18 (*ante*, p. 589), such registration will protect him against all who become mortgagees or purchasers during the currency of the five years, and such protection will continue as to them under a re-registration, even though he should have omitted to re-register within five years; but as to persons becoming mortgagees or purchasers between the period when his first registration ceased and when his re-registration began, he will not be protected, but they will have priority over him. (*Shaw v. Neale*, 6 H. L. Cas. 581; 4 Jur., N. S. 695; 27 L. J., Ch. 444.)

In 1836, before the passing of this act, T. had recovered a judgment against Lord O., which was duly docketed. After that judgment was so docketed and before the passing of this act, Lord O. executed a voluntary settlement in favour of his wife, under which she was tenant for life. After the passing of this act other creditors recovered judgments against Lord O., which were duly registered in pursuance of the statute 2 & 3 Vict. c. 11, and the question was whether they, in respect of these judgments, had a claim on Lady O.'s interest under the voluntary settlement. T. omitted to register his judgment till 1849, and thereby lost his priority as against the subsequent judgment creditors: it was held, that this did not entitle the latter to stand in his place as against the voluntary settlement. (*Beavan v. Lord Oxford*, 25 L. J., Ch. 299.)

The provisions as to re-registration in this section were held to be operative for the benefit of all persons deriving title mediately or immediately from the judgment debtor, and not merely for that of immediate purchasers, mortgagees and creditors of the debtor himself. A purchaser from a mortgagee of the judgment debtor, taking with notice of a judgment which had not been registered or re-registered in the Common Pleas within five years, and having the legal estate, was held not to be affected by such judgment. *Wood*, V.-C., said that the intention of this act was to make a five years' search sufficient. (*Benham v. Keane*, 1 J. & H. 685.)

In 1846, the plaintiff, a mortgagee with power of sale under a deed of mortgage dated in January, 1844, contracted to sell the mortgaged premises to the defendant. At the date of the contract the premises in question were subject to two judgments registered against the mortgagor in 1843, but it appeared that on taking his mortgage the plaintiff also took an assignment to a trustee for himself of the residue of a term of 1,000 years in the premises created in 1818, and it was denied by the plaintiff that at the date of the mortgage he had notice of the judgment. The defendant, who had been let into possession, having refused to complete the contract by payment of the purchase-money, the suit was instituted for specific performance of the contract. Shortly afterwards, the five years from the date of the registration of the judgments terminated without a re-registration of such judgments having been made pursuant to this section, and afterwards, pending the suit, one only of such judgments was re-registered: it was held, upon appeal from the decree of Sir *J. Stuart*, V.-C., for specific performance, that the purchaser could not be forced to take a conveyance of the premises in question, except upon the terms either of the concurrence therein of the judgment creditor who had re-registered, and of the other in case he should re-register, or of a release or exoneration of the premises from the judgments. (*Freer v. Hesse*, 17 Jur. 703; 22 L. J., Ch. 597.)

The search for judgments on a purchase or mortgage was rarely carried back beyond twenty years, because the lapse of that period raised, as has been already stated, the presumption of satisfaction (*ante*, p. 238); and now, by stat. 3 & 4 Will. 4, c. 27, s. 40, no action or suit or other proceeding shall be brought to recover any sum of money secured by any judgment but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless the charge be kept alive by part payment, or by some written acknowledgment. (See *ante*, p. 236.) The search for judgments need not be extended beyond five years, because the second section of this act (*ante*,

Search for judgments.

2 & 3 Vict.  
c. 11, s. 4.

Present rule as  
to searches for  
judgments and  
writs of exe-  
cution.

p. 599) has provided that no judgment already docketed under 4 & 5 Will. & Mary, c. 20, shall, after the 1st August, 1841, affect any lands as to purchasers, mortgagees or creditors, unless and until the minute thereof prescribed by the 1 & 2 Vict. c. 110, s. 19 (*ante*, p. 593), shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments. The 4th section of this act has further provided that all judgments, decrees or orders, rules and orders, which had been registered under the 1 & 2 Vict. c. 110, or which thereafter should be so registered, are, in order to bind purchasers, mortgagees or creditors, to be again registered every *five years*.

The rule as to the searches which should be made in the case of sales of land since 1864 has been thus stated: "A purchaser should, as a general rule, search in the Common Pleas for judgments entered up before the 28th July, 1864, against the vendor and all other persons who appear from the abstract to have been owners of or interested in the property during a period of twenty years immediately preceding the sale, except mortgagees who have been paid off on the occasion of a prior sale or mortgage, or are intended to be paid off out of the present purchase-money; and such search should be made immediately before the completion of the purchase, and be carried back for a period of five years, which will in all cases be sufficient. . . . If upon such search a judgment is found, its satisfaction or release should be required, unless it has been entered up between the 23rd July, 1860, and the 29th July, 1864, and execution has not been duly issued and registered. The purchaser should also search for executions issued and registered since the 29th July, 1864, and should require the release or satisfaction of any judgment upon which he shall find a writ of execution to have been so issued and registered." (1 *Prideaux*, Conv. 147, 7th ed.)

Other searches.

The register of judgments should be searched, although the estate lie in a registered county. (Sugd. V. & P. 546, 14th ed.) In purchasing from a tenant in tail or remainderman it will be necessary to search for judgments against the preceding tenants in tail. (See *ante*, pp. 568, 574.) A purchaser should also search the Court of Chancery for statute deeds substituted for fines and recoveries, as well as the index in the Common Pleas for the certificates of acknowledgments of deeds by married women; in which index the names of married women and their husbands are alphabetically arranged. (See 3 & 4 Will. 4, c. 74, s. 87, *ante*, p. 394; Sugd. V. & P. 546, 14th ed.) There should be a search for grants of annuities. (18 & 19 Vict. c. 15, s. 12, *post*; Sugd. V. & P. 547, 14th ed.)

Purchaser not  
bound to search.

The next section seems to show that registration is not in itself notice. An estate was mortgaged to A., and afterwards to the defendant. The plaintiff subsequently obtained a registered judgment against the mortgagor. The defendant then purchased the equity of redemption without searching for judgments. On a bill to charge the equity of redemption with the judgment, the court held, that the defence of "purchase for valuable consideration without notice" was available in this case, and that it was not incumbent on a purchaser to search for judgments. (*Lane v. Jackson*, 20 Beav. 535. See Sugd. V. & P. 761, 14th ed.)

When a judgment has been registered and a search has been made for such judgment, the person searching must be considered to have notice of the judgment. (*Procter v. Cooper*, 18 Jur. 444; 2 Drew. 1.)

Where a vendor, from inability to make out a title, fails to complete a contract for the sale of an estate, the purchaser is entitled to recover the expense of comparing deeds, of searching for judgments, and of journeys for that purpose, and interest on his deposit money. Unless judgments are searched for at an early stage of the proceedings, great expense may afterwards be incurred unnecessarily; and for the same reason, the comparison of deeds with the abstract should be early. (*Hodges v. Earl of Lichfield*, 1 Bing. N. C. 492, 499. See *Lodge v. Lysely*, 4 Sim. 75; *Foster v. Blackstone*, 1 Myl. & K. 259; *Forth v. Duke of Norfolk*, 4 Madd. 504; and Sugd. V. & P. 538, 547, 14th ed.)

## PURCHASERS WITHOUT NOTICE.

2 & 3 Vict.  
c. 11, s. 5.

5. As against purchasers and mortgagees without notice of any such judgments, decrees or orders, rules or orders, as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements or hereditaments, or any interest therein, further or otherwise or more extensively in any respect, although duly registered, than a judgment of one of the superior courts aforesaid, would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present Majesty, where it had been duly docketed according to the law then in force (*f*).

Judgments duly registered not to affect purchasers or mortgagees more extensively than judgments of superior courts would hitherto have done.

(*f*) A judgment registered under the stat. 1 & 2 Vict. c. 110, does not bind leasehold lands against a purchaser for value without notice until an *elegit* is awarded, for before that act a *docketed* judgment did not bind such lands before an *elegit* was awarded. (*Westbrook v. Blythe*, 3 Ell. & Bl. 737, *ante*, p. 576.)

A creditor by judgment registered pursuant to 1 & 2 Vict. c. 110, but not registered in the Middlesex registry, by suit sought priority over a mortgagee of a subsequent date, but whose security was properly registered in the Middlesex registry, and to foreclose him. The court thought the question of priority turned upon notice, and directed an issue, whether the mortgagee had, at the date of his mortgage, actual notice of the judgment. (*Robinson v. Woodward*, 4 De G. & S. 562. See, however, *Hughes v. Lumley*, 4 Ell. & Bl. 274; and *Benham v. Keane*, 3 De G., F. & J. 318, *ante*, p. 576.)

## EXTINCT JUDGMENTS.

6. Nothing in the said recited act of her present Majesty nor in this act contained shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect or prejudice any judgments as between the parties thereto, or their representatives, or those deriving as volunteers under them.

Not to revive judgments already extinguished or barred.

## REGISTRY OF LIS PENDENS.

7. No *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis*

Purchasers not to be affected by any *lis pendens*, unless such suit is duly registered as directed by this act.

2 & 3 Vict.  
c. 11, s. 7.

Special case to be  
a *lis pendens*, and  
may be regis-  
tered.

*pendens* which shall be registered under the provisions of this act (*g*).

(*g*) By stat. 13 & 14 Vict. c. 35, s. 17, the filing of a special case under that act (which commenced on 1st of Nov. 1850), and the entering of appearances thereto by the persons named as defendants therein, shall be taken to be a *lis pendens*, and may be registered under the provisions of this act in like manner as any other *lis pendens* in a court of equity may now be so registered, and unless and until so registered, shall not bind a purchaser or mortgagee without express notice thereof.

It seems that, upon filing a bill in equity, there is a *lis pendens* before service of the bill; and that a general administration suit is a *lis pendens quoad* lands afterwards sold under the decree in it. (*Drew v. Earl of Norbury*, 3 Jones & L. 267.)

As to *lis pendens*, see *Kinsman v. Kinsman*, 1 Russ. & My. 617; Powell on Mortgages, by Coventry, Vol. 1, 541—547; Sugd. V. & P. 758 *et seq.*, 14th ed.; Dart, V. & P. 455, 796, 4th ed.; and as to negligence on the part of a solicitor for not registering a *lis pendens*, see *Plant v. Pearman*, 20 W. R. 814.

Under 25 & 26 Vict. c. 89, s. 114, which authorized the registration of a petition for winding up a company as a *lis pendens*: it was held, that the petition could not be registered against the individual contributories. (*Ex parte Thornton*, L. R., 2 Ch. 171.) But the section is now repealed. (30 & 31 Vict. c. 47, s. 1.)

Satisfaction may be entered as to a registered *lis pendens* under 23 & 24 Vict. c. 115, s. 2, *post*; and the court may order the vacating of the registration of a *lis pendens* where the suit has determined, or where the court is satisfied that the litigation is not being prosecuted *bonâ fide*. (30 & 31 Vict. c. 47, s. 2.)

#### REGISTRY OF CROWN DEBTS.

Recognizances  
entered into not to  
affect purchasers,  
unless duly regis-  
tered as directed  
by this act.

33 Hen. 8, c. 39.

13 Eliz. c. 4.

8. No judgment, statute or recognizance which shall hereafter be obtained or entered into in the name or upon the proper account of her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to her Majesty, her heirs or successors, or obligation or specialty which shall hereafter be made to her Majesty, her heirs or successors, in the manner directed by an act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled "The Erection of the Court of Surveyors of the King's Lands, and the Names of the Officers there, and their Authority," or any acceptance of office which shall hereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled "An Act to make the Lands, Tenements, Goods and Chattels of Tellers, Receivers, et cætera, liable to the Payment of their Debts," shall affect any lands, tenements, or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade or profession of the person whose estate is intended to be affected thereby, and also in the case of any judgment the court and the title of the cause in which such judgment shall have been obtained, and the date of such judg-

ment, and the amount of the debt, damages and costs thereby recovered, and also in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty the sum in which the obligee\* shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office, and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled "The Index to Debtors and Accountants to the Crown," in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute or recognizance, inquisition, obligation or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee (*h*).

2 & 3 Vict.  
c. 11, s. 8.

\* Sic, query obligor.

Registry to be open to inspection.

(*h*) The statute 13 Eliz. c. 4, enumerates a great many officers of the crown, and renders their lands liable to crown debts. That statute is repealed as to *receivers of customs*, by the 6 Geo. 4, c. 105, s. 13. (See 6 Geo. 4, c. 106, s. 7.) In *Wilde v. Fort*, 4 Taunt. 334, a commissioner of Dutch property who was directed by statute to pay the surplus of certain sales into the Bank of England, subject to the orders of the king in council, was considered to come within the words "receiver of any sums of money, imprest or otherwise, for the use of the crown." Money impressed by the crown is money advanced for the purpose of being employed by the party for the use of the crown. (6 Price, 424.) But in *Casbord v. Ward and the Attorney-General* (6 Price, 411), it was held, that a collector of assessed taxes is not a collector or receiver of money *to the use* of the king's majesty, within the purview of the statute. (See 16 Vin. Abr. 527—529.) See 43 Geo. 3, c. 99, and 3 Geo. 4, c. 88, as to the bond by a tax collector and his surety, and the sale of lands and goods under it. (*Gwynne v. Burnell*, 2 Bing. N. C. 7; 9 Bing. 544.) A recognizance by a guardian in the matter of a minor is not a debt due to the crown upon which an extent can issue, as the debt not being of a public nature, is not altered by the form of the security. (*Ex parte Usher*, 1 Rose, 366.) It was formerly questioned whether a bond to the crown, entered into by the committee of a lunatic, in consequence of a grant of the lunatic's estate having been made to him in the usual form, under the great seal, be an obligation of the same force and effect as a statute staple within the 33 Hen. 8, c. 39, s. 50, so that an extent may be issued on it. (*Rex v. Lamb*, M'Clel. 402; 13 Price, 649. See form of bond in Shelford on Lunatics, 849, 850, 2nd ed.) It has been decided that such bond is within that statute, and that the crown is entitled to treat it as matter of record, and to have a *scire facias* thereon. (*Reg. v. Chambers*, 11 Mees. & W. 776.) A bond to the crown under 33 Hen. 8, c. 39, binds all lands of the obligor over which he has a disposing power at the time he entered into the bond. The giving such a bond is the voluntary act upon the part of the obligor, and he cannot, by afterwards exercising the power, defeat the right of the crown. Such bond is within the 33 Hen. 8, c. 39,

Who are and are not accountants to the crown.



2 & 3 Vict.  
c. 11, s. 8.

though made payable to "the king, his heirs and successors," and, being a record, can be looked at by the court, although it be not set out in the pleadings. (*Reg. v. Ellis*, 4 Exch. 652.) A deputy assistant commissary-general was held to be a public accountant within the meaning of the statutes, subjecting the property of certain accountants with the crown to seizure and sale for satisfaction of the balance against them. (*Rex v. Fernandes*, 12 Price, 862.) An agent of a fire insurance company, who has received premiums and duties for the company to whom he has given security, is liable to a writ of immediate extent for the duties, although the company be also liable to the crown. (*Rex v. Wrangham*, 1 C. & J. 408 ; 1 Tyr. 383.) A person employed in the service of the crown as deputy commissary-general to the forces abroad, and assistant commissary in the islands of Guernsey and Alderney, and employed in the negotiation of Bank of England notes received from the paymaster-general of the forces, and of bills of exchange received from the treasury on account of the public service, having also received specie on the same account, is accountable to the crown, and is, as such accountant, within the stat. 13 Eliz. c. 4, s. 1, and his lands, of which he was seised at any time during the period of his accountability, are bound by his engagement with the public, and subjected to prerogative process for security and payment of the balance ultimately declared against him. (*Rex v. Rawlings*, 12 Price, 834.) Where the defendant was appointed Clerk of the Patents under 8 & 4 Will. 4, c. 84, it was held that he was a paid agent for the purpose of receiving and paying over money, and that the crown was entitled to file an information in the Court of Chancery for an account of the public monies received by him. (*Attorney-General v. Edmunds*, L. R., 6 Eq. 381.)

When lien of  
crown attaches.

In cases coming within the stat. 13 Eliz. c. 4, the lien of the crown attaches from the time at which the owner of the land becomes a receiver and accountant ; so that a sale made after the acceptance of the office, and before any debt is contracted, may, to the extent of the interest of the crown, be defeated by the existence of a subsequent debt to the crown. (*Nicholls v. How*, 2 Vern. 389 ; *King v. Bishop of Sarum*, Moore, 126 ; 25 Geo. 3, c. 35.) All freehold lands are liable to the execution of the crown, and *trust estates* (*Earl of Devonshire's case*, 11 Rep. 92 ; 13 Eliz. c. 4, s. 5) as well as legal estates, are bound by this lien. Consequently the plea of being a purchaser for valuable consideration, without notice, will not avail against the crown ; and a purchaser, though thus favourably circumstanced, cannot use an attendant term as a protection against the crown. (*Rex v. Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed. ; *How v. Nichol*, Pr. Ch. 125. See *Rex v. St. John*, 2 Price, 317 ; *Rex v. Hollier*, 2 Price, 394.) Where the term never was held in trust for the crown debtor, it may be used as a defence against the crown debt. (*Rex v. Lamb*, 13 Price, 649 ; M'Clel. 402.) Entailed lands are chargeable under 33 Hen. 8, c. 39, s. 76 : when the lien attached on the *heir in tail*, as such, under the statute, a *bonâ fide* alienation by the heir in tail before the *teste* of the writ of extent would bind the crown. (*Anderson's case*, 7 Rep. 21.) An agreement on borrowing (by recital in a bond) money, on the part of the borrower, that certain real property, freehold and leasehold, should stand pledged for repayment of it, and a delivery of the title deeds, amounting in equity to a mortgage or right to a mortgage, creates a lien binding as against the prerogative lien of the crown, in respect of a debt accruing due to the king subsequently ; and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the crown debtor, seized under an extent in chief. (*Fector v. Philpot*, 12 Price, 197.) Where part of the property so equitably pledged was leasehold, renewable by the lessee, and the equitable mortgagee had procured a renewal of the lease in the name of the lessee (the crown debtor), by surrendering the original lease, and taking a new one of the same premises after the crown debt had accrued, such new lease, and the premises leased thereby, were held to be subject to the equitable lien on the old lease, and the lien to be preferable to the demand on the part of the crown against the crown debtor, in respect of priority of satisfaction out of the proceeds of the sale. (*Ib.*) When the mortgagor had become bankrupt, an equitable mortgagee was not allowed

the costs of successfully defending an extent in aid. (*Ex parte Stevens*, 2 Mont. & Ay. 31; see 12 & 13 Vict. c. 106, s. 127.)

2 & 3 Vict.  
c. 11, s. 8.

The crown is not entitled to recover against its debtors under an extent property which had been fairly and *bonâ fide* assigned to other creditors prior to the time when the debt to the crown was incurred. A. and B. carried on business in partnership; they were also members of a firm, which traded as C. & Co.: A. and B., for the purposes of paying off certain of their debts, assigned in trust to the other members of the firm of C. & Co. portions of their shares in that firm. The assignment, which was *bonâ fide*, was regularly intimated, and it was duly entered in the books of the firm. An extent at the suit of the crown afterwards issued against A. and B.: it was held, that the portions of the shares thus assigned could not be seized under the extent. (*Spears v. The Lord Advocate*, 6 Cl. & Fin. 180, 189. See *Scott v. Scholey*, 8 East, 467; *Rex v. Sanderson*, 1 Wight. 51; *Rex v. Lee*, 6 Price, 369.)

It was held no objection to the title to an estate, that an extent had issued from the crown against the owner, which remained in the hands of the sheriff unexecuted, it appearing that the Lords of the Treasury had in fact compromised the debt, though a writ of *amoveas manus* had not actually issued. (*Pool v. Shergold*, 1 Cox, 160.) But it was held a sufficient objection to a title, that a person under whom the vendors claimed held during his seisin of the estate an office under the crown, and that his accounts with the crown had not been liquidated. (*Wilde v. Fort*, 4 Taunt. 834; *ante*, p. 605.)

The stat. 6 & 7 Will. 4, c. 28, (amended by 2 Vict. c. 61), enables persons to deposit stock or Exchequer bills in lieu of giving security by bond to the postmaster-general, and to the commissioners of land revenue, customs, excise, stamps and taxes.

On the subject of crown debts, see West on the Law and Practice of Extents in Chief and in Aid, 8vo. 1817; Manning's Practice of the Court of Exchequer, 8vo. 1827; 5 Jarm. Convey. by Sweet, pp. 64 f, 79; Butl. Co. Litt. 209 a, 18th ed.; Fisher's Digest, tit. Extent.

Before the above act there was no easy and certain mode of guarding against the risk of crown debts, on account of there being no index to debtors and accountants to the crown. The usual searches for crown liabilities were made at the Exchequer Office, and amongst the receivers-generals' bonds at the Tax Office. (2 Real Prop. Rep. 12.)

Old mode of  
searching for  
crown debts.

Re-registration of crown debts was not at first required, but by 22 & 23 Vict. c. 35, s. 22, it is enacted, that from and after the thirty-first day of December, one thousand eight hundred and fifty-nine, the provision for re-registration of judgments, decrees or orders, rules or orders, contained in the act 2 & 3 Vict. c. 11, as explained and amended by the act of the 18 & 19 Vict. c. 15, shall extend and apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by section eight of the first-mentioned act required to be registered, so that it shall be obligatory on the crown, in order to bind the lands, tenements or hereditaments of its debtors or accountants, as against purchasers, mortgagees or creditors, becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, to re-register in like manner, as it is obligatory on a private person, and so that notice of any such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office not duly re-registered, shall not avail against purchasers, mortgagees or creditors, becoming such after the thirty-first day of December, one thousand eight hundred and fifty-nine, as to lands, tenements, or hereditaments; and this provision shall apply to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as since the passing of the first-mentioned act has been registered under the provisions therein contained, or as shall hereafter be so registered. This section shall not extend to Ireland. (22 & 23 Vict. c. 35, s. 22.)

22 & 23 Vict.  
c. 35, s. 22.  
Re-registration  
of crown debts.

As to future crown debts, it is enacted by 28 & 29 Vict. c. 104, s. 48, that any judgment, decree or order obtained after the commencement of this act (5th July, 1865), by or on behalf of the crown, or any recognizance entered into after the commencement of this act on the proper account of

28 & 29 Vict.  
c. 104, ss. 48, 49  
Future crown  
debts, &c. not to  
affect land till

2 & 3 Vict.  
c. 11, s. 8.

writ of execution  
issued and  
registered.

Mode of regis-  
tration, and dis-  
continuance of  
other modes of  
registration.

the crown, or any inquisition finding after the commencement of this act a debt due to the crown, or any obligation or specialty made after the commencement of this act to the crown, or any acceptance of office accepted after the commencement of this act from or under the crown, shall not affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have or have not notice of the judgment, decree, order, recognizance, inquisition, obligation, specialty or acceptance of office), unless a writ of extent, or of *diem clausit extremum*, or other writ or process of execution in pursuance of or in relation to such judgment, decree, order, recognizance, inquisition, obligation, specialty or acceptance of office, has been issued and registered before the execution of the conveyance or mortgage to such purchaser or mortgagee, and the payment by him of the purchase or mortgage money.

The registration of such writ or process shall be effected as follows, namely, a minute of the name of the person against whom the writ or process is issued, and of the date of the issuing thereof, and of the amount for which it is issued, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book by the name in alphabetical order of the person against whom the writ or process is issued, and no other registration of such writ or process, or of the judgment, decree, order, recognizance, inquisition, obligation, specialty or acceptance of office, in pursuance of or in relation to which it is issued, shall be necessary for any purpose. There shall be paid for every such entry a fee of two shillings and sixpence, and all persons shall be at liberty to search the said book, with the other books in the office, on payment of a fee of one shilling. (28 & 29 Vict. c. 104, s. 49.)

Facility is given for searches for crown debts by 2 & 3 Vict. c. 11, ss. 8, 9; and 23 & 24 Vict. c. 115 (*post*), provides for the entry of satisfaction on the registry of crown debts. The existence of crown debts incurred before the 4th June, 1839, must be ascertained by the old mode (*ante*, p. 607). See further, as to searching for crown debts, Dart V. & P. 454, 4th ed.

### REGISTRY OF A QUIETUS.

Quietus to  
debtors or ac-  
countants to the  
crown to be re-  
gistered.

9. Whenever a quietus shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence (*i*).

(*i*) Formerly, where a vendor was a debtor or accountant to the crown, the title was not good until a *quietus* was entered up on record. (See *Wilde v. Fort*, 4 Taunt. 334.) And a purchaser could not be compelled to take the title, although the crown consented to the payment of the purchase-money into the Exchequer on account of the debt. (*Brakespear v. Innes*, Sugd. V. & P. 1009, 11th ed.) Where it appeared that certain bonds, given to the crown to secure an advance of Exchequer bills, which had been duly indorsed, had been paid off, but no *quietus* had been obtained, by reason of the abolition of the pipe-office, the court, upon the production of a warrant by the attorney-general on behalf the crown, ordered the master to make a minute in the index of the crown debtors that the bonds had been satisfied; *valeat quantum*. (*Ex parte Fleetwood*, 4 Man. & G. 640; 5 Scott, N. R. 184.) A *quietus* obtained by a party who is an accountant to the

crown is pleadable to all prior debts, although he continue to be an accountant, and become indebted afterwards to the crown. (*Ex parte Fleetwood*, 4 Man. & G. 644.)

2 & 3 Vict.  
c. 11, s. 9.

DISCHARGE OF CROWN DEBTOR'S ESTATE.

10. And whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown from the claim of the crown in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged; be it therefore enacted, that it shall be lawful for the commissioners of her Majesty's treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim or liability, present or future, of the debtor or accountant to whom such lands, tenements or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid.

For discharge of the estates of debtors or accountants to the crown in certain cases.

PART DISCHARGE.

11. Any such certificate, or the discharge of any such lands, tenements or other hereditaments by virtue of this act, shall in nowise impeach, lessen or affect the right or power of her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of or from any other lands, tenements or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained (*k*).

Discharge of part of the estate of a debtor or creditor to the crown not to affect claim of the crown on other lands liable.

(*k*) By 1 & 2 Geo. 4, c. 121, s. 10, where an estate is sold under a writ of extent, or by the Court of Chancery or Exchequer, and the purchase-money

2 & 3 Vict.  
c. 11, s. 11.

is paid into the receipt of the king's exchequer, that will absolve the purchaser.

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IRELAND.

Act not to extend  
to Ireland.

14. This act shall not extend to Ireland (*l*).

(*l*) The provisions of the above act, with some alterations, were extended to Ireland by 7 & 8 Vict. c. 90.

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3 & 4 VICTORIA, c. 82.

*An Act for further amending the Act for abolishing Arrest  
on Mesne Process in Civil Actions.*

[7th August, 1840.]

3 & 4 Vict.  
c. 82, s. 1.

DEFINITION AND EXTENSION OF PROPERTY LIABLE TO  
JUDGMENTS.

1 & 2 Vict. c. 110.

Provisions of  
recited act as to  
property of judg-  
ment debtors de-  
fined and ex-  
tended.

RECITES the act 1 & 2 Vict. c. 110, s. 14 (*ante*, p. 580), and that doubts had been entertained whether the said provisions extend to the cases hereinafter mentioned: and declares and enacts, that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stocks, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stocks, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer (*m*), or in, to, or out of the dividends, interest or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer (*m*), or as to the interest, dividends or annual produce thereof, shall prevent the governor and company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court



of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

3 & 4 Vict.  
c. 82, s. 1.

(m) These words are to be construed as if the paymaster-general for the time being were here named. (35 & 36 Vict. c. 44, s. 6.)

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**REAL ESTATE NOT TO BE AFFECTED BY JUDGMENT UNTIL  
MEMORANDUM LEFT.**

2. And whereas it was by the said act further enacted, that no judgments of any of the superior courts of common law at Westminster, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, should by virtue of the said act affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as therein mentioned should be left with the senior master of the Court of Common Pleas at Westminster (n): and whereas doubts have been entertained whether a purchaser, mortgagee or creditor, having notice of any such judgment, decree, order or rule as aforesaid, would not in equity be affected thereby, notwithstanding such a memorandum or minute of the same as in the said act is mentioned may not have been left with the senior master of the said Court of Common Pleas; be it therefore further declared and enacted, that no such judgment, decree, order or rule as aforesaid, shall by virtue of the said act affect any lands, tenements or hereditaments at law or in equity as to purchasers, mortgagees or creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the senior master of the said Court of Common Pleas at Westminster: any notice of such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in anywise notwithstanding (o).

No judgment, decree, &c. to affect real estate, until memorandum left with the senior master of the Common Pleas, notwithstanding notice of such decree, &c. to purchaser, &c.

(n) See *ante*, 1 & 2 Vict. c. 110, s. 19, p. 593.

(o) See 18 & 19 Vict. c. 15, s. 5, *post*, p. 614.

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**18 & 19 VICTORIA, c. 15.**

*An Act for the better Protection of Purchasers against Judgments, Crown Debts, Cases of Lis pendens, and Life Annuities or Rent-charges.* [26th April, 1855.]

WHEREAS an act of parliament was passed in the session of the first and second years of her Majesty, intituled "An Act for abolishing Arrest on Mesne Process in Civil Actions, except in

18 & 19 Vict.  
c. 15, s. 1.

1 & 2 Vict. c. 110.

18 & 19 Vict.  
c. 15, s. 1.

2 & 3 Vict. c. 11.

3 & 4 Vict. c. 82.

13 & 14 Vict.  
c. 43, s. 1.

Judgments of  
common law  
palatinate courts  
obtained before  
coming into op-  
eration of 1 & 2  
Vict. c. 110, and  
not registered  
under the same,  
not to affect lands,  
&c. unless  
registered within  
limited time.

Fee for entry of  
judgments.

Certain provisions  
of 1 & 2 Vict.  
c. 110, extended  
to common law  
palatinate courts,  
and to equity  
court of Durham.

certain Cases, for extending the Remedies of Creditors against the Property of Debtors, and for amending the Laws for the Relief of Insolvent Debtors in England ;” and another act in the session of the second and third years of her Majesty, intituled “An Act for the better Protection of Purchasers against Judgments, Crown Debts, Lis pendens, and Fiats in Bankruptcy ;” and another act in the session of the third and fourth years of her Majesty, intituled “An Act for further amending the Act for abolishing Arrest on Mesne Process in Civil Actions :” and whereas the provisions of the said acts respecting judgments, decrees, orders and rules, and lis pendens, ought to include and be applicable to the counties palatine of Lancaster and Durham, and the common law and equity courts thereof respectively : and whereas an act was passed in the session of the thirteenth and fourteenth years of her Majesty, intituled “An Act to amend the Practice and Proceedings of the Court of Chancery of the County Palatine of Lancaster,” by force whereof the said provisions do to some extent include and are applicable to the county palatine of Lancaster, as far as regards the Court of Chancery thereof: be it therefore enacted as follows :

1. Any judgment of the Court of Common Pleas of the county palatine of Lancaster, or of the Court of Pleas of the county palatine of Durham, obtained before the coming into operation of the said act of the session of the first and second years of her Majesty, and not already registered in the said courts respectively under the provisions of the same act, and which shall not be registered in the said courts respectively under the same provisions as amended by this act, on or before the first day of November, one thousand eight hundred and fifty-five, shall not after that day affect any lands, tenements or hereditaments in the said counties palatine respectively as to purchasers, mortgagees or creditors, unless and until such memorandum or minute of such judgment as in the said act prescribed shall be left with the prothonotary of the court in which the judgment has been obtained, who shall forthwith enter the same in manner by the same act as amended by this act directed in regard to judgments thereby authorized to be registered, and shall be entitled for every such entry to the sum of two shillings and sixpence ; and the provision for re-registration, toties quoties, hereinafter mentioned, as explained by this act, is hereby extended and applied, mutatis mutandis, to judgments registered under this present provision.

2. And be it declared and enacted as follows : the provisions contained in the sections of the said act of the first and second years of her Majesty, numbered respectively 18, 19, and 20 (a), giving to certain rules of courts of common law, and decrees and orders of courts of equity, the effect of judgments in the superior courts of common law, and constituting the persons therein mentioned judgment creditors, and giving to courts of equity the powers by the same act given to the judges of the said superior courts, and giving to the persons so con-

stituted judgment creditors as aforesaid such remedies as are therein mentioned, and authorizing the registration of such decrees, orders and rules as aforesaid, and providing for the writs to be sued out of courts of equity, shall extend and are applicable, *mutatis mutandis*, to the said counties palatine and the courts of common law thereof respectively, and to the Court of Chancery of the county palatine of Durham, within the limits of their respective jurisdictions, to the end that the same law in the respects aforesaid may apply to the courts of the said counties palatine, and the decrees, orders, judgments and rules thereof, so far as relates to lands, tenements and hereditaments within the jurisdiction of such courts respectively, as under the previous statutes amended by this act, will regulate the operation of judgments in the superior courts of common law: but no judgment, decree, order or rule of any court shall bind lands, tenements and hereditaments in the said counties palatine respectively, as against purchasers, mortgagees or creditors, unless and until such memorandum or minute thereof as hereinbefore is mentioned shall be left with the prothonotary of the palatine court in which are situated the lands, tenements and hereditaments intended to be charged thereby.

18 & 19 Vict.  
c. 15, s. 2.

(a) See *ante*, pp. 589, 593.

3. The provisions contained in the sections of the said act of the second and third of her Majesty numbered respectively 3, 4, 5 (b) and 7 (c), and in the section of the said act of the third and fourth of her Majesty numbered 2 (d), respecting the particulars to be inserted in the register by the master, and respecting the re-registration of judgments, decrees or orders, and rules, and respecting the registration and re-registration of *lis pendens*, and respecting the protection of purchasers, mortgagees and creditors, as explained or amended by this act, shall extend and are applicable, *mutatis mutandis*, to the counties palatine and the courts of common law and Courts of Chancery thereof respectively, within the limits of their respective jurisdictions.

Certain provisions of 2 & 3 Vict. c. 11, and 3 & 4 Vict. c. 82, extended to common law and equity courts of counties palatine.

(b) *Ante*, pp. 599, 600, 603.

(c) *Ante*, p. 603.

(d) See *ante*, p. 611.

4. And whereas the protection afforded to purchasers, mortgagees and creditors, by the said act of the third and fourth of her Majesty, against judgments, decrees, orders or rules not duly registered, any notice thereof notwithstanding, is confined to judgments, decrees, orders or rules binding by virtue of the said act of the first and second years of her Majesty: and whereas the docket or register previously in use has been closed, and the said provision ought not to be so restricted: be it therefore enacted, that no judgment, decree, order or rule which might be registered under the said act of the first and second years of her Majesty shall affect any lands, tenements or hereditaments, at law or in equity, as to purchasers, mortgagees or

No judgment, &c. registered under 3 & 4 Vict. c. 82, to affect lands, &c. as to purchasers, &c. until registered.

18 & 19 Vict.  
c. 15, s. 4.

creditors, unless and until such a memorandum or minute as in the said act in that behalf mentioned shall have been left with the proper officer of the proper court, any notice of any such judgment, decree, order or rule to any such purchaser, mortgagee or creditor in anywise notwithstanding (e).

(e) See *ante*, p. 611.

Purchasers protected against judgments not registered.

5. And whereas it is expedient that certain doubts which have arisen upon some of the provisions for the protection to purchasers against judgments in the said acts contained should be removed; be it therefore declared and enacted as follows: the provisions contained in the section numbered 2 (f) of the said act of the third and fourth years of her Majesty extends and shall be deemed to extend as well to the act therein referred to as to the section numbered 4 (g) of the said act of the second and third of her Majesty, as explained by this act, so that notice of any judgment, decree, order or rule, not duly registered, shall not avail against purchasers, mortgagees or creditors as to lands, tenements or hereditaments.

(f) *Ante*, p. 611.

(g) *Ante*, p. 600.

Provision for re-registration explained.

6. Where by the said act of the second and third years of her Majesty re-registry of judgments, decrees, orders or rules is required within such period of five years as is therein mentioned, in order to bind purchasers, mortgagees and creditors, it shall be deemed sufficient to bind such purchasers, mortgagees and creditors if such a memorandum or minute as was required in the first instance is again left with the senior master of the Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease or other deed or instrument vesting or transferring the legal or equitable right, title, estate or interest, in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued, as directed by the said last-mentioned act, although more than five years shall have expired by effluxion of time since the last previous registration before such last-mentioned memorandum or minute was left, and so toties quoties upon every re-registry.

Judgments of inferior courts, when removed, shall be registered.

7. Where by the section numbered 22 (h) of the said act of the first and second years of her Majesty power is given to remove judgments, rules or orders obtained in or made by certain inferior courts into the said superior courts, or into the Court of Common Pleas of Lancaster, as the case may be, no such judgment, rule or order which has already been or hereafter shall be so removed shall bind any lands, tenements or hereditaments as to purchasers, mortgagees or creditors, unless and until after such removal it shall be registered, and, if necessary, re-registered, in like manner as in order to bind such purchasers, mortgagees or creditors, it must have been if originally entered up in one of the said superior courts, or in the said Court of Common Pleas of Lancaster, as the case may be; but

from and after the passing of this act every such judgment, rule or order so registered, and where necessary re-registered, shall be binding in like manner, but not further or otherwise, as other judgments, rules or orders of the said superior courts or of the said Court of Common Pleas of Lancaster respectively, and the proviso at the end of the said section 22, restricting the operation of the same is hereby repealed.

18 & 19 Vict.  
c. 15, s. 7.

(h) *Ante*, p. 596.

8. Nothing herein contained shall extend to revive or restore any judgment which shall be extinguished or barred, or to affect or prejudice any such judgment, or any decree, order or rule, as between the parties thereto, or their representatives, or those deriving as volunteers under them.

Extinguished  
judgments not  
revived.

9. For the purposes of any registration or re-registration to be made in pursuance of this act in either of the said counties palatine, all such acts and things as under the provisions of the said several acts of the reign of her Majesty ought to be done by or left with the senior master of the Court of Common Pleas at Westminster shall be done by or left with the prothonotary or deputy prothonotary of the Court of Common Pleas of the county palatine of Lancaster, or of the Court of Pleas of the county palatine of Durham, as the case may require, or such other officer (if any) of the same courts respectively as may for the time being have been appointed by the same courts respectively for the purpose of entering the judgments thereof respectively, under the provisions of the said act of the first and second years of her Majesty; and the said prothonotary, deputy prothonotary, or other officer as aforesaid, shall be entitled to the sum of two shillings and sixpence, and no more, for the duties to be performed on every registration, and the sum of one shilling only for re-registration; and all persons shall be at liberty to search all or any of the books kept in pursuance of any of the foregoing provisions of this act in each court, for the sum of one shilling.

Duties of protho-  
notary.

Fees for regis-  
tration and  
searches.

10. And whereas by the section numbered 123 of the Bankrupt Law Consolidation Act, 1849, when any person admits (in manner therein mentioned) that he is indebted to a bankrupt, it is enacted, that every order of the Court of Bankruptcy for the payment by such person of the amount so admitted, and costs (if any), shall have the effect of a judgment in the said superior courts, and may be enforced accordingly, and by the section numbered 249 (i) of the same act: be it therefore enacted as follows: no such order of the Court of Bankruptcy for payment of money or of costs as aforesaid shall affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until it shall be registered, and if necessary re-registered, in like manner as in order to bind such purchasers, mortgagees or creditors, it must have been if it had originally been a judgment or rule obtained or entered up in one of the said superior courts or in the said palatine courts respectively,

No order of Court  
of Bankruptcy to  
affect lands, &c.  
until registered.



18 & 19 Vict.  
c. 15, s. 10.

any notice of any such order to any such purchaser, mortgagee or creditor in anywise notwithstanding.

(i) This section is repealed by the Bankruptcy Act, 1861, s. 290, Schedule (G.). The effect of judgments entered up between the 23rd July, 1860, and the 29th July, 1864, is determined by 23 & 24 Vict. c. 38 (*post*), and of judgments entered up after the 29th July, 1864, by 27 & 28 Vict. c. 112. In both of these acts the term judgment includes orders of the Court of Bankruptcy.

Legal estate  
vested in pur-  
chaser or mort-  
gagee not to be  
taken in execu-  
tion.

11. And whereas great delay and expense are occasioned upon purchases and mortgages of lands in consequence of judgments against mortgagees and crown debts and liabilities to the crown of mortgagees continuing to bind lands, although the mortgagees have been *bonâ fide* paid off, and the lands have been actually conveyed to purchasers, or to other mortgagees: for remedy whereof be it enacted as follows: where any legal or equitable estate or interest or any disposing power in or over any lands, tenements or hereditaments, shall, under any conveyance or other instrument executed after the passing of this act, become vested in any person as a purchaser or mortgagee for valuable consideration, such lands, tenements or hereditaments, shall not be taken in execution under any writ of elegit, or other writ of execution, to be sued upon any judgment, or any decree, order or rule, against any mortgagee or mortgagees thereof, who shall have been paid off prior to or at the time of the execution of such conveyance, nor shall any such judgment, decree, order or rule, or the money thereby secured, be a charge upon such lands, tenements or hereditaments, so vested in purchasers or mortgagees, nor shall such lands, tenements or hereditaments so vested in purchasers or mortgagees be extended or taken in execution, or rendered liable under any writ of extent, or writ of execution or other process issued by or on behalf of her Majesty, her heirs or successors, in respect of any judgment, statute or recognizance obtained against or entered into by, or inquisition found against, or obligation or specialty made by, or acceptance of office by any mortgagee or mortgagees, whereby he or they hath or have become or shall become a debtor or accountant, or debtors or accountants to the crown, where such mortgagee or mortgagees shall have been paid off prior to or at the time of the execution of such conveyance as aforesaid (*k*).

(*k*) It had been decided that a judgment creditor acquired a charge, under the 1 & 2 Vict. c. 110, against the mortgage property of the debtor, whether the interest was legal or equitable, and the object of this section is to make the charge cease when the mortgage is paid off. (Per *Wood*, V.-C., *Arison v. Holmes*, 1 Johns. & H. 543, 544.) See *ante*, p. 578, and see further, *Dart*, V. & P. 432 *et seq.*, 4th ed.

If a mortgagor sells the mortgaged estate, and pays off the mortgage, after the passing of this act, the estate in the hands of the purchaser ceases to be affected, by a judgment which had been registered against the mortgagee. (*Greaves v. Wilson*, 25 Beav. 434; 28 L. J., Ch. 103; 4 Jur., N. S. 802.)

Life annuities and  
rent-charges not  
to affect lands as

12. And whereas by reason of the repeal in the last session of parliament of the act of the fifty-third year of King George

the Third, chapter one hundred and forty-one, requiring the enrolment of life annuities or rent-charges, purchasers are no longer enabled to ascertain by search what life annuities or rent-charges may have been granted by their vendors or others: be it therefore enacted by the authority aforesaid as follows: any annuity or rent-charge granted after the passing of this act, otherwise than by marriage settlement, for one or more life or lives, or for any term of years or greater estate determinable on one or more life or lives, shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until a memorandum or minute containing the name, and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the date of the deed, bond, instrument or assurance, whereby the annuity or rent-charge is granted, and the annual sum or sums to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars aforesaid in a book in alphabetical order by the name of the person whose estate is intended to be affected by the annuity or rent-charge, together with the year and the day of the month when every such memorandum or minute is so left with him, and he shall be entitled for every such entry to the sum of two shillings and sixpence, and all persons shall be at liberty to search the same book, together with the other books or registers in the office, on payment of the sum of one shilling.

18 & 19 Vict.  
c. 15, s. 12.

to purchasers, &c.  
until memo-  
randum left with  
senior master.

13. The searches of the several registers, by the said recited acts or by this act authorized to be made for the sum of one shilling, may be made by the parties themselves, under proper regulations in the office, and the sum of one shilling only shall be payable on one search, although more names than one shall be searched for where such names relate to the same purchase, mortgage or other transaction.

Searches may be  
made by parties  
themselves.

14. The provisions of this act shall not extend to require the registry of annuities or rent-charges given by will.

Annuities, &c.  
given by will  
excepted from  
act.

## 23 &amp; 24 VICTORIA, c. 38.

*An Act to further amend the Law of Property.*  
[23rd July, 1860.]

23 & 24 Vict. BE it enacted as follows :  
c. 38, s. 1.

*Judgments.*

Writs of execu-  
tion of judgments  
to be registered.

1. Whereas it is desirable to place freehold, copyhold and customary estates on the same footing with leasehold estates, in respect of judgments, statutes and recognizances as against purchasers and mortgagees, and also to enable purchasers and mortgagees of estates, whether freehold, copyhold or customary or leasehold, to ascertain when execution has issued on any judgment, statute or recognizance, and to protect them against delay in the execution of the writ: be it therefore enacted, that no judgment, statute or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) as to a *bonâ fide* purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have notice or not of any such judgment, statute or recognizance), unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him: provided always, that no judgment, statute or recognizance to be entered up after the passing of this act, nor any writ of execution or other process thereon, shall affect any land of whatever tenure as to a *bonâ fide* purchaser or mortgagee, although execution or other process shall have issued thereon, and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered (a).

(a) As to judgments entered up before the 23rd July, 1860, see the previous acts, *ante*, p. 574 *et seq.* As to judgments entered up after the 29th July, 1864, see 27 & 28 Vict. c. 112, *post*, p. 624.

It was held under the above section, that a registered judgment creditor who had issued execution, but never executed the same, was a proper party to a foreclosure suit instituted more than three months after registration of execution. (*Appleton v. Sturgis*, 10 W. R. 312.)

It was also held, that this section applied to property of the judgment debtor which was not extendible; and that, as against a purchaser, a judgment would not affect an equity of redemption unless a writ of execution was issued before completion. (*Wallis v. Morris*, 12 W. R. 997.)

The first five clauses of this act do not extend to Ireland. (Sect. 15.)

Mode of register-  
ing.

2. The registry hereinbefore required of any writ of execution, or other due process on any judgment, statute or recog-

nizance, in order to bind a purchaser or mortgagee, shall be made by a memorandum or minute referring to the judgment, statute or recognizance already registered, so as to connect the registry of the writ of execution or other process therewith; such memorandum or minute to be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the particulars in a book in alphabetical order by the name of the person in whose behalf the judgment, statute or recognizance upon which the writ of execution or other process issued was registered, and also the year and the day of the month when every such memorandum or minute is left with him, and such officer shall be entitled for any such registry to the sum of five shillings; and all persons shall be at liberty to search the same book, in addition to all the other books in the same office, on payment of the sum of one shilling only: and all the provisions in this act in regard to writs of execution or other process and the registry thereof, or otherwise relating thereto, shall extend, *mutatis mutandis*, to writs of execution or other due process issuing on judgments of the several Courts of Common Pleas of the county palatine of Lancaster, and of pleas of the county palatine of Durham; but none of these provisions are to extend to Ireland (*b*).

23 & 24 Vict.  
c. 38, s. 2.

(*b*) As the writ of execution is to be registered in the name of the judgment creditor, two searches will be necessary; first, in the register of judgments in the name of the debtor; and, secondly, in the register of executions in the name of the creditor.

Double search  
necessary.

3. And whereas by an act passed in the fourth and fifth years of their late Majesties King William and Queen Mary, intituled "An Act for the better Discovery of Judgments in the Courts of King's Bench, Common Pleas and Exchequer in Westminster," it was enacted, that no judgment not docketed and entered in books in the manner thereby provided should affect any lands or tenements as to purchasers or mortgagees, or have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates: And whereas by several later acts judgments are required to be registered with more particulars than were required by the said recited act; and it is thereby enacted, that judgments not so registered shall not affect any lands, tenements or hereditaments, as to purchasers, mortgagees or creditors, unless and until the same shall be registered in manner thereby required; and in obedience to a direction in one of the same acts contained the dockets existing under the said first-recited act have been finally closed: And whereas the said several later acts do not expressly enact that judgments not docketed as thereby required shall not have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates, in consequence whereof such heirs, executors or administrators have been held to have lost the protection which they enjoyed under the said first recited act, and it is expedient that the same should be

Provision for  
protection of  
heirs and execu-  
tors against un-  
registered judg-  
ments.

23 & 24 Vict.  
c. 38, s. 8.

restored; be it therefore declared and enacted, that no judgment which has not already been or which shall not hereafter be entered or docketed under the several acts now in force, and which passed subsequently to the said act of the fourth and fifth years of King William and Queen Mary, so as to bind lands, tenements or hereditaments as against purchasers, mortgagees or creditors, shall have any preference against heirs, executors or administrators in their administration of their ancestors', testators' or intestates' estates (c).

(c) By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference against heirs, executors or administrators in the administration of estates, and the 2 & 3 Vict. c. 11, closed the docket: it was held, that the old law was thereby revived, and that the administrator had committed a devastavit by paying a simple contract debt before a judgment debt, even though he had no actual notice of the latter. (*Fuller v. Redman*, 26 Beav. 600; 29 L. J., Chan. 324.) In consequence of this decision the above section was passed.

Where judgments had been recovered against a deceased testator, but had never been registered, it was held, that they were not entitled to priority over simple contract debts in the administration of the estate. (*Re Turner*, 12 W. R. 337.) And where a judgment was signed in 1854, but not registered until after the death of the debtor, which happened after the passing of this act, it was held that the judgment creditor was not entitled to preference in the administration of the estate. (*Kemp v. Waddingham*, L. R., 1 Q. B. 355.)

But judgments against executors and administrators need not be registered to retain their priority over simple contract debts. (*Jennings v. Rigby*, 83 Beav. 198.) And in the case of a person dying since 1870, an unregistered judgment against an administratrix was held entitled to priority over both specialty and simple contract debts. (*Re Williams*, L. R., 15 Eq. 270.)

Judgments as  
against heirs and  
executors to be  
re-registered.

4. No judgments which since the passing of an act 1 & 2 Vict. c. 110 (d) (being one of the acts hereinbefore referred to), have been registered under the provisions therein contained, or contained in the later act of the second and third years of Queen Victoria, chapter eleven (e), as explained and amended by the act of the session of the eighteenth and nineteenth years of Queen Victoria, chapter fifteen (f) (being two other of the acts hereinbefore referred to), or which shall hereafter be so registered, shall have any preference against heirs, executors or administrators in their administration of their executors' (g), testators' or intestates' estates, unless at the death of the (h) testator or intestate five years shall not have elapsed from the date of the entry thereof on the docket or from the only or last re-registry thereof, as the case may be, which re-registry from time to time is hereby authorized to be made in manner directed by the said act of the second and third of Queen Victoria, as explained and amended by the act of the eighteenth and nineteenth of Queen Victoria; but it shall be deemed sufficient to secure such preference as aforesaid, if such a memorandum as was required in the first instance is again left with the senior master of the Common Pleas within five years before the death of the (h) testator or intestate, although more than five years shall have expired by effluxion of time since the last previous registration, before

such last-mentioned memorandum or minute was left; and so toties quoties upon every re-registry (*i*). 23 & 24 Vict.  
c. 38, s. 4.

(*d*) See *ante*, p. 593.

(*e*) *Ante*, p. 599.

(*f*) *Ante*, p. 612.

(*g*) Clearly a mistake for "ancestors'."

(*h*) The word "ancestor" seems to have been omitted.

(*i*) This section is not retrospective. So that where a debtor died before the passing of the act, a judgment, which had not been re-registered within five years before his death, retained its priority in the administration of his estate. (*Evans v. Williams*, 2 Dr. & Sm. 324.)

5. In the construction of the previous provisions the term judgment shall be taken to include registered decrees, orders of Courts of Equity and Bankruptcy, and other orders having the operation of a judgment (*k*). Extent of the  
word "judg-  
ment."

(*k*) The other sections of this act are inserted in other parts of this work. (See *ante*, p. 236, and *post*.)



23 & 24 VICTORIA, c. 115.

*An Act to simplify and amend the Practice as to the Entry of Satisfaction on Crown Debts and on Judgments.*

[28th August, 1860.]

23 & 24 Vict.  
c. 115, s. 1.

Provisions of  
sects. 195, 196  
and 197 of 16 &  
17 Vict. c. 107,  
extended to all  
bonds to the  
crown.

WHEREAS by several acts of parliament debts and obligations to the crown, judgments pending suits, and annuities are severally required to be registered in the office of the senior master of the Court of Common Pleas at Westminster, in order to affect any lands, tenements and hereditaments sought to be charged therewith, and it is expedient to simplify and amend the practice with respect to the entry of satisfaction or discharge on the registry thereof respectively: be it therefore enacted, as follows:

1. All the powers, provisions and regulations, concerning bonds and other securities relating to the customs contained in sections one hundred and ninety-five, one hundred and ninety-six, and one hundred and ninety-seven, of the act passed in the session of parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter one hundred and seven (a), shall, mutatis mutandis, be deemed to extend and shall be applied to all bonds and other securities entered into or given to her Majesty, her heirs or successors: provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorized to be done by the commissioners of customs, or any number of them, any such certificate or matter in relation to any bond or other security concerning or incident to any public department shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer then by him, as the case may be, or if there shall be no such commissioner or other principal officer then by the commissioners of her Majesty's treasury or any two of them.

All bonds, &c.  
valid.

Bonds to be taken  
to the use of her  
Majesty.

(a) Sect. 195. All bonds and other securities entered into by any person or persons for the performance of any condition, order or matter relative to the customs or incident thereto, shall be valid in law, and upon breach of any of the conditions thereof may be sued and proceeded upon in the same manner as any bond expressly directed, or given by or under the provisions of any act relating to the customs, and all bonds relating to the customs or for the performance of any condition or matter incident thereto shall be taken to or for the use of her Majesty, and all such bonds, except such as

are given for securing the due exportation of or payment of duty upon warehoused goods, may, after the expiration of three years from the date thereof or from the time, if any, limited therein for the performance of the condition thereof, be cancelled by or by the order of the commissioners of customs, and all bonds given under the provisions of this or any act relating to the customs by persons under twenty-one years of age shall be valid.

23 & 24 Vict.  
c. 115, s. 1.

Bonds of minors  
valid.  
How bonds may  
be discharged.

Sect. 196. If any bond given under the provisions of this or any act relating to the customs, or in respect of any matter under the control or management of the commissioners of customs shall have been registered in the Court of Common Pleas in England, or in the office of the registrar of judgments in Ireland, and the condition of such bond shall have been satisfied, the commissioners of customs, by certificate under the hands of any two or more of them, may authorize the proper officer of the said court or office of registrar of judgments as the case may be, to enter up satisfaction on the record of such bond or obligation, and such certificate may be in the form or to the effect following :—

This is to certify that the following bond has been satisfied and cancelled.

Name or names of the obligor or obligors.	Date of bond.	Penalty.	Condition.	Where registered.
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Given under our hands this — day of —, 186—.

} Commissioners  
of Customs.

To the Senior Master or other proper officer of the Court of Common Pleas [*if in England*], or to the Registrar of Judgments [*if in Ireland, as the case may be*].

And upon the receipt of such certificate such officer is required to enter up satisfaction accordingly, whereupon the bond or obligation shall be discharged, and the land thereby affected shall be released and exonerated from all claims in respect thereof.

Sect. 197. When any bond entered into under the provisions of this or any act relating to the customs, or for the performance of any condition, order or matter incident or relative to the customs, shall have been registered in the Court of Common Pleas in England, under the act of the second year of the reign of her present Majesty, chapter eleven, or in the office of the registrar of judgments in Ireland, under the act of the seventh and eighth years of the reign of her said Majesty, chapter ninety, and it shall be deemed necessary in the discretion of the commissioners of customs, to exonerate the whole or any part of the lands of any obligor of such bond from liability in respect thereof, the commissioners of customs, by certificate or certificates under the hands of any two or more of them, may, first requiring the consent of any co-obligor if they shall deem it necessary, exonerate and discharge such lands or any part thereof, as the case may require, and such certificate may be in the form or to the effect following :—

Exoneration of  
estates of  
obligors.

By a bond or obligation bearing date the — day of —, 186—, [*name of obligor seeking exoneration,*] of [*residence and description of obligor*], became bound to her Majesty, her heirs and successors, in the sum of —, conditioned as therein mentioned, and the said bond was on the — day of —, 186—, duly recorded in the Court of Common Pleas, [*if in England,*] or filed in the office of the registrar of judgments, [*if in Ireland,*] in pursuance of the act [*state the act under which the bond was registered*]. This is to certify that all the estates, lands, tenements and hereditaments [*if the whole are to be discharged*] or [*here set out the particular lands, tenements and hereditaments exonerated, if part only are to be discharged, adding the following words,*] being part of the estate, lands, tenements and hereditaments of the said [*name of obligor seeking exoneration,*] are wholly exonerated and discharged from all claims of her Majesty, her heirs or successors, or of the commissioners of customs on her or their

Form of certificate  
of exoneration.

23 & 24 VICTORIA, C. 115.

*An Act to simplify and amend the Practice as to the Entry of Satisfaction on Crown Debts and on Judgments.*

[28th August, 1860.]

23 & 24 Vict.  
c. 115, s. 1.

WHEREAS by several acts of parliament debts and obligations to the crown, judgments pending suits, and annuities are severally required to be registered in the office of the senior master of the Court of Common Pleas at Westminster, in order to affect any lands, tenements and hereditaments sought to be charged therewith, and it is expedient to simplify and amend the practice with respect to the entry of satisfaction or discharge on the registry thereof respectively: be it therefore enacted, as follows:

Provisions of  
sects. 195, 196  
and 197 of 16 &  
17 Vict. c. 107,  
extended to all  
bonds to the  
crown.

1. All the powers, provisions and regulations, concerning bonds and other securities relating to the customs contained in sections one hundred and ninety-five, one hundred and ninety-six, and one hundred and ninety-seven, of the act passed in the session of parliament holden in the sixteenth and seventeenth years of her Majesty's reign, chapter one hundred and seven (a), shall, mutatis mutandis, be deemed to extend and shall be applied to all bonds and other securities entered into or given to her Majesty, her heirs or successors: provided always, that in every case in which under the provisions of the said sections any certificate is required to be signed or any other matter authorized to be done by the commissioners of customs, or any number of them, any such certificate or matter in relation to any bond or other security concerning or incident to any public department shall respectively be signed and done by the respective commissioners or other principal officers of such department, or any two of them respectively, or if there shall be only one such commissioner or principal officer then by him, as the case may be, or if there shall be no such commissioner or other principal officer then by the commissioners of her Majesty's treasury or any two of them.

All bonds, &c.  
valid.

Bonds to be taken  
to the use of her  
Majesty.

(a) Sect. 195. All bonds and other securities entered into by any person or persons for the performance of any condition, order or matter relative to the customs or incident thereto, shall be valid in law, and upon breach of any of the conditions thereof may be sued and proceeded upon in the same manner as any bond expressly directed, or given by or under the provisions of any act relating to the customs, and all bonds relating to the customs or for the performance of any condition or matter incident thereto shall be taken to or for the use of her Majesty, and all such bonds, except such as

are given for securing the due exportation of or payment of duty upon warehoused goods, may, after the expiration of three years from the date thereof or from the time, if any, limited therein for the performance of the condition thereof, be cancelled by or by the order of the commissioners of customs, and all bonds given under the provisions of this or any act relating to the customs by persons under twenty-one years of age shall be valid.

23 & 24 Vict.  
c. 115, s. 1.

Bonds of minors  
valid.

Sect. 196. If any bond given under the provisions of this or any act relating to the customs, or in respect of any matter under the control or management of the commissioners of customs shall have been registered in the Court of Common Pleas in England, or in the office of the registrar of judgments in Ireland, and the condition of such bond shall have been satisfied, the commissioners of customs, by certificate under the hands of any two or more of them, may authorize the proper officer of the said court or office of registrar of judgments as the case may be, to enter up satisfaction on the record of such bond or obligation, and such certificate may be in the form or to the effect following:—

How bonds may  
be discharged.

This is to certify that the following bond has been satisfied and cancelled.

Name or names of the obligor or obligors.	Date of bond.	Penalty.	Condition.	Where registered.
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Given under our hands this — day of —, 186—.

} Commissioners  
of Customs.

To the Senior Master or other proper officer of the Court of Common Pleas [*if in England*], or to the Registrar of Judgments [*if in Ireland, as the case may be*].

And upon the receipt of such certificate such officer is required to enter up satisfaction accordingly, whereupon the bond or obligation shall be discharged, and the land thereby affected shall be released and exonerated from all claims in respect thereof.

Sect. 197. When any bond entered into under the provisions of this or any act relating to the customs, or for the performance of any condition, order or matter incident or relative to the customs, shall have been registered in the Court of Common Pleas in England, under the act of the second year of the reign of her present Majesty, chapter eleven, or in the office of the registrar of judgments in Ireland, under the act of the seventh and eighth years of the reign of her said Majesty, chapter ninety, and it shall be deemed necessary in the discretion of the commissioners of customs, to exonerate the whole or any part of the lands of any obligor of such bond from liability in respect thereof, the commissioners of customs, by certificate or certificates under the hands of any two or more of them, may, first requiring the consent of any co-obligor if they shall deem it necessary, exonerate and discharge such lands or any part thereof, as the case may require, and such certificate may be in the form or to the effect following:—

Exoneration of  
estates of  
obligors.

By a bond or obligation bearing date the — day of —, 186—, [*name of obligor seeking exoneration,*] of [*residence and description of obligor*], became bound to her Majesty, her heirs and successors, in the sum of —, conditioned as therein mentioned, and the said bond was on the — day of —, 186—, duly recorded in the Court of Common Pleas, [*if in England,*] or filed in the office of the registrar of judgments, [*if in Ireland,*] in pursuance of the act [*state the act under which the bond was registered*]. This is to certify that all the estates, lands, tenements and hereditaments [*if the whole are to be discharged*] or [*here set out the particular lands, tenements and hereditaments exonerated, if part only are to be discharged, adding the following words,*] being part of the estate, lands, tenements and hereditaments of the said [*name of obligor seeking exoneration,*] are wholly exonerated and discharged from all claims of her Majesty, her heirs or successors, or of the commissioners of customs on her or their

Form of certificate  
of exoneration.

23 & 24 Vict.  
c. 115, s. 1.

behalf in respect of such bond or obligation. Given under our hands this  
— day of —, 186—.

(Signed)

} Commissioners of her  
} Majesty's Customs.

Certificates to be  
sufficient evi-  
dence of exonera-  
tion.

And the lands mentioned in such certificate or certificates shall thereupon be held wholly exonerated and discharged from all liability in respect of such bond or obligation, and every such certificate shall be accepted by all persons and in all courts as sufficient evidence of the exoneration of the lands therein described.

As to entry of  
satisfaction on  
judgments.

2. The senior master of the Court of Common Pleas at Westminster may, upon the filing with him of an acknowledgment in the form or to the effect following, be at liberty to enter a satisfaction or discharge as to any registered judgment, pending suit, *lis pendens*, decree, order, rule, annuity or rent-charge, or writ of execution, and such officer shall be entitled for any such registry of satisfaction or discharge to the sum of two shillings and sixpence, and no more; and such senior master may issue certificates of the entry of any satisfaction or discharge, and may charge the sum of one shilling for every such certificate (b).

*Form of Acknowledgment of Satisfaction.*

(b) Satisfaction is acknowledged between *A. B.* and *C. D.* as to a — dated the — day of —, 186—, for the sum of £—, a memorandum of which said — was left with the senior master of the Court of Common Pleas at Westminster, on the — day of —, 186—, to affect the estate of —, and [if so] on the writ of execution thereon, dated the — day of —, 186—, a memorandum of which was left with the said master on the — day of —, 186—.

And — [or the executor or administrator of] do hereby expressly nominate and appoint —, of —, attorney-at-law, to witness and attest the execution of this acknowledgment of satisfaction.

Signed by the said —, in the presence of me, the undersigned —, one of the attorneys of her Majesty's Court of —, at Westminster, and I hereby declare myself to be the attorney for and on behalf of the said —, expressly named by —, and attending at —, request to inform him of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by —), and I also declare that I subscribe my name as witness hereto as such attorney.

A. B., the above-named —, [or F. G., executor or administrator of] the — day of —, 186—.

27 & 28 VICTORIA, C. 112.

*An Act to amend the Law relating to future Judgments, Statutes and Recognizances.* [29th July, 1864.]

27 & 28 Vict.  
c. 112, s. 1.

WHEREAS it is desirable to assimilate the law affecting freehold, copyhold, and leasehold estates to that affecting purely personal estates in respect of future judgments, statutes, and recognizances: Therefore be it enacted by the Queen's

most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

27 & 28 Vict.  
c. 112, s. 1.

1. No judgment, statute, or recognizance to be entered up after the passing of this act shall affect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of *elegit* or other lawful authority, in pursuance of such judgment, statute, or recognizance (a).

Potential judgments, &c. not to affect land until land delivered in execution.

(a) As to judgments entered up before the 23rd July, 1860, see 1 & 2 Vict. c. 110, s. 13, *ante*, p. 574; and as to judgments entered up between the 23rd July, 1860, and the 29th July, 1864, see 23 & 24 Vict. c. 38, s. 1, *ante*, p. 618.

Judgments entered up before the passing of this act.

The present section requires that in every case the land shall have been "actually delivered in execution." Where the debtor's property consisted of corporeal hereditaments in possession, it was held, that the return of the sheriff to a writ of *elegit* constituted actual delivery of the land in execution within the meaning of the act, and that it was not necessary to go on the land and deliver seisin. (*Champneys v. Burland*, 19 W. R. 148.)

What is actual delivery in execution.

Literally construed, the provisions of the act can only mean that, except in the comparatively few cases where the debtor's land is capable of being delivered in execution, and has actually been so delivered, no future judgment was to operate as a charge on land. But by sect. 2, "land" is to include incorporeal hereditaments, and any interest (e.g. a reversionary interest) in corporeal hereditaments. And sect. 5 speaks of charges "prior or subsequent to the charge of the petitioner." Clearly, therefore, the act contemplates the case of a judgment creditor who may acquire a charge under the act, and be entitled to the summary remedy in equity which it provides, although not in actual possession under a writ of *elegit*. (*Dart*, V. & P. 438, 4th ed.) In a case where a creditor had taken out a writ of *fi. fa.*, and the debtor's property could not be taken in execution under that writ, Lord *Remilly* stated, that he could see no steps by means of which the creditor could claim the assistance of the court under this act. And that he had serious doubts whether 1 & 2 Vict. c. 110, s. 13, had not been repealed. (*Re Duke of Newcastle*, L. R., 8 Eq. 706.) Wood, V.-C., however (in speaking of the intention of the legislature in passing 27 & 28 Vict. c. 112), said, that it could not have been intended that all the remedies given by 1 & 2 Vict. c. 110, should be swept away by a side wind. The intention must have been simply, that all those remedies which a judgment creditor can affect by means of a writ of *elegit* must be exercised by him before he can come in under the act. (*Re Cambridge R. Co.*, L. R., 5 Eq. 416.) See, further, the note to sect. 4, *post*.

Whether act applies to property not actually delivered in execution.

As to the necessity of issuing a writ of *elegit* and obtaining a return to the writ, see *Wallis v. Morris*, 12 W. R. 297; *Godfrey v. Tucker*, 22 Benv. 280; *Partridge v. Foster*, 34 Benv. 1.

It has been held by Lord *Remilly*, M. R., that judgment creditors of a mortgagor, whose judgments do not affect the mortgaged land at the date of the decree in a foreclosure suit, are entitled to redeem if they acquire a charge on the land by issuing writs of *elegit*, and obtaining a return from the sheriff within six months from the date of the decree. (*Mildred v. Austin*, L. R., 8 Eq. 220.) This, however, has been disapproved by *Malins*, V.-C., who has held, that judgment creditors who have not issued execution are not necessary parties to foreclosure suits. (*Re Bailey*, 17 W. R. 303; *Earl of Cork v. Russell*, L. R., 13 Eq. 210.)

Judgment creditors of mortgagor who have not issued execution.

Where mortgagees of real estate were about to sell under their power, and a bill was filed by a judgment creditor of the mortgagor (who had issued and registered a writ of *elegit*, and delivered the same to the sheriff) to restrain the mortgagees from paying over the balance of the purchase-money to the mortgagor, the court granted the injunction. (*Thornton v. Nash*, 4 Giff. 515.)

Sale by mortgagees.



27 & 28 Vict.  
c. 112, s. 1.

Tacking.

It has been held, under this act, that a mortgagee without notice of the issue of a writ of *elegit* is not entitled to tack a subsequent charge to his first mortgage on redemption by the tenant by *elegit*. (*Champneys v. Burland*, 19 W. R. 148.)

Interpretation  
of terms.

2. In the construction of this act the term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of a judgment; and the term "land" shall be taken to include all hereditaments, corporeal or incorporeal, or any interest therein; and the term "debtor" shall be taken to include husbands of married women, assignees of bankrupts, committees of lunatics, and the heirs or devisees of deceased persons.

Writs of execution to be registered in manner prescribed by 23 & 24 Vict. c. 38.

3. Every writ or other process of execution of any such judgment, statute, or recognizance, by virtue whereof any land shall have been actually delivered in execution, shall be registered in the manner provided by an act passed in the session of the twenty-third and twenty-fourth years of her present Majesty, intituled "An Act to further amend the Law of Property," but in the name of the debtor against whom such writ or process is issued, instead of, as under the said act, in the name of the creditor; and no other or prior registration of such judgment, statute, or recognizance shall be or be deemed necessary for any purpose; and no reference to any such prior registration shall be required to be made in or by the memorandum or minute of such writ or other process of execution which shall be left with the senior master of the Court of Common Pleas for the purpose of such registry (*b*).

(*b*) The writ may be registered prior to the date of the sheriff's return. (*Champneys v. Burland*, 19 W. R. 148.)

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

4. Every creditor (*c*) to whom any land of his debtor shall have been actually delivered in execution (*d*) by virtue of any such judgment (*e*), statute, or recognizance, and whose writ or other process of execution shall be duly registered, shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of his debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper (*f*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

Plaintiff in administration suit not a creditor.

(*g*) Where an order was made in an administration suit for payment into court of sums found due from an executor; and default having been made in payment, sequestration issued at the instance of the plaintiffs, and possession was taken of the executor's lands by the sequestrators: it was

held, that the plaintiffs were not creditors within the meaning of this section, so as to be entitled to an order for sale on petition. (*Johnson v. Burgess*, L. R., 15 Eq. 398.)

27 & 28 Vict.  
c. 112, s. 4.

(d) A debtor executed a conveyance of real estate to volunteers, and afterwards a writ of sequestration was issued against him at the instance of a creditor. The volunteers reconveyed the estate to a trustee for the sequestrators, and they entered into possession. It was held, that the land had been actually delivered in execution within the meaning of this act, and that the sequestrators and creditors were entitled to an order for sale. (*Re Rush*, L. R., 10 Eq. 442.)

Lands taken  
under writ of  
sequestration.

This section requires that the land should have been actually delivered in execution. Therefore, where a judgment creditor caused a writ of elegit to be issued, but his debtor's lands (having been already extended and delivered under a prior elegit) could not be delivered to him; it was held, that he could not obtain an order for sale under this section. It was said, however, that he might file a bill to assert his equitable rights, and when he had got rid of the prior elegit, he might petition under this act. (*Re Combridge R. Co.*, L. R., 5 Eq. 413. See *Guest v. Combridge R. Co.*, L. R., 6 Eq. 619.)

Actual delivery  
necessary.

Case where pro-  
perty had been  
already delivered  
to prior judgment  
creditor.

Where a debtor had an equitable life interest in leaseholds and the judgment creditor took out a writ of fi. fa. and petitioned for an order for sale under this section; it was held, that, as an equitable leasehold could not be taken in execution under a fi. fa., an order for sale could not be made. (*Re Duke of Newcastle*, L. R., 8 Eq. 700.)

Case where pro-  
perty could not  
be taken in  
execution.

(e) This section does not apply to judgments entered up before the passing of the act. (*Re Isle of Wight Ferry Co.*, 34 L. J., Ch. 194.) As to the priorities of judgment creditors inter se, see *Guest v. Combridge R. Co.*, L. R., 6 Eq. 619, *post*.

Section does not  
apply to judg-  
ment entered up  
before passing of  
act.

(f) An order was made under this section for the sale of lands of a railway company (*Re Bishops Waltham R. Co.*, 14 W. R. 1008); on appeal, the court expressed an opinion that the railway was not saleable, and directed inquiries as to the nature of the company's interest. (*S. C.*, L. R., 2 Ch. 382.)

Lands of a rail-  
way company.

Superfluous lands belonging to a railway company have been ordered to be sold without inquiries being directed (*Re Calne R. Co.*, L. R., 9 Eq. 658); in other cases inquiries have been directed. (*Re Hull and Hornsea R. Co.*, L. R., 2 Eq. 262; *Ex parte Grissell*, L. R., 2 Ch. 385; *Re Ogilvie*, L. R., 7 Ch. 174.)

As to schemes of arrangement by railway companies and the restraining of actions and executions in such a case, see 30 & 31 Vict. c. 127; *Re Cambrian R. Co.*, L. R., 3 Ch. 278; *Re Potteries, &c. R. Co.*, L. R., 5 Ch. 67.

As to inquiries, where an official liquidator petitioned for sale of the lands of a contributory, see *Re Kirby* (14 L. T., N. S. 615); and as to inquiries in other cases, see *Ex parte Clark*, 6 N. R. 335; Dan. Ch. Forms, 914, 916. For forms of petitions for sale of lands delivered in execution under an elegit, and of lands taken under a writ of sequestration, see Dan. Ch. Forms, 913, 915.

Inquiries.

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities (g).

Where there are  
other creditors,  
notice of sale to  
be served upon  
them.

(g) The priorities of judgment creditors inter se are determined by the date at which the writs issued upon their judgments are placed in the hands

27 & 28 Vict.  
c. 112, s. 5.

of the sheriff. A creditor whose judgment was subsequent in date, but whose writ was first placed in the hands of the sheriff, was held entitled in priority to a creditor whose judgment was prior in date, and whose writ was subsequently placed in the sheriff's hands before the lands were extended. (*Guest v. Cambridge R. Co.*, L. R., 6 Eq. 619.)

Parties claiming  
interest through  
debtor bound by  
order for sale.

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Extent of act.

7. This act shall not extend to Ireland.

## LEASE AND RELEASE.

4 &amp; 5 VICTORIA, C. 21.

*An Act for rendering a Release as effectual for the Conveyance of Freehold Estates as a Lease and Release by the same Parties.*  
[18th May, 1841.]

WHEREAS it is expedient to lessen the expense of conveying freehold estates: be it enacted, that every deed or instrument of release of a freehold estate, or deed or instrument purporting or intended to be a deed or instrument of release of a freehold estate, which shall be executed on or after the fifteenth day of May, one thousand eight hundred and forty-one, and shall be expressed to be made in pursuance of this act, shall be as effectual for the purposes therein expressed, and shall take effect as a conveyance to uses or otherwise, and shall operate in all respects both at law and equity as if the releasing party or parties who shall have executed the same had also executed in due form a deed or instrument of bargain and sale or lease for a year for giving effect to such release, although no such deed or instrument of bargain and sale or lease for a year shall be executed (*a*); provided that every such deed or instrument so taking effect under this act shall be chargeable with the same amount of stamp duty as any bargain and sale or lease for a year would have been chargeable with (except progressive duty) if executed to give effect to such deed or instrument, in addition to the stamp duties which such deed or instrument shall be chargeable with as a release or otherwise under any act or acts relating to stamp duties (*b*).

4 & 5 Vict.  
c. 21, s. 1.

A release to be effectual although no lease for a year shall be executed.

Release chargeable with the stamp duty to which the lease for a year would have been liable.

(*a*) See 8 & 9 Vict. c. 106, s. 2, *post*, p. 631. The principles upon which the conveyance by lease and release is founded will be found in 2 Sanders on Uses, Chap. Lease and Release; 2 Preston's Conv. 207—489; Shep. Touch. 320; Sugd. Intr. to Gilbert on Uses; Butl. Co. Litt. 271, b. n. Div. iii. 3; Watk. on Conv. by Coventry and Preston; 3 Jarm. Conv. tit. Bargain and Sale.

(*b*) This provision as to stamp duties, so far as the same relates to any deed or instrument bearing date after the 10th day of October, 1850, is repealed by 13 & 14 Vict. c. 97, s. 6.

2. And whereas many deeds or instruments of bargain and sale or leases for a year, to give effect to deeds or instruments of release of freehold estates heretofore executed, have been lost or mislaid; be it enacted, that where, in or by any deed or instrument of release of freehold estates executed before the fifteenth day of May, one thousand eight hundred and forty-one, any deed or instrument of bargain and sale or lease for a year for giving

The recital or mention of a lease for a year in a release executed before the passing of this act, to be evidence of the execution of such lease for a year.

4 & 5 Vict.  
c. 21, s. 2.

effect to such deed or instrument of release shall be recited, or by any mention thereof in such deed or instrument of release appear to have been made or executed, such recital or mention thereof shall be deemed and taken to be conclusive evidence of the deed or instrument of bargain and sale or lease for a year so recited or mentioned having been made and executed; and such deed or instrument of release shall also have the like effect as if the same had been executed after the fifteenth day of May, one thousand eight hundred and forty-one, whether such deed or instrument of bargain and sale or lease for a year shall or shall not have been lost or mislaid, or may or may not be produced: provided always, that this act shall not prejudice or affect any proceedings at law or in equity pending at the time of the passing of this act, in which the validity of any bargain and sale or lease for a year shall be in question between the party claiming under such bargain and sale or lease for a year and the party claiming adversely thereto; and such bargain and sale or lease for a year, if the result of such proceedings shall invalidate the same, shall not be rendered valid by this act (c).

Recital of lease  
for year sufficient  
as to lands in  
Ireland.

(c) In Ireland the actual existence of a lease for a year is not required, it is sufficient if the release contains the usual reference to it. By the Irish stat. 9 Geo. 2, c. 5, s. 6, made perpetual by 1 Geo. 3, c. 3, after reciting that it has frequently happened that purchasers for valuable considerations under deeds of lease and release have been prevented from recovering their rights for want of being able to produce the lease for a year, which is often lost or mislaid, it is enacted, "that in all cases the recital of a lease for a year in the deed of release shall be deemed and be taken to be full and sufficient evidence of such lease." This statute makes no alteration in the law, and only facilitates the proof of the lease for a year, by making the recital of it equal to the production, but it must be recited to be such as it ought to be if produced. The words "in his (the releasee's) actual possession now being, by virtue of a lease made pursuant to the statute," were held an insufficient recital of the lease within this statute. The lands however being in lease, the release was held to operate as a grant of the reversion, from the words "demise, set, and to farm let," notwithstanding there was a covenant in the instrument to make a future grant. (*Doe d. Burns v. Saunders*, 1 Fox & Smith, 18. See 1 T. R. 735; 12 East, 186; 15 East, 244; 5 T. R. 163.) By the Irish stat. 1 Geo. 3, c. 3, it is declared, that in all cases of pleading deeds of lease and release, wherein it may be necessary to allege the bringing such deeds into court, it shall be sufficient to allege the bringing into court the deed of release, in which the recital of such lease shall to all purposes whatsoever be as effectual as producing the same. (See *Bolton v. Bishop of Carlisle*, 2 H. Bl. 262; *Jenkins v. Peace*, 4 Jur. 850.)

Construction of  
the word "free-  
hold."

3. In the construction of this act the word "freehold" shall have not only its usual signification, but shall extend to all lands and hereditaments for the conveyance of which, if this act had not been passed, a bargain and sale or lease for a year, as well as a release, would have been used.

## AMENDMENT OF THE LAW OF REAL PROPERTY.

8 & 9 VICTORIA, c. 106.

*An Act to amend the Law of Real Property (a).*  
[4th August, 1845.]

### REPEAL OF STATUTE 7 & 8 VICT. c. 76.

BE it enacted as follows (that is to say) ;

8 & 9 Vict.  
c. 106, s. 1.

1. That so much of an act passed in the last session of parliament, intituled "An Act to simplify the Transfer of Property," as enacted that, after the time at which that act should come into operation, no estate in land should be created by way of contingent remainder; but that every estate which, before that time, would have taken effect as a contingent remainder should take effect (if in a will or codicil) as an executory devise, and (if in a deed) as an executory estate of the same nature, and having the same properties, as an executory devise; and that contingent remainders existing under deeds, wills or instruments executed or made before the time when that act should come into operation, should not fail, or be destroyed or barred, merely by reason of the destruction or merger of any preceding estate, or its determination by any other means than the natural effluxion of the time of such preceding estate, or some event on which it was in its creation limited to determine, shall be and is hereby repealed, as from the time of the commencement and taking effect thereof; and that the residue of the said act shall be and is hereby repealed, as from the first day of October, one thousand eight hundred and forty-five (b).

Repeal of so much of 7 & 8 Vict. c. 76, as abolishes contingent remainders as from the commencement,

and the residue as from 1st October, 1845.

(a) A letter from Mr. H. B. Ker, dated April, 1845, to the Lord Chancellor, contains an explanation of the reasons upon which this act is founded, and is printed in Davidson's Concise Precedents in Conveyancing, 10—49, 2nd ed.

(b) See the eighth section of this act as to contingent remainders.

### GRANT.

2. After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery (c); and that every deed which, by force only of this enactment,

The immediate freehold of corporeal tenements to lie in grant as well as in livery.



8 & 9 Vict.  
c. 106, s. 2.

Stamp duty on  
grants thereof.

Object of this  
section.

shall be effectual as a grant, shall be chargeable with the stamp duty with which the same deed would have been chargeable in case the same had been a release, founded on a lease or bargain and sale for a year, and also with the same stamp duty (exclusive of progressive duty) with which such lease or bargain and sale for a year would have been chargeable (*d*).

(*c*) The general object of this section is to give to all freehold lands in possession the capacity of being transferred without any of those forms or solemnities which occasion expense and trouble, but have no essential connexion with the act of transfer. "A large class of freehold hereditaments was by the previous law, and had, from the remotest antiquity, been invested with this capacity, to the extent of being transferable by the observance only of those forms or solemnities which are included in the execution of an ordinary deed. The hereditaments so circumstanced are technically said to lie in grant, while the hereditaments to which the law has hitherto denied the capacity of being transferred by deed are technically said to lie in livery. It has never been proposed that the class of property with which this section deals should be made transferable by any mode less formal than a deed. We have therefore considered that the most direct and the most simple means of obtaining the object proposed is, to impart to *corporeal* hereditaments, that is, to hereditaments which lie in livery only, the capacity of being transferred by deed, by providing that, 'as regards the conveyance of the immediate freehold thereof,' they 'shall be deemed to lie in grant as well as in livery.' The effect of the clause will be to render a reference to the Lease and Release Act of the 4 & 5 Vict. c. 21, unnecessary in the case of corporeal hereditaments in England, and to dispense with a reference to a recital of a lease for a year in the case of corporeal hereditaments in Ireland." (See Mr. Ker's Letter to the Lord Chancellor.) A remainder, reversion and incorporeal hereditaments are not the subjects of a feoffment, for a feoffment operates on the possession which the owners of such estates had not to convey; hence remainders, reversions and incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates which did not lie in livery or of which livery could not be given. As to the methods commonly used for conveying corporeal hereditaments prior to this act, see Williams on Real Property, Chap. 9.

Immediate free-  
hold.

By the term *immediate freehold* is meant the first of all the estates of freehold; for example, when A. is tenant for life, remainder to B. for life, in tail or in fee, B. has an *estate of freehold*, but A. has the *immediate freehold*. (1 Preston's Convey. 48.)

Although livery of seisin is rendered unnecessary by this section, the colour given by a plea claiming title to a dwelling-house, in which, &c., under colour of a certain charter of demise pretended to have been made thereof, was held not to show a title in the plaintiff. (*Wright v. Burroughes*, 8 C. B. 685; 4 Dowl. & L. 438.)

(*d*) This provision as to stamp duties, so far as the same relates to any deed or instrument bearing date after the 10th day of October, 1850, is repealed by 13 & 14 Vict. c. 97, s. 6.

### CERTAIN ACTS TO BE VOID UNLESS BY DEED.

Feoffments, par-  
titions, ex-  
changes, leases,  
assignments and  
surrenders re-  
quired (subject to  
certain excep-  
tions) to be by  
deed.

3. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant, shall be void at law, unless evidenced by deed (*e*), and that a partition and an exchange (*f*) of any tenements or hereditaments not being copyhold, and a lease, required by law to be in writing (*g*), of any tenements or

hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments (*h*), and a surrender in writing (*i*) of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed : provided always, that the said enactments so far as the same relates to a release (*j*) or a surrender shall not extend to Ireland.

8 & 9 Vict.  
c. 106, s. 3.

(*e*) By the custom of gavelkind an infant on attaining the age of fifteen years may alien lands by feoffment, livery of seisin being made in person and not by attorney. (Robinson on Gavelkind, 248—250, 3rd ed.)

(*f*) At common law coparceners might have made partition of things lying in livery or grant by parol without deed, and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin. (Litt. s. 250 ; Co. Litt. 169 a.) So, too, joint tenants for years might have made partition by parol without deed. (Co. Litt. 187 a.) But joint tenants of freeholds, whether corporeal or incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed. (Co. Litt. 169 a.) Since the Statute of Frauds, 29 Car. 2, c. 3, a writing was in all cases necessary, but a deed was required only in cases in which it was necessary before that statute. (1 Martin's Conv. by Davidson, 417, 418; 1 Byth. Conv. by Jarman, 193.) As to the partition of copyholds, see 4 & 5 Vict. c. 35, s. 85. *Jope v. Morshead*, 6 Beav. 213; *Dillon v. Coppin*, 4 Beav. 217, n.; *Bolton v. Ward*, 4 Hare, 530.

Partition.

An exchange since the Statute of Frauds, 29 Car. 2, c. 3, must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, *i. e.*, if they consist of reversions, rents or other incorporeal hereditaments, or if they lie in several counties, it must be by deed. (Co. Litt. 51 b.)

Exchange.

(*g*) By the Statute of Frauds every lease of corporeal hereditaments for a term exceeding three years from the making thereof was required to be in writing (29 Car. 2, c. 3, ss. 1, 2); but as a lease for years of corporeal hereditaments might be created by a writing not under seal, questions frequently arose whether an instrument relating to the creation of such an interest was an actual demise or an agreement for a future demise. (See 5 Davidson, Conv. 7—13, 3rd ed.) The distinctions upon this subject had become very refined. (Woodfall's Landlord and Tenant, 118—130, 5th ed.; 1 Platt on Leases, 579—611.)

Leases.

Questions arising  
formerly.

As regards incorporeal hereditaments, it was held that an instrument not under seal could not operate as a lease. (*Gardiner v. Wilkinson*, 2 B. & Ad. 336, *ante*, p. 139.) But where by agreement in writing not under seal the plaintiff let to the defendant, at a yearly rent, the right of fishing in a certain river with rod and line only, and the defendant used the fishery, it was held, that the plaintiff might recover the rent under an indebitatus count for the use and occupation of the fishery, although it was objected on the authority of *Bird v. Higginson* (5 Ad. & E. 83, *ante*, p. 58), that no interest passed by the agreement. (*Holford v. Pritchard*, 3 Exch. 793.)

The result of the present section is, that whatever be the language of the instrument, if it be not under seal, it will operate only as an agreement for a lease.

Result of present  
section.

It was once held by the Court of Common Pleas, that the same rule of construction must be applied to instruments before and since this act; and that in the case of an instrument not under seal, which before the act would have been held to be a lease, since the act it was valid neither as a lease nor as an agreement. (*Stratton v. Pettit*, 16 C. B. 420; 24 L. J., C. P. 182; 3 W. R. 548.)

*Stratton v. Pettit*.

8 & 9 Vict.  
c. 106, s. 3.

Instrument void  
as lease may be  
good as agreement  
for lease.

The case of *Stratton v. Pettit* has, however, been overruled. (*Tidey v. Mollett*, 16 C. B., N. S. 398; 12 W. R. 802, see the judgment of *Byles*, J.; *Stranks v. St. John*, L. R., 2 C. P. 377.) It has been intimated that a different rule of construction may be applied to instruments before and since the act (*Tidey v. Mollett*, sup.; see the judgment of *Erle*, C. J.); and it has been held, that an instrument which is void as a lease may be good as an agreement. (*Rollason v. Leon*, 7 H. & N. 73; *Bond v. Rosling*, 1 B. & Sm. 371, post; *Stranks v. St. John*, L. R., 2 C. P. 376.)

In *Rollason v. Leon* (7 H. & N. 77), *Bramwell*, B., said "With unfeigned respect for the learned Judges of the Court of Common Pleas, I have always thought and still think that the case of *Stratton v. Pettit* (16 C. B. 420) was not rightly decided. We are not, however, called upon to overrule it, because the present case is distinguishable. It seems to me that in *Stratton v. Pettit* the court made this mistake, whereas before the 8 & 9 Vict. c. 106 passed, it involved no inconvenience that certain words should be interpreted as an actual demise; yet when that statute passed and made the same reasoning inapplicable, and rendered it impossible that parties using words of agreement should have intended to create a lease, the court held that the same reasoning applied and that words of mere agreement were words of lease."

An action was brought on the following agreement made in 1861:—"L. agrees to let, and R. agrees to take the wood-mill with the house and land adjoining for the period of three years from Lady-day then next at the rent of 120*l.* per annum. A lease for the same to be executed and signed as soon as possible, subject to the permission of the landlord of the mill. L. also agrees to let and R. agrees to take the mill, house, land, &c., from this date up to Lady-day then next on the same terms and at the same rate of rent; R. to have the sole use of the mill, house and land, and all machinery and utensils therein contained. It was held, that the agreement operated as an actual demise from its date up to Lady-day, and as an agreement for a lease from that time for a term of three years, and consequently was not void under this section for not being under seal. (*Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Exch. 96.)

By agreement not under seal, the plaintiff agreed to let and the defendant to hire certain premises for seven years; and it was further agreed that a good and sufficient lease, embodying the terms of the agreement, should be prepared at the joint expense of the parties. In an action for not accepting a lease, the court decided, that the instrument was void as a lease under this section, but that it operated as an agreement with mutual promises by the lessor to grant and by the lessee to accept a formal lease on a future day. (*Bond v. Rosling*, 1 Best & Sm. 371; 9 W. R. 746.)

A. and B., after this act came into operation, executed a written instrument not under seal, by which A. agreed to let and B. to hire land for a term exceeding three years, at a rent payable monthly. B. entered, and it was afterwards orally agreed that the rent should be paid quarterly: it was held, that this section, though rendering the lease void as not being by deed, still made it void only as a lease, and did not prevent it from indicating the terms on which B. held as tenant from year to year, and that consequently B.'s tenancy might be determined during the term by a half-year's notice, but at the end of the term expired without notice. (*Tress v. Savage*, 4 Ell. & Bl. 36; 18 Jur. 680; 23 L. J., Q. B. 339.) The court was of opinion that the party entering into possession under such an instrument is in the same position as that in which he would have been in before the acts 7 & 8 Vict. c. 76 and 8 & 9 Vict. c. 106. He has not a lease nor a tenancy for the three years and a week, but a tenancy from year to year, which, during that time, is determinable by half-a-year's notice. If he stays to the end of the time, then, by the agreement of both parties, he goes out without notice. (*Ib.* 43.)

By writing not under seal, signed by the plaintiff and the defendant, the plaintiff agreed to take of the defendant a farm at a yearly rental, "the tenancy to commence from the 29th day of September next," for a term of eight years, subject to a lease, to be drawn up by the defendant. It was held, that there was no contract by the defendant to give the plain-

tiff possession of the farm on the day named, for that possession was to be given only on the commencement of a tenancy under a lease for eight years, and this agreement was void as a lease under this section, and that an action could not be maintained upon it against the defendant for not delivering possession to the plaintiff. (*Drury v. Maonamara*, 5 Ell. & Bl. 612 ; 1 Jur., N. S. 1168.)

8 & 9 Vict.  
c. 106, s. 3.

In 1851, A. became tenant to the defendant of premises under terms of a written agreement (not under seal) for a term of three years, the rent payable quarterly in advance. A. occupied the premises for some time, and paid several quarters' rent, and the receipts given to him by the defendant's agent stated that such payments were in advance, although in fact A. never paid the rent in advance : it was held, that although the agreement was void under this section as not being under seal, still that the receipt taken was ample evidence of the tenancy being upon the terms of the rent being payable quarterly in advance. It seems that the agreement itself might also have been referred to for the purpose. (*Lee v. Smith*, 9 Exch. 662 ; 23 L. J., Ex. 198. See *Ecclesiastical Commissioners v. Merral*, L. R., 4 Ex. 162.)

Specific performance has been decreed in equity of an agreement which was void at law as a lease. (*Parker v. Taswell*, 2 De G. & J. 559, and see *Poyntz v. Fortune*, 27 Beav. 398 ; *Crook v. Corporation of Seaford*, L. R., 6 Ch. 551.)

Specific performance of instrument void at law as lease.

This provision as to leases does not apply to agreements for the lease of tolls under the General Turnpike Act, 3 Geo. 4, c. 126, s. 57. (*Shepherd v. Hodsman*, 18 Q. B. 316.)

The word "release" in the final proviso appears to be inserted by mistake instead of "lease." It would seem, therefore, that this provision as to leases does not extend to Ireland. Every lease in Ireland required by law to be in writing must be made by deed. (*Gilman v. Crowley*, 7 Ir. C. L. R. (N. S.) 557.)

Ireland.

By 7 & 8 Vict. c. 76, s. 4 (in force from and after the 31st of December, 1844, and repealed by 8 & 9 Vict. c. 106, from the 1st of October, 1845), it was enacted, that no lease in writing of any freehold, copyhold or leasehold land should be valid, unless the same should be made by deed, but that any agreement in writing to let any such lands should be valid and take effect as an agreement to execute a lease. By a document, dated the 3rd of July, 1845, and purporting to be a memorandum of agreement (made while that section was in force), M. agreed to let and B. to take certain rooms in a house from the 7th day of that month, for the monthly rent of 36s., to be paid every four weeks : it was held, that it was only an agreement to execute a lease. (*Burton v. Revell*, 16 Mees. & W. 307.) An agreement in writing not under seal, under which the defendant had entered into possession, was made in March, 1845, and was prevented from operating as a lease by 7 & 8 Vict. c. 76, s. 4, which came into operation in December, 1844 ; the court thought that the stat. 8 & 9 Vict. c. 106, repealing so much of the former statute as related to agreements from October, 1845, did not apply to the agreement in question, both because it was made at a time in respect of which the former statute remained unrepealed, and also because the nature of the contract was fixed by the intention of the parties at the time it was made. (*Arden v. Sullivan*, 19 L. J., Q. B. 268.)

Cases of agreements to let under 7 & 8 Vict. c. 76, s. 4.

(h) The Statute of Frauds required that all assignments of leases should be by deed or note in writing, signed by the party assigning or his agent. (29 Car. 2, c. 3, s. 3.)

Assignments.

In an action for the use and occupation of a part of a house from June to October, it was proved that the plaintiffs, being lessees from May till the 13th December, let by parol the premises to the defendant till the latter day, reserving a weekly rent ; that the parties intended to create the relation of landlord and tenant, and to pass the interest by lease ; that the defendant occupied and paid rent till June, and then gave a week's notice to quit, and at the expiration thereof returned the key, against the will of the plaintiffs, and left the premises vacant, and refused to pay any subsequent rent. Upon these facts the defendant objected, that, as the plaintiffs intended to

8 & 9 Vict.  
c. 106, s. 3.

part with all their interest in the premises, they must be taken to have intended an assignment, and that the transaction could not take effect as an assignment, as there was no writing nor deed, as required by stat. 29 Car. 2, c. 3, s. 3, and stat. 8 & 9 Vict. c. 106, s. 3; and that therefore the defendant was not liable beyond the time of his actual occupation. It was held, that the intention of the parties at the time of the contract could be effected by holding that the interest passed by way of lease. Lord Denman, C. J., observed: "The parties intended to contract the relation of landlord and tenant, and to pass the right of possession by a parol lease. This they were at liberty to do by law, and we therefore carry their lawful intention into effect. If we were to decide that the transaction was an assignment, we should at the same time decide that it was no assignment, being by parol only; and we should construe that which was expressed and intended to be a lease to be an assignment merely, *ut res pereat*, which is against a known salutary maxim. As important rights and duties arise often from assignment of terms, the law has properly provided that the relation of assignor and assignee shall not be contracted, unless the intention is proved by deed. But in protecting against imperfect evidence of assignment, there was no need to alter the law of leasing; and it appears to us to remain unchanged, and we see no inconvenience in supporting as a lease that which was intended to be so, although it may pass all the lessor's interest. (*Pollock v. Stacy*, 9 Q. B. 1035.)

Reassignment by  
indorsement.

A., to whom B. had granted a lease, mortgaged to C. all his freeholds, goods and personalty, except any leaseholds or any portion of the term or terms for which such leaseholds might be holden, which C. by indorsement on the deed should declare not to be therein included. C. discovered subsequently the existence of the lease granted by B., and at once indorsed the deed to the effect that the lease was not included in it: it was held, that C. could not by such an indorsement defeat the rights of B., a stranger to the deed which had previously accrued. *Kelly, C. B., and Pigott, B.*, held, that the only operation of the indorsement was to give C. an equity to get rid of the lease as against A. *Martin, B.*, considered that the provisions of this section did not apply, and that C. could get rid of the lease by the indorsement. (*Debenham v. Digby*, 21 W. R. 359.)

Surrenders.

(i) The Statute of Frauds required that every surrender should be by deed or note in writing duly signed. (29 Car. 2, c. 3, s. 3.) This section refers to a surrender *in writing*, and does not include a surrender by operation of law.

Surrender by  
operation of law.

A surrender by deed is unnecessary where the former lessee is the party who takes the new lease, as the fact of his so doing is evidence that the new lease has been accepted by him, and such acceptance operates as a surrender in law; but it is not enough that the lessee agrees to an act done by the reversioner; and it seems that a demise of premises by the reversioner to a stranger, with the consent of the lessee in possession, will not amount to a surrender by operation of law. (*Lyon v. Read*, 13 Mees. & W. 285.) In this case *Parke, B.*, observed, the term surrender by operation of law is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former. So, if there be tenant for life, remainder to another in fee, and the remainderman comes on the land and makes a feoffment to the tenant for life, who accepts livery thereon, the tenant for life is thereby estopped from disputing the seisin in fee of the remainderman, and so the law says that such acceptance of livery amounts to a surrender of his life estate. Again, if tenant for years accepts from his lessor a grant of a rent issuing out of the land and payable during the term, he is thereby estopped from disputing his lessor's right to grant the rent, and as this could not be



dono during his term, therefore he is deemed in law to have surrendered his term to the donor. (13. 306, 306.) As to surrenders by operation of law, see further 2 Smith L. C. 759 *et seq.*, 6th ed.

(j) The word "release" appears to be inserted by mistake instead of "lease."

§ 9 Flat.  
c. 106, s. 2.

#### OPERATION OF CERTAIN INSTRUMENTS LIMITED.

4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation (k); and that an exchange or a partition of any tenements or hereditaments, made by deed, executed after the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and that the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law, in respect of any tenements or hereditaments (l), except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant (m).

Feoffments not to operate by wrong, nor exchange, or partitions to imply any condition, or give and grant any covenant.

(k) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates. (*Archer's case*, 1 Rep. 66 b.) A feoffment also destroyed powers appendant and powers in gross, but not powers collateral. A feoffment was the only conveyance by which a tenant for years, by assent, statute merchant or staple or a copyholder, could create an estate of freehold by disseisin. (Co. Litt. 49; 2 Sand. on Uses, 14, 15.) In consequence of the new enactment, a feoffment in fee simple, made by a tenant for life, will merely convey his life interest, and will not be a cause of forfeiture; and a feoffment by a lunatic or idiot will be void and not merely voidable, as formerly. (See Shelford on Law of Lunatics, 335, 336, 2nd edit.)

Tortious operation of feoffment.

(l) As to the conditions implied on exchanges and partitions, see 4 Cruise, Dig. tit. XXXII. c. 6, 20. The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is fully discussed by Mr. Butler in his note to Co. Litt. 384 a. (See 4 Cruise, Dig. tit. XXXII. c. 24; and see 1 Davidson, Conv. 70, 103, 3rd ed.)

Covenant implied by words "grant," "give."

An action of covenant will lie by the lessee against the lessor upon the word "demise" in a lease, that word importing a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term. (*Burnett v. Lynch*, 5 B. & C. 609.) This case was qualified by *Humble v. Langston*, 7 M. & W. 517, but upheld by the Court of Exchequer Chamber. (*Walker v. Bartlett*, 18 C. B. 645; *Mathew v. Blackmore*, 1 H. & N. 766.) In a contract for the demise of land, a promise of quiet enjoyment during the term is implied by law. (*Hall v. City of London Brewery Company (Limited)*, 3 Best & S. 737.) Although the word "demise" in a lease implies a covenant for title and a covenant for quiet enjoyment, both branches of such implied covenant are restrained by an express covenant for quiet enjoyment. (*Lane v. Stephenson*, 5 Bing. N. C. 163; 4 Bing. N. C. 678; 7 Scott, 69; 8 Scott, 447; *Merrill v. Prime*, 4 Taunt. 329; *Hinde v. Gray*, 1 Man. & Gr. 196; *Granger v. Collins*, 6 Mees. & W. 458; *Leadenbury v. Evans*, 3 Man. & G. 210; *Dennett v. Atterton*, L. R., 7 Q. B. 316.) Where land is demised by parol without any actual covenant, the law implies a covenant for quiet enjoyment during the term, but not a covenant for good title. (*Bandy v. Cartwright*, 8 Exch. 913.)

"demise."

Where the defendant executed a written agreement not under seal to let certain lands to the plaintiff, it was held that the defendant had impliedly agreed to grant a valid lease. (*Stranks v. St. John*, L. R., 2 C. P. 376.)

The plaintiff in ejectment on a demise of the 12th of October, 1860, claimed under the following deed:—"In consideration of the love and affection which I have towards my son W. B. (the lessee of the plaintiff),

Covenant to stand quiet.



8 & 9 Vict.  
c. 106, s. 4.

I have given and granted, and by these presents do give and grant, to the said W. S. all that," &c., "and that the said W. S. is to take possession of the same at Michaelmas-day next (1850). I have delivered him, the said W. S., all the premises absolutely at Michaelmas-day next, without further condition." It was held, that supposing such a deed to be void as a grant of the freehold in future, still, the day named having passed, the plaintiff was entitled to recover, the deed amounting to a covenant to stand seised to the use of W. S. (*Doe d. Starling v. Prince*, 15 Jur. 632; 20 L. J., C. P. 223.) The provision in this section, that "The word 'give' or the word 'grant,' in a deed shall not imply a covenant in law," was held inapplicable to the case. (*Ib.*)

Exception as to  
acts of parliament.

(*m*) In the conveyance of lands to be made by the promoters of the undertaking under the Lands Clauses Consolidation Act, or the special act, the word "grant" implies certain covenants by them for title, except so far as the same shall be limited by express words contained in any such conveyance. (8 & 9 Vict. c. 18, s. 132.)

The words "grant, bargain and sell" operate as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Ann. c. 35, s. 30; 8 Geo. 2, c. 6, s. 35.

### STRANGERS TO DEEDS.

Strangers may  
take immediately  
under an inden-  
ture, and a deed  
purporting to be  
an indenture shall  
take effect as  
such.

5. Under an indenture, executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also, that a deed, executed after the first said day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented (*n*).

(*n*) It was necessary to name as parties to an indenture all persons who are intended to take an immediate estate or benefit by it. (Co. Litt. 231 a.) This rule did not extend to remainders, (Co. Litt. 231 a, 259 b,) nor, it was said, to uses or the benefit of a trust. (2 Prest. Conv. 394.) A practical distinction between an indenture and a deed poll is, that no person can take an immediate estate or benefit under an indenture, unless he be named as a party to it; but any person can take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world. (Co. Litt. 26 a, 231; Burton's Real Prop. 442, n.; 2 Prest. Conv. 394 *et seq.*; 1 Martin's Conv. 324.) Another practical distinction between a deed poll and an indenture is, that a covenant entered into by a deed poll with any covenantee named in the deed is valid; but a covenant in an indenture entered into with a person not a party cannot be sued on by that person. (*Greene v. Hoare*, Salk. 197; *Berkley v. Hardy*, 5 B. & C. 353; *Lord Southampton v. Browne*, 6 B. & C. 718.) But a person not a party to a deed may covenant with one who is, and will be bound by executing the deed. (*Salter v. Kidgley*, Carth. 76; 2 Prest. Conv. 415.)

### ALIENATION OF CONTINGENT INTERESTS.

Contingent and  
other like in-  
terests, also rights  
of entry, made  
alienable by deed,

6. After the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or

hereditaments (*o*) of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*p*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but that no such disposition shall, by force only of this act, defeat or enlarge an estate tail, and that every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance" (*q*), or, in Ireland, of an act passed in the fourth and fifth years of the reign of his said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

8 & 9 Vict.  
c. 106, s. 6.

saving estates in tail; and as regards married women enjoining conformity to 8 & 4 Will. 4, c. 74.

4 & 5 Will. 4,  
c. 92.

(*o*) The alienation of interests of this description under the law as it existed previously to the abolition of fines and recoveries, has been already considered. (See *ante*, pp. 325—327.) As to alienation of supposed rights, see 32 Hen. 8, c. 9; *Doe d. Williams v. Evans*, 1 C. B. 717, and the cases there cited.

(*p*) It was said by *Maule, J.*, "that this does not mean a right of entry for a forfeiture, but the right of entry in the nature of an estate or interest, that is, where a person by lapse of time has lost everything except his right of entry." (*Hunt v. Remnant*, 9 Exch. 640.) *Pollock, C. B.*, said, "This section does not relate to a right to repossess or re-enter for a condition broken, but only to an original right where there has been a disseisin, or where the party has a right to recover lands, and his right of entry, and nothing but that, remains." (*Hunt v. Bishop*, 8 Exch. 680.)

(*q*) See *ante*, pp. 368—399.

#### DISCLAIMER BY MARRIED WOMEN.

7. After the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and that every such disclaimer shall be made conformably to the said provisions of the said Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance (*r*).

Capacity of married women to disclaim estates or interests by deed extended to England.

(*r*) See *ante*, p. 371.

#### CONTINGENT REMAINDERS.

8. A contingent remainder, existing at any time after the thirty-first day of December, one thousand eight hundred and forty-four, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or

Contingent remainders protected as from 31st December, 1844, against the premature failure of a preceding estate.

8 & 9 Vict.  
c. 106, s. 8.

Destruction of  
contingent re-  
mainders.

Section super-  
sedes necessity of  
trustees to pre-  
serve contingent  
remainders.

Contingent  
remainders in  
copyholds.

When the rever-  
sion on a lease is  
gone the next es-  
tate to be deemed  
the reversion.

merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened (s).

(s) This section of the act does not alter the rules of law as to the creation of contingent remainders. (See 2 Bl. Comm. 164, 170; Watk. on Conv. tit. Remainder.) In consequence of the rule that a remainder must vest in the grantee during the existence of the particular estate, or the very instant it determines, contingent remainders might be defeated, by destroying or determining the particular estate on which they depend, before the contingency happens whereby they become vested. (1 Real Prop. Rep. 66, 135.) Therefore, when there was tenant for life, with divers remainders in contingency, he might not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest; the consequence of which was, that he utterly defeated them all. As, if there were tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son was born, surrendered his life estate, he by that means defeated the remainder in tail to his son: for his son not being *in esse* when the particular estate determined, the remainder could not then vest; and, as it could not vest then by the rules of law it never could vest at all. In these cases, therefore, it was necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines. If, therefore, his estate for life determines otherwise than by his death, the estate of the trustees, for the residue of his natural life, will then take effect, and become a particular estate in possession, sufficient to support the remainders depending in contingency. (2 Black. Com. 171.) The above clause will supersede the necessity of a limitation of estates to trustees during the life of the tenant for life, to support the contingent remainders expectant upon the determination of the life estate by forfeiture, surrender or merger.

See *Egerton v. Massey*, 3 C. B., N. S. 338; 8 Jur., N. S. 1325; 27 L. J., C. P. 10, as to the destruction of a contingent remainder by merger.

The act only applies to the three cases of forfeiture, surrender or merger. If at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still fail as before. (Williams's Real Prop. 261, 7th ed.)

Contingent remainders of copyholds were never liable to destruction by the sudden determination of the particular estate on which they depend. But there is no distinction between freeholds and copyholds in those cases where the particular estate expires naturally and regularly before the happening of the contingency. (Scriven on Copyholds, 281, 5th ed.) Quasi contingent remainders in copyholds were protected from destruction by the estate of the lord of the manor. (*Pickersgill v. Grey*, 30 Beav. 352.)

#### REVERSION EXPECTANT ON LEASE.

9. When the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditament, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease (t).

(t) This section of the act is retrospective in its operation. (*Upton v. Townend*, 17 C. B. 542.)

It sometimes happened, where the immediate reversion on a lease is a term, or other particular estate, that it becomes merged in some other estate in the same land; and, where that is the case, not only the benefit of the covenants, but the rent and all remedies for it, are lost. (3 Real Prop. R. 49.) The object of this section is to prevent such consequence, and to preserve covenants of, and remedies against a lessee, and the obligations on the lessor which are incident to the immediate reversion. (*Webb v. Russell*, 3 T. R. 678; *Wootley v. Gregory*, 2 Yo. & J. 536; *Burton v. Barclay*, 7 Bing. 745; *Thorne v. Woolcombe*, 3 B. & Ad. 586; 2 Platt on Leases, 393—399.)

8 & 9 Vict.  
c. 106, s. 9.

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10. This act shall not extend to Scotland.

Act not to extend  
to Scotland.

## SATISFIED TERMS.

8 &amp; 9 VICTORIA, c. 112.

*An Act to render the Assignment of Satisfied Terms unnecessary.*  
[8th August, 1845.]

## TERMS ATTENDANT ON 31ST DECEMBER, 1845.

8 & 9 Vict.  
c. 112, s. 1.

On 31st December, 1845, satisfied terms of years attendant on inheritance, &c. of land, to cease, except, &c.

WHEREAS the assignment of satisfied terms has been found to be attended with great difficulty, delay and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate: be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands (a), shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (b).

(a) Allusion has already been made to the doctrine of attendant terms of years assigned to attend the inheritance. (*Ante*, p. 421.) The subject is fully explained in the Second Report of the Real Prop. Comm. pp. 7—14; and see Williams, Real Prop. 383—387, 7th ed.

As to the nature of attendant terms, see Sugd. V. & P. 616 (14th ed.): and as to the merger, cesser by proviso, or presumption of the surrender of a term, see *Id.* 617—621.

The result of this section is that all satisfied terms, which were attendant on the 31st Dec. 1845, ceased and determined on that day. The points to be determined are, (1) whether the term was on the 31st Dec. 1845, "satisfied;" and (2) was also on the same day "attendant upon the inheritance or reversion." (Davidson, Conc. Prec. 38, 7th ed.)

As to when a term is "satisfied" generally, see Davidson, Conc. Prec. 38, and note. A term does not become satisfied within this act, except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate are united and merged in one person. (Per James, L. J., *Anderson v. Pignet*, L. R., 8 Ch. 189.)

As to terms attendant by implication or construction of law, see Sugd. V. & P. 625; *Belaney v. Belaney*, L. R., 2 Ch. 138.

The intention of this act was that all mere dry satisfied terms should merge, but not terms assigned or agreed to be assigned as a protection to a mortgagee or purchaser. Therefore, where a term was outstanding in trust for a mortgagor, and by the mortgage deed, which was dated before the act, it was agreed that this term should be assigned to another person as trustee for the mortgagee to secure the mortgage debt and interest, but the deed of assignment was never executed, it was held that the term did not merge under the act. (*Shaw v. Johnson*, 1 Dr. & Sm. 412; 7 Jur., N. S. 1005.)

8 & 9 Vict.  
c. 112, s. 1.

Cases under the  
act where terms  
were held not to  
have ceased.

A lessor, who was married in 1832, created a term by way of mortgage in the lands comprised in his lease, which ultimately became vested in a trustee for a mortgagee. The lessee subsequently acquired the fee, and then became bankrupt. Afterwards, by a deed made between the assignees in bankruptcy, the mortgagor and the mortgagee, in consideration of the release by the latter of his mortgage debt, the fee simple was conveyed to the mortgagee freed and discharged from all equity of redemption. The wife of the mortgagor was joined as a party to the deed for the purpose of releasing her right to dower: but she refused to execute it, and after her husband's death, she filed her bill to enforce her right to dower. It was held, that as the widow had not executed the deed, the term was not satisfied within the meaning of sect. 2, and that it protected the mortgagee against her claim to dower. (*Anderson v. Pignet*, L. R., 8 Ch. 180.)

In 1838, Mary Humphreys, seised in fee, mortgaged premises for 1,000 years to Davies. In 1839, she conveyed the fee, subject to the mortgage term, to her daughter, the wife of the defendant; this conveyance was unknown to the parties to the subsequent deeds. In 1842, Mary Humphreys mortgaged the premises in fee to Minshall, and in 1844 conveyed the equity of redemption to Clay, who agreed to sell a moiety of the premises to Meredith Humphreys. The executors of Davies called in his mortgage money, which was advanced by John Thompson, together with further sums for Clay and Meredith Humphreys. And in October, 1844, the executors of Davies assigned the term of 1,000 years to John Thompson, with a proviso that if Clay and Meredith Humphreys paid the moneys advanced, together with interest, on a certain day, John Thompson would assign the term as Clay and Meredith Humphreys should direct or appoint. For further assurance Minshall, and Clay and Meredith Humphreys, conveyed the fee to Richard Thompson in trust for sale, or to reconvey to Clay and Meredith Humphreys on payment of the mortgage money. In 1847, part of the premises being required for a railway, Clay received the purchase-money from the company, and therewith paid off the mortgagees. Ejectment was brought on the demise of J. Thompson against the person claiming under the conveyance of 1839: it was held, that the term had not determined under the act, and that the plaintiff was entitled to recover. (*Doe d. Clay v. Jones*, 18 Q. B. 774; 18 L. J., Q. B. 260.) *Patteson, J.*, observed, "It is not necessary to decide whether the defendants claiming to have the fee can maintain that this is a satisfied term, the satisfaction of the mortgages having been made not by him, but by Clay, under a mistaken belief that the equity of redemption in fee had been conveyed to himself, because we are of opinion that this term is not within either of the alternatives in the statute for determining terms. It is not attendant on the inheritance by express declaration, there being no such declaration; neither is it by construction of law, for the trust is expressly declared to be for Clay and Humphreys, who have not the inheritance; and although they were supposed to be entitled thereto when the deed was executed, that supposition is now proved to have been founded on a mistake. That mistaken supposition has no effect upon the express words of the instrument." (*Ib.*) Lord *St. Leonards* observes, that if the payment of the mortgage debt could have been considered as made by Clay and Humphreys out of their own money, the term should not have been treated as satisfied, and the case might have been decided in favour of the plaintiff on that ground. But that it would be difficult to support the decision if Clay and Humphreys were not to be considered as having paid off the mortgage. (*R. P. Stat.* 280, 2nd ed.) The decision has been disapproved by Mr. Dart



8 & 9 Vict.  
c. 112, s. 1.

Cases in which  
terms were held  
to have ceased.

(V. & P. 467, 4th ed.), but see the observations of Lord Selborne (*Anderson v. Pignet*, L. R., 8 Ch. 189).

In *Doe d. Hall v. Mouldsdale* (16 Mees. & W. 689, *ante*, p. 194), it was contended that an outstanding term, although for some purposes destroyed by the above statute, was still to remain as a protection against actions and claims at law. The defendant was the party in possession, and required the protection of the term. The court held that, under the circumstances, the ejectment was barred, and that it was therefore unnecessary to consider the effect of the term. But the court had no doubt that the term was to be deemed to have absolutely ceased and determined under the act on the 31st December, 1845, and consequently would have afforded no defence to the action of ejectment.

In 1829, A. died seised in fee of lands, of which his eldest son B. was his tenant. On his death B., supposing him to have died intestate, entered on the lands, claiming them as heir at law, and in 1830 mortgaged them in fee, and levied a fine to confirm the mortgage; and at the same time an outstanding term of 500 years was by his direction assigned to a trustee for the mortgagee. In 1835, B. sold the estate to the defendant, who paid off the mortgage; the legal estate in fee and the equity of redemption were conveyed to the defendant, and the term was assigned to a trustee for him to attend the inheritance. In 1845 it was discovered that A. had executed a will, whereby he devised the lands in fee to his second son, who thereupon brought ejectment to recover the estate from the defendant, and laid a demise in the name of the trustee, to whom the term was assigned in 1835: it was held, first, that B. had a sufficient estate to make him a good consor of the fine; secondly, that by the operation of this statute the term had absolutely determined, and that the plaintiff could not recover upon the demise laid in the name of the trustee. (*Doe d. Cadwalader v. Price*, 16 Mees. & W. 603.) On the question as to what had become of the satisfied term under the 1st section of the statute 8 & 9 Vict. c. 112, *Parke*, B., observed, "As the plaintiff has in his declaration a demise by a trustee of the term, added to that of the real claimant of the property, we must decide whether that satisfied term did or did not continue after the 31st December, 1845; and in order to do this, we must also determine whether the party claiming the protection of the term was really entitled to that protection against an incumbrance; and as that is a question of equity, we have thrown on us the duty of a court of equity without adequate machinery. Such, however, is the operation of the act, and we must therefore decide whether the defendant, who was in possession, wanted the protection of this term. Now as we have already held that he did not, seeing that he had the legal estate wholly independent of the term, his case does not fall within the latter part of the 1st section of the statute; but it falls within the former part of it, the effect of which is, that the term actually ceased and determined by the operation of the act on the 31st of December, 1845, and consequently the plaintiff cannot recover on the demise of the trustee of the term. If it had turned out that the defendant wanted the protection of the term, on the ground that he was a purchaser for valuable consideration, it would be necessary for us to determine what course he ought to take; probably it would be necessary for him to apply to a court of equity, or to apply to this court to strike out of the declaration the demise in the name of the trustee; but as he does not want the protection of the term, it has absolutely ceased and determined on the 31st December, 1845. The defendant is therefore entitled to a verdict on all the demises." (*Ib.* 613, 614.)

The exception in  
the section:  
nature of the  
protection.

(b) "The object of the act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this is a limited protection; for it gives not such protection as a further assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist but had not been assigned or dealt with after the 31st December, 1845. This protection will of course extend to a new purchaser, although the term assigned to attend was left undisturbed." (Sugd. V. & P. 497, 14th ed.;

*Freer v. Hesse*, 4 De G., M. & G. 495; see also Sugd. V. & P. 623, 624, 14th ed., as to the nature of the protection afforded by an attendant term.)

8 & 9 Vict.  
c. 112, s. 1.

The proper way of testing the right of a person to the protection of such a term is to consider whether, if the act had not been passed, equity would restrain him from setting up the term. (*Cottrell v. Hughes*, 15 C. B. 532.) C. being, under a deed of settlement of 1813, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement, and the residue of two terms, each of 1,000 years, was assigned by the personal representatives of H. to a trustee for the defendant to attend the inheritance. These terms had originally been created for mortgage purposes, and in 1773, the mortgage debt having been satisfied, were assigned to H. in trust to attend the inheritance for the benefit of the then owner in fee. The estate had been settled in 1778, and had also been mortgaged in 1836 and the three following years, but in none of the deeds, nor in the settlement of 1813, was any notice taken of the outstanding terms. In 1844, C. duly exercised his power of appointment, limiting the estate after his death (which took place in 1853) to the plaintiff, his eldest son, in fee. In an action of ejectment, a verdict having been taken for the plaintiff, subject to a case disclosing these facts: it was held, that, as the terms were, on the 31st December, 1845, attendant on the inheritance by express declaration, and would, if subsisting, have afforded to the defendant such protection against the settlement of 1813 as a court of equity would not have restrained him from setting up in a court of law, they were within the exception of this section, and must be considered as subsisting terms. (*Ib.*)

A term of 500 years having been created in 1738 as a security for portions for younger children, and to attend the inheritance, was afterwards assigned by the tenant for life, under a settlement made in 1784, to a trustee as a security for 100*l.* advanced by W., and to attend the inheritance. W. and the tenant for life afterwards conveyed the term to M., in trust for S., with a declaration of trust for certain parties: it was held, that such parties, having had notice that the object of the term was satisfied, could not set up against the parties claiming under the settlement of 1784, the term which had been assigned to W. by a person who had no right to deal with it except to the extent of his own interest. (*Plant v. Taylor*, 7 H. & N. 211; 8 Jur., N. S. 140; 31 Law J., Exch. 289.)

A., who had married in 1832, purchased an estate in 1837, subject to a satisfied term, of which he procured an assignment to a trustee for himself. He afterwards executed three mortgages, in each of which he covenanted that the lands were free from dower; and on the occasion of the first mortgage the deed of assignment of the term was delivered to the solicitor for the mortgagee, but it did not clearly appear that he retained the exclusive possession of it. It was held that, notwithstanding the saving in this statute, the term had ceased by the operation of this act, and that the mortgagees were not entitled to its protection against A.'s wife's right of dower. (*In re Sleeman*, 4 Ir. Ch. R. 563; *Corry v. Cremorne*, 12 Ir. Ch. R. 136.)

In *Bass v. Wellsted*, 12 Jur. 347, a question was raised, but not decided, as to the protection against dower by a term since the above act.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to. (*Garrard v. Tuck*, 13 Jur. 871; 18 Law J., C. P. 338; 8 C. B. 231.) Therefore, where the owner of the estate, which is subject to such attendant term, devised it without referring to the term, and the devisee mortgaged it with notice of the term, but without the mortgagee taking any assignment of the term, and the devisee afterwards conveyed the estate to trustees for sale, it was held, that there had not been such a dealing with the estate as to induce the court to presume a surrender of the term. (*Ib.*) As to presuming the surrender of terms, see also *Cottrell v. Hughes*, 15 C. B. 532 (where the decision in *Doe d. Putland v. Hilder*, 2 B. & Ald. 782, was doubted); *Doe v. Langdon*, 12 Q. B. 711; *Hele v. Lord Bexley*, 17 Beav. 28; Sugd. V. & P., Appendix 26 (11th ed.).

Presuming sur-  
render of terms.

8 & 9 Vict.  
c. 112, s. 2.

Satisfied terms  
now subsisting,  
&c. to cease on  
becoming attend-  
ant upon inherit-  
ance, &c. of lands.

# TERMS SATISFIED AFTER 31st DECEMBER, 1845.

2. Every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid (c).

(c) See *Anderson v. Pignet*, L. R., 8 Ch. 180, *ante*, p. 643, and the note to the preceding section.

Construction of  
act.

3. In the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

Not to extend to  
Scotland.

4. This act shall not extend to Scotland.

## THE TRUSTEE ACT, 1850.

13 &amp; 14 VICTORIA, c. 60.

*An Act to consolidate and amend the Laws relating to the Conveyance and Transfer of Real and Personal Property vested in Mortgagees and Trustees.* [5th August, 1850.]

WHEREAS an act was passed in the first year of the reign of his late majesty King William the Fourth, intituled "An Act for amending the Laws respecting Conveyances and Transfers of Estates and Funds vested in Trustees and Mortgagees, and for enabling Courts of Equity to give Effect to their Decrees and Orders in certain Cases:" and whereas an act was passed in the fifth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Amendment of the Law relative to the Escheat and Forfeiture of Real and Personal Property holden in Trust:" and whereas an act was passed in the second year of the reign of her present Majesty, intituled "An Act to remove Doubts respecting Conveyances of Estates vested in Heirs and Devisees of Mortgagees:" and whereas it is expedient that the provisions of the said acts should be consolidated and enlarged: be it therefore enacted, that all proceedings under the said acts or any of them commenced before the passing of this act may be proceeded with under the said recited acts, or according to the provisions of this act, as shall be thought expedient, and, subject as aforesaid, that the said recited acts shall be and the same are hereby repealed: provided always, that the several acts repealed by the said recited acts shall not be revived, and that such repeal shall only be on and after this act coming into operation.

13 & 14 Vict.  
c. 60, s. 1.11 Geo. 4 & 1  
Will. 4, c. 60.4 & 5 Will. 4,  
c. 23.

1 &amp; 2 Vict. c. 69.

2. And whereas it is expedient to define the meaning in which certain words are hereafter used; it is declared, that the several words hereinafter named are herein used and applied in the manner following respectively; (that is to say,)

Interpretation of  
terms.

The word "lands" shall extend to and include manors, messuages, tenements and hereditaments, corporeal and incorporeal, of every tenure or description, whatever may be the estate or interest therein:

The word "stock" shall mean any fund, annuity or security transferable in books kept by any company or society established or to be established, or transferable by deed alone, or by deed accompanied by other formalities, and any share or interest therein (a):

18 & 14 Vict.  
c. 60, s. 2.

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The word "seised" (*b*) shall be applicable to any vested estate for life or of a greater description, and shall extend to estates at law and in equity (*c*), in possession or in futurity, in any lands :

The word "possessed" shall be applicable to any vested estate less than a life estate, at law or in equity, in possession or in expectancy, in any lands :

The words "contingent right," as applied to lands, shall mean a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent (*d*) :

The words "convey" and "conveyance" applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveyance or disposing to another lands whereof such person is seised or entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of an act passed in the fourth year of the reign of his late majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and the Substitution of more simple Modes of Assurance" (*e*), and including also surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of such customary or copyhold lands (*f*) :

The words "assign" and "assignment" shall mean the execution and performance by a person of every necessary or suitable deed or act for assigning, surrendering, or otherwise transferring lands of which such person is possessed, either for the whole estate of the person so possessed or for any less estate :

The word "transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock can transfer such stock from himself to another :

The words "Lord Chancellor" shall mean as well the Lord Chancellor of Great Britain as any lord keeper or lords commissioners of the great seal for the time being :

The words "Lord Chancellor of Ireland" shall mean as well the Lord Chancellor of Ireland as any keeper or lords commissioners of the great seal of Ireland for the time being :

The word "trust" shall not mean the duties incident to an estate conveyed by way of mortgage (*g*) ; but, with this exception, the words "trust" and "trustee" shall extend to and include implied and constructive trusts (*h*), and

2 & 4 Will. 4,  
c. 74.

shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of personal representative of a deceased person :

13 & 14 Vict.  
c. 60, s. 2.

The word "lunatic" shall mean any person who shall have been found to be a lunatic upon a commission of inquiry in the nature of a writ *de lunatico inquirendo* :

The expression "person of unsound mind" shall mean any person not an infant, who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

The word "devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the lands of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent :

The word "mortgage" shall be applicable to every estate, interest, or property in lands or personal estate which would in a court of equity be deemed merely a security for money (i) :

The word "person" used and referred to in the masculine gender shall include a female as well as a male, and shall include a body corporate :

And generally, unless the contrary shall appear from the context, every word importing the singular number only shall extend to several persons or things, and every word importing the plural number shall apply to one person or thing, and every word importing the masculine gender only shall extend to a female.

(a) Shares in a joint stock banking company come within this definition of stock. (*In re Angelo*, 5 De G. & S. 278.) Shares in ships registered under the "Merchant Shipping Act, 1854," are also included. (18 & 19 Vict. c. 91, s. 10.)

(b) This word does not apply to leaseholds. (*Re Harrey*, Seton, 819. See *Re Mundel*, quoted under sect. 15, *post*.)

(c) See *Re Williams*, 5 De G. & Sm. 515, quoted under sect. 7, *post*.

(d) This definition of "contingent right" is taken from the 8 & 9 Vict. c. 106, s. 6, (*ante*, p. 638,) with the view of including in this act all the estates and interests which may be disposed of under the former act.

(e) A vesting order under this act will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under 3 & 4 Will. 4, c. 74, s. 34. (*Porrell v. Matthews*, 1 Jur., N. S. 973, *ante*, p. 339, n.)

(f) See *Rowley v. Adams*, 14 Beav. 130.

(g) See *Re Osborn's Mortgage Trusts*, L. R., 12 Eq. 392, where it was held, that, having regard to these words, the court had no authority to convey the estate of a mortgagee who had been paid off. See, also, *Re Underwood*, 3 K. & J. 745, quoted under sect. 15, *post*.

(h) As to constructive trustees, in the case of stock, see *Re Angelo*, 5 De G. & Sm. 278; *Re Davis' Trusts*, L. R., 12 Eq. 214; in the case of a sale of land, *Re Badcock*, 2 W. R. 386; *Re Carpenter*. Kay, 418; *Re Wilkinson*, 12 W. R. 522; *Re Weeding*, 4 Jur., N. S. 707; and in the case of a mortgage of leaseholds, see *Re Probert*, 1 W. R. 237.

(i) As to the meaning of mortgage in the act, see *Re Underwood*, 3



13 & 14 Vict.  
c. 60, s. 3.

Lord Chancellor  
may convey es-  
tates of lunatic  
trustees and mort-  
gagees.

Orders under  
this section.

Form of order.

Practice on  
applications under  
this act in lunacy.  
Lord Justices  
acting in lunacy.

Whether appli-  
cation should be  
made in chancery  
or lunacy.

Lunatic trustee  
who is an infant.

K. & J. 745, quoted under sect. 15, *post*, and see *Lawrence v. Galsworthy*, 8 Jur., N. S. 1049.

3. When any lunatic or person of unsound mind shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics to make an order that such lands be vested in such person or persons in such manner and for such estate as he shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*k*).

(*k*) Where one of three trustees was a lunatic, though the will contained a power to appoint new trustees, an order was made, appointing a new trustee, and vesting real estate and leaseholds in him jointly with the continuing trustees. (*Re Davies*, 3 Mac. & G. 278.) And where one of four trustees was a lunatic, and another unfit to act, an order was made appointing two new trustees, and vesting real estate and the right to call for a transfer of stock in the new trustees jointly with the two continuing old ones. (*Re Chauncey*, 14 W. R. 849.) But as the section speaks of conveyance and assignment, it was held, the court could not act under this section where the lunatic had only a power of sale. (*Re Porter*, 3 W. R. 583; where the order was subsequently made, Seton, 818; and see *Re Boyce*, 12 W. R. 359.) For form of petition by committee of lunatic mortgagor, on payment off of mortgage, see Elmer, Pr. Lun. 240, 5th ed.; and for form of vesting order, and of order appointing person to convey estates vested in lunatic, see Elmer, 241—244.

See, further, as to the form of orders vesting real estate, the note to sects. 7, 10, and 34, *post*.

It was considered that the Lords Justices acting in lunacy under the royal sign manual had jurisdiction to make a vesting order under this section. (*Re Waugh's Trusts*, 2 De G., M. & G. 279.) And it has since been enacted, that all the jurisdiction and all the powers and authorities of a judicial nature, given by 11 Geo. 4 & 1 Will. 4. c. 65, by the Trustee Act, 1850, and by any other acts or act of parliament then (1st July, 1852) in force, to the Lord Chancellor intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of persons found idiot, lunatic or of unsound mind, shall belong to and may be exercised by all or any of the persons or person, for the time being, intrusted as aforesaid. (15 & 16 Vict. c. 87, s. 15; and see 15 & 16 Vict. c. 55, s. 11, *post*.)

Where a trustee is lunatic, and there is no other disability, it has been held, that the Court of Chancery has no jurisdiction (*Re Good Intent Benefit Society*, 2 W. R. 671; *Re Ormerod*, 3 De G. & J. 249); and that a petition in lunacy is necessary. (*Jeffries v. Drysdale*, 9 W. R. 428.) Where, however, the legal estate in land, sold under the order of the court, was vested in a person of unsound mind, not found a lunatic, an order was made in Chancery by Lord *Hatherley* and *Selwyn*, L. J., appointing a person to convey such legal estate. (*Herring v. Clark*, L. R., 4 Ch. 167.) A vesting order has been made upon a petition presented in chancery, and also in lunacy. (*Re Stewart*, 8 W. R. 297.) As to the power of the court to appoint new trustees, on a petition in lunacy alone, see 15 & 16 Vict. c. 55, s. 10, *post*, and note.

Where stock is standing in the name of a trustee, who is of unsound mind, but not found a lunatic, which it is desired to bring into court to the credit of a cause, the cause should be first heard by the judge to whose court it is attached, and then a petition in lunacy should be presented. (*Re Dawson*, 6 N. R. 346.)

Where a trustee is an infant as well as a lunatic, the Court of Chancery has jurisdiction, and recourse need not be had to the jurisdiction in lunacy. (*Re Arrowsmith*, 6 W. R. 642.)

Where a person has not been found lunatic by inquisition, it seems that the court has jurisdiction, even where the fact of the lunacy is disputed. (*Re Viall*, 8 De G., M. & G. 439; and see sect. 52, *post*; see *contra*, *Re Campbell*, 18 L. T. 202, and *Re Walker*, Cr. & Ph. 147.)

A petition for an order, vesting in new trustees property, a trustee of which has become lunatic, ought to be served on his committee. (*Re Saumarez*, 8 De G., Mac. & G. 890. And see *Re Parker*, 32 Beav. 580; *Re Wylde*, 5 De G., M. & G. 25.) Where the committee of a lunatic mortgagee presents a petition for an order enabling him to re-convey to the mortgagor, the petition should not be served on the mortgagor. (*Re Rowley*, 1 De G., J. & S. 417; *Re Phillips*, L. R., 4 Ch. 629.)

Where the heir of a mortgagee was a lunatic, and on payment off of the mortgage debt a petition for a vesting order was presented by the mortgagor, the mortgagor was ordered to pay the costs. (*Re Stuart*, 4 De G. & J. 317; *Re Jones*, 2 De G., F. & J. 554.) When the mortgagee himself was a lunatic, and the mortgagor petitioned, the costs were ordered to be paid out of the lunatic's estate. (*Re Townsend*, 2 Phil. 348.) It seems, however, that the petition should be presented by the committee (*Re Wheeler*, 1 De G., M. & G. 434); and Lord *St. Leonards* has laid down that, when the lunatic is beneficially interested in the mortgage money, and the committee petitions for a vesting order, the costs of the petitioner should come out of the lunatic's estate. (*Re Wheeler*, 1 De G., M. & G. 434; *Re Rowley*, 1 De G., J. & S. 417.) The costs of the mortgagor's appearance as respondent on such a petition, even where he is served, will not be allowed out of the lunatic's estate. (*Re Phillips*, L. R., 4 Ch. 629.)

Where a mortgagee was a lunatic, and the mortgagor petitioned for a reconveyance, and it appeared on the face of the mortgage deed that the mortgagee was a trustee, the costs were ordered to be paid by the mortgagor. (*Re Lewes*, 1 Mac. & G. 28.) But where the existence of the trust did not appear on the face of the mortgage deed, the costs were paid out of the estate of which the lunatic was trustee. (*Re Townsend*, 1 Mac. & G. 686.)

Where a mortgagee was a lunatic and the purchaser of the mortgaged property under a decree in a suit for the administration of the mortgagor's estate petitioned for a vesting order, part of the costs were ordered to be paid to the petitioners out of the mortgage money, the remainder of the costs to be costs in the cause. (*Re Viall*, 8 De G., M. & G. 439.)

Where a trustee becomes lunatic, and consequently an application in lunacy is necessary to obtain a transfer of the trust funds, no order will be made as to costs. (*Re Garden*, 6 N. R. 347.)

4. When any lunatic or person of unsound mind shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order wholly releasing such lands from such contingent right, or disposing of the same to such person or persons as the said Lord Chancellor shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

5. When any lunatic or person of unsound mind shall be solely entitled to any stock or to any chose in action upon any trust or by way of mortgage, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting in any person or persons the right to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof; and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or chose in action upon any trust or by way of mortgage, it shall be lawful

13 & 14 Vict.  
c. 60, s. 3.

Trustee of unsound mind not found lunatic.  
Service.

Costs where mortgagee or his heir is a lunatic.

Where trustee a lunatic.

Contingent rights may be conveyed.

Lord Chancellor may transfer stock of lunatic trustees and mortgagees.

13 & 14 Vict.  
c. 61, s. 5.

for the said Lord Chancellor to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons, together with any other person or persons the said Lord Chancellor may appoint (1).

(1) The wife of a lunatic was sole surviving trustee of stock. An order was made, appointing new trustees in the place of the married woman and the deceased trustee, and vesting in the new trustees the right to transfer the stock. (*Re Wood*, 3 De G., F. & J. 125.)

Where one of the three executors of a surviving trustee of canal shares was of unsound mind, and the other two refused to act, an order was made vesting the right to transfer the shares in the persons beneficially entitled. (*Re White*, L. R., 5 Ch. 698.)

The court will not, under the act, make an order as to the retransfer of stock which has been transferred out of the names of the trustees. (*Re Stewart*, 8 W. R. 297.)

As to the effect of an order vesting the right to transfer stock, see sect. 26, *post*, and 15 & 16 Vict. c. 55, s. 6. Directions may be given as to how such a right is to be exercised. (Sect. 31, *post*.)

Vesting orders as to stock.

Where a person of unsound mind was entitled to a sum of stock, as to part as trustee, and as to the residue beneficially, an order was made vesting in new trustees a right to call for a transfer of the trust stock, and to receive the arrears of dividends. It was found that the Bank could not pay arrears of dividends on part of a sum of stock, and an order was therefore made enabling the new trustees to receive the arrears of dividends on the whole sum of stock, upon an undertaking to invest in the name of the old trustee the dividends to which he was entitled beneficially. (*Re Stewart*, 3 De G., F. & J. 1; as to the indivisibility of dividends, see also *Skyner v. Prichet*, 9 W. R. 191.) As to the form of an order vesting the right to transfer stock, see further the note to sect. 22, *post*.

As to the practice under the act in Lunacy, see note to sect. 3, *ante*.

Power to transfer stock of deceased person.

6. When any stock shall be standing in the name of any deceased person whose personal representative is a lunatic or person of unsound mind, or when any chose in action shall be vested in any lunatic or person of unsound mind as the personal representative of a deceased person, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action or any interest in respect thereof, in any person or persons he may appoint.

Court of Chancery may convey estates of infant trustees and mortgagors.

7. Where any infant shall be seised or possessed of any lands upon any trust or by way of mortgage, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the infant trustee or mortgagor had been twenty-one years of age, and had duly executed a conveyance or assignment of the lands in the same manner for the same estate (m).

Form of orders vesting real estate.

(m) It was at first doubted whether under this section real estate could be ordered to go to uses to bar dower in favour of the *cestui que trust* (*In re Howard's Estates*, 21 Law J., Ch. 437; 5 De G. & S. 435); but in a subsequent case an order was made under this act that the legal estate outstanding in a trustee should vest to uses to bar dower in favour of a purchaser.

(*Davey v. Miller*, 17 Jur. 908; 1 Sm. & G., App. xix.) And it is said that the same practice might be adopted under other sections, enabling the court to make vesting orders. (*Ex parte Grieve*, 5 De G. & S. 436, where the form of the order is stated: the court refused to insert a declaration against dower.)

13 & 14 Vict.  
c. 60, s. 7.

Where the executor and executrix (a married woman) of a mortgagee applied for a vesting order, the court instead of vesting the property in the executor and executrix, who was a feme covert, and who, in order to part with it, would have to acknowledge the deed, vested it in such person or persons as the executor and executrix should appoint, and, in default thereof, in the executor and executrix. (*Re Powell*, 4 Kay & J. 338.)

A petition was presented under this act for an order to vest the legal estate, which was outstanding, in the infant heir of an intestate mortgagee. The owner of the equity of redemption had devised it to his three daughters, charged with a legacy of 200*l*. The three daughters applied that the estate might be vested in them subject to the legacy, and the court made the order. (*In re Ellerthorpe*, 18 Jur. 669.)

An order vesting real estate should contain some description of the property intended to be comprised in it. (*Re Ord*, 3 W. R. 386.) See, further, as to the forms of order vesting real estate, the note to sect. 10 and sect. 34, *post*.

For forms of orders under this section, see Seton, 790.

Where a mortgagee died leaving an infant heir, and having given all his "securities for money" to his executrix, it was held that the legal estate passed to the executrix, and a vesting order was refused. (*Re King*, 5 De G. & S. 644.) See *Re Field*, 9 Hare, 414; *Knight v. Robinson*, 2 K. & J. 503. And as to where the legal estate in mortgaged property passes under a devise, see further *Re Finney*, 3 Giff. 465, *post*; *Re Stevens' Will*, L. R., 6 Eq. 597; *Martin v. Laverton*, L. R., 9 Eq. 563; Lewin on Trusts, 187.

Infant heir of mortgagee.

The infant heir of a person who has died intestate leaving real estate, which he had in his lifetime contracted to sell, is not a constructive trustee for the purchaser within this act, unless he has been declared to be so by a decree of the court. (*Re Carpenter*, Kay, 420.) But where a vendor dies before completion of a compulsory sale to a railway company, both an infant heir (*Re Russell's Estate*, W. N. 1866, p. 125) and an infant devisee (*Re Lowry's Estate*, L. R., 15 Eq. 78) are trustees within the act, and orders will be made on petition without bill filed.

Infant heir of vendor.

A mortgage in fee was made of real estate. The mortgagor died, having devised the estate to an infant. A claim of foreclosure was filed by the mortgagee against the infant, and an order for sale was made therein. A vesting order as to the equity of redemption in the infant, against whom the decree for sale had been made, was refused on the ground that the mortgagee had the legal estate, and that all equitable estates were bound by the order for sale. (*In re Williams' Estate*, 5 De G. & S. 515; 21 Law J., Ch. 437.)

Equitable estate of infant.

In the case of an infant tenant in tail, a vesting order under this act will, if the protector consents to it, bar all estates in remainder. (*Powell v. Matthews*, 1 Jur., N. S. 973; and see *Hargreaves v. Wright*, 1 W. R. 408; *Singleton v. Hopkins*, 4 W. R. 107.)

Infant tenant in tail.

A petition under this act for the appointment of a person to convey in the place of an infant heir of a deceased mortgagee, need not be served on the infant. (*Re Willan*, 9 W. R. 689; *Re Wise*, 5 De G. & Sm. 415.) Where a vendor died before executing the conveyance, the court held that service on his infant heir was necessary, and that a guardian must be appointed. (*Re Russell's Estate*, W. N. 1866, p. 125.) Service of a petition for vesting in newly-appointed trustees lands which had descended to the infant heir of the former sole trustee upon the guardian of the infant heir was held unnecessary. (*Re Little*, L. R., 7 Eq. 323; *Re Tweedy*, 9 W. R. 398.) But see *Re Cooper* (9 W. R. 531), where the court required the appointment of a guardian *ad litem*.

Service.

8. Where any infant shall be entitled to any contingent right in any lands upon any trust or by way of mortgage, it shall be

Contingent rights of infant trustees and mortgagees.

13 & 14 Vict.  
c. 60, s. 12.

the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right (*s*).

(*s*) For form of order under this section, see Seton, 792.

When it is uncertain which of several trustees was the survivor.

13. Where there shall have been two or more persons jointly seised or possessed of any lands upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*t*).

(*t*) For form of order under this section, see Seton, 792.

When it is uncertain whether the last trustee be living or dead.

14. Where any one or more person or persons shall have been seised or possessed of any lands upon any trust, and it shall not be known, as to the trustee last known to have been seised or possessed, whether he be living or dead, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate (*u*).

(*u*) For form of order under this section, see Seton, 792.

When trustee dies without an heir.

15. When any person seised (*x*) of any lands upon any trust shall have died intestate as to such lands without an heir, or shall have died and it shall not be known who is his heir or devisee, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the lands in the same manner for the same estate (*y*).

(*x*) From the use of the word "seised" it was inferred that this section does not apply to leaseholds. (*Re Mundel*, 8 W. R. 683.)

(*y*) In consideration of money lent, real estate was conveyed to the lender, his heirs and assigns, upon trust, in case the principal money and interest should be repaid by a given day, for the borrower, his heirs or assigns; but in case default should be made, then upon trusts for sale; and the trusts of the purchase-money were declared to be for payment of the principal money, interest and costs, and subject thereto for the borrower, "his executors, administrators or assigns." Default having been made: it was held, that the trust of the surplus being for the borrower, "his executors, administrators or assigns," and not for him, "his heirs or assigns;" the deed operated to convert the property as between his real and personal representatives. It was, therefore, more than merely a security for money, more, that is, than a "mortgage," as defined by the 2nd section of this act, it was a deed of "trust" within the meaning of this section; and the lender having died intestate, and it being impossible to find his heir, the court had power to make a vesting order under that section. (*Re Underwood*, 8 Kay & J. 745.)

Where a mortgagee with power of sale and a trust to pay the residue to the mortgagor took possession and so remained until his death, giving his estate generally to trustees but left no heir at law, the court refused to make a vesting order under the 9th or 19th sections of this act, but made an order under this section. (*Re Keeler*, 11 W. R. 62.)

18 & 14 Vict.  
c. 60, s. 15.

A bastard sold a reversionary interest in realty to which he was entitled under a will; the trustees of the will subsequently conveyed the legal estate to the bastard who died without children: an order was made under this act vesting the legal estate in the purchaser. (*Re Wilkinson's Trust*, 12 W. R. 522.)

For form of order under this section, see Seton, 798.

16. When any lands are subject to a contingent right in an unborn person or class of unborn persons who upon coming into existence would in respect thereof become seised or possessed of such lands upon any trust, it shall be lawful for the Court of Chancery to make an order which shall wholly release and discharge such lands from such contingent right in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would upon coming into existence be seised or possessed of in such lands (z).

Contingent right  
of unborn trustee.

(z) Orders have been made under this section, vesting in purchasers under a decree the rights and interests of unborn children (*Wake v. Wake*, 1 W. R. 283); and discharging in favour of purchasers the rights of unborn persons claiming under a settlement. (*Hargraves v. Wright*, 1 W. R. 408.)

17. Where any person jointly or solely seised or possessed of any lands upon any trust shall, after a demand by a person entitled to require a conveyance or assignment of such lands, or a duly authorized agent of such last-mentioned persons, have stated in writing that he will not convey or assign the same, or shall neglect or refuse to convey or assign such lands for the space of twenty-eight days next after a proper deed for conveying or assigning the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands in the same manner for the same estate (a).

Power to convey  
in place of a re-  
fusing trustee.  
(*Repealed.*)

(a) This and the following sections are repealed, and another provision substituted, by 15 & 16 Vict. c. 55, s. 2, *post*. See *Rowley v. Adams*, 14 Beav. 130, in which difficulties arose in the application of this section to copyholds.

18. Where any person jointly or solely entitled to a contingent right in any lands upon any trust shall, after a demand for a conveyance or release of such contingent right by a person entitled to require the same, or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey or release such contingent right, or shall neglect or

Power to convey  
in place of person  
entitled to con-  
tingent right.  
(*Repealed.*)



13 & 14 Vict.  
c. 60, s. 18.

refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct ; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right (b).

(b) This section is repealed by the 2nd section of 15 & 16 Vict. c. 55. See *post*.

Power to convey  
in place of mort-  
gagee.

19. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct ; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found :

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assigment of the lands in the same manner and for the same estate (c).

Application of  
section.

(c) This clause is not confined in its operation to a case of simple reconveyance to the mortgagor. Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the court may,

under this act, make an order vesting the legal estate in his executors. (*Boden's Trust*, 1 De G., M. & G. 57; 16 Jur. 279; 21 L. J., Ch. 316; 9 Hare, 820; see *Re Lea's Trust*, 6 W. R. 482.) And where the personal representative of a mortgagee assigns the mortgage, the heir of the mortgagee being out of the jurisdiction, the assignee may, under this section, obtain an order vesting the legal estate. (*Re Quinlan*, 9 Ir. Ch. R. 306.) But such an order will not be made except in the cases of sale or transfer. (*Re Hewitt*, 27 L. J., Ch. 302.)

13 & 14 Vict.  
c. 60, s. 19.

A testator, in 1860, after specifically devising certain lands, &c., not including in such devise any lands or hereditaments vested in him as mortgagee or trustee, gave all the residue of his real and personal estate unto all his nephews and nieces as tenants in common. It was held, on petition by the executors, that the trust and mortgage estates did not pass to the unascertained class, but to the heir at law as trustee; and the court directed the same to be vested in the executors upon the trusts of the will. (*Re Finney's Estate*, 3 Giff. 465.) See the cases quoted *ante*, p. 653.

This section only applies where the mortgagee has never been in possession or in receipt of the rents and profits of the mortgaged property. But where a mortgagee had been in receipt of the rents and profits, the court, under sect. 9, made an order vesting in her executors the legal estate outstanding in the heir at law who was out of the jurisdiction. (*Re Skitter's Mortgage Trust*, 4 W. R. 791; and see *Re Keeler*, *ante*, p. 657, under sect. 15.)

A bastard mortgagee, having devised her real estate in terms which did not pass the legal estate in the mortgaged premises, died without issue, and the money was subsequently paid off. The crown offering no opposition, an order was made vesting the legal estate in a purchaser. (*Re Minchin*, 2 W. R. 179.)

Bastard mortgagee.

Where the personal representative of a mortgagee sold the mortgaged property, the legal estate outstanding in the heir of the mortgagee was vested in the purchaser, without service being required on the heir of the mortgagee or the personal representative of the deceased mortgagor. (*Re Wise*, 5 De G. & Sm. 415.)

Service.

For form of order under this section, see Seton, 793.

20. In every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order having the effect of a conveyance or assignment of any lands, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act (*d*); and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be

Power to appoint a person to convey in certain cases.

13 & 14 Vict.  
c. 60, s. 18.

refuse to convey or release such contingent right for the space of twenty-eight days next after a proper deed for conveying or releasing the same shall have been tendered to him by any person entitled to require the same, or by a duly authorized agent of such last-mentioned person, it shall be lawful for the Court of Chancery to make an order releasing or disposing of such contingent right in such manner as it shall direct ; and the order shall have the same effect as if the trustee so neglecting or refusing had duly executed a conveyance so releasing or disposing of the contingent right (*b*).

(*b*) This section is repealed by the 2nd section of 15 & 16 Vict. c. 55. See *post*.

Power to convey  
in place of mort-  
gagee.

19. When any person to whom any lands have been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance of such lands, then in any of the following cases it shall be lawful for the Court of Chancery to make an order vesting such lands in such person or persons in such manner and for such estate as the said court shall direct ; that is to say,

When an heir or devisee of such mortgagee shall be out of the jurisdiction of the Court of Chancery, or cannot be found :

When an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such lands or a duly authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such lands shall have been tendered to him by a person entitled as aforesaid, or a duly authorized agent of such last-mentioned person :

When it shall be uncertain which of several devisees of such mortgagee was the survivor :

When it shall be uncertain as to the survivor of several devisees of such mortgagee, or as to the heir of such mortgagee whether he be living or dead :

When such mortgagee shall have died intestate as to such lands, and without an heir, or shall have died and it shall not be known who is his heir or devisee :

And the order of the said Court of Chancery made in any one of the foregoing cases shall have the same effect as if the heir or devisee or surviving devisee, as the case may be, had duly executed a conveyance or assignment of the lands in the same manner and for the same estate (*c*).

Application of  
section.

(*c*) This clause is not confined in its operation to a case of simple reconveyance to the mortgagor. Where a mortgagee in fee (who has never been in possession or in receipt of the rents and profits) has died intestate as to the mortgaged hereditaments, and his heir cannot be found, the court may,

the case may be, should it be deemed more convenient, to make an order appointing a person to convey or assign such lands, or release or dispose of such contingent right; and the conveyance or assignment, or release or disposition, of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect in conveying or assigning the lands, or releasing or disposing of the contingent right, as an order of the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, would in the particular case have had under the provisions of this act (*d*); and in every case where the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, shall, under the provisions of this act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of the Governor and Company of the Bank of England, or of any other company or society established or to be established, it shall also be

13 & 14 Vict.  
c. 60, s. 20.

lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, if it be deemed more convenient, to make an order directing the secretary, deputy secretary or accountant-general for the time being of the Governor and Company of the Bank of England, or any officer of such other company or society, at once to transfer or join in transferring the stock to the person or persons to be named in the order; and this act shall be a full and complete indemnity and discharge to the Governor and Company of the Bank of England, and all other companies or societies and their officers and servants, for all acts done or permitted to be done pursuant thereto (e).

Cases where  
person has been  
appointed to  
convey.

(d) Where real estate devised to married women and infants was sold under a decree in lots, the court appointed the plaintiff's solicitor to convey their shares to the several purchasers. (*Hancox v. Spittle*, 3 Sm. & Giff. 478; and see *Wilks v. Groom*, 6 De G., M. & G. 205, *ante*, p. 654.)

A vendor covenanted to surrender copyholds to the purchaser, but the deed contained no declaration that until surrender the vendor and his heirs would hold in trust for the purchaser. The purchase-money was paid; and the vendor died before surrender. The customary heir being of unsound mind, the court appointed a person to convey to the purchaser without a suit being instituted to have the heir declared a trustee. (*Re Cuming*, L. R., 5 Ch. 72.)

Person absolutely  
entitled to  
stock.

(e) Where stock was standing in the names of two trustees, who were both dead, the survivor having died intestate and being without a legal personal representative, a person absolutely entitled to the stock petitioned that it might be transferred directly into his own name. The court appointed the petitioner trustee of the fund for his own benefit, and ordered it to be transferred into his name. (*Re Dickson*, W. N. 1872, p. 223; 21 W. R. 220.)

A form of petition for an order appointing a person to convey lands, whereof a trustee died seised without an heir, is given, Dan. Ch. Forms, 2047. For forms of orders see the above cases, and Seton, 794; and as to the conveyance, see *Ex parte Foley*, 8 Sim. 395.

As to lands in  
Lancaster and  
Durham.

21. As to any lands situated within the duchy of Lancashire or the counties palatine of Lancaster or Durham, it shall be lawful for the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, to make a like order in the same cases as to any lands within the jurisdiction of the same courts respectively as the Court of Chancery has, under the provisions hereinbefore (f) contained, been enabled to make concerning any lands; and every such order of the Court of the Duchy Chamber of Lancaster, the Court of Chancery in the county palatine of Lancaster, or the Court of Chancery in the county palatine of Durham, shall, as to such lands, have the same effect as an order of the Court of Chancery: provided always, that no person who is anywhere within the limits of the jurisdiction of the High Court of Chancery shall be deemed by such local courts to be an absent trustee or mortgagee within the meaning of this act.

(f) The provisions of this act as well subsequent as prior to this section, and also the provisions of 15 & 16 Vict. c. 55, have been extended to lands and personal property in the county palatine of Lancaster. (17 & 18 Vict. c. 82, s. 11.) As to orders in lunacy see *Re Ormerod*, 3 De G. & J. 249, p. 668, *post*.

22. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the Court of Chancery (*g*), or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead (*h*) to any stock or chose in action upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said court may appoint; and when any sole trustee (*i*) of any stock or chose in action shall be out of the jurisdiction of the said court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in any person or persons the said court may appoint (*k*).

13 & 14 Vict.  
c. 60, s. 22.

When trustees of stock out of the jurisdiction.

(*g*) The husband of an executrix out of the jurisdiction was held to be a trustee within this section. (*Ex parte Bradshaw*, 2 De G., M. & G. 900.) Where a lunatic or infant trustee is also out of the jurisdiction, the case falls within the provisions applicable to the cases of lunacy and infancy. (*Re Cramer*, 5 De G. & Sm. 312; see *Re Smith's Trusts*, 1 R., 4 Eq. 180.)

Trustees out of jurisdiction.

Where a trustee of stock was absent from England in command of a merchant vessel on a voyage to India, it was held that he was not out of the jurisdiction within the meaning of 11 Geo. 4 & 1 Will. 4, c. 60. (*Hutchinson v. Stephens*, 5 Sim. 498.)

A debtor resident in India pledged shares held by him in a joint-stock banking company in England with a creditor in England, with an authority by letter to sell, which was communicated to and recognized by the banking company. The creditor, in exercise of the authority, sold the shares to a purchaser. Upon the petition of the purchaser, it was held, that the shares were "stock," and that the debtor in India, being a constructive trustee, was a trustee for the purchaser within this act, and the court made an order directing a specified person to transfer the shares to the petitioner. (*Re Angelo*, 5 De G. & S. 278.)

(*h*) Where stock was standing in the names of A. and B. as trustees for a lunatic, and A. had died long previously, but no proof upon which the bank would act could be furnished of his death, an order under this section was made upon B.'s death, appointing the bank's officer to concur with B.'s executor in transferring the stock into court. (*Re Bourke*, 2 De G., J. & S. 426.)

Death of trustee unprovable.

(*i*) It is said that the term "sole trustee" has a clear and definite meaning, and that it means a person originally a sole trustee or one who has become sole trustee by surviving. A. and B. being trustees, the Master found that it was uncertain whether A. was living or dead, but B. was living; afterwards B. died. It was held, that A. was not a sole trustee within the meaning of this section. (*Re Randall's Will*, 1 Drew. 401.)

Sole trustee.

(*k*) Bank stock was standing in the names of four trustees, one of whom was abroad and inaccessible. There being some inconvenience in removing him, the court, under this section, vested the right to receive the past and future dividends in the three other trustees during their joint lives. (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290.) See, however, as to future dividends, *Re Hartnall*, 5 De G. & Sm. 111, *post*.

Form of order.

It should appear on the face of the order that the trustee is out of the jurisdiction. (*Re Mainwaring*, 26 Beav. 172.) And see the form of order made under this section in *Coles v. Benbow*, W. N. 1873, p. 60, *post*, p. 682.



18 & 14 Vict.  
c. 60, s. 22.

Orders have been made under this section vesting the right to transfer stock in a *cestui que trust*, who was absolutely entitled. (*Ex parte Bradshaw*, 2 De G., M. & G. 900; *Re Ryan*, 9 W. R. 137; and see *Re White*, L. R., 5 Ch. 698. See *contra*, *Re Brass*, 4 W. R. 764; and *Re Dickson*, *ante*, p. 660.) For forms of orders, see Seton, 795—797.

When trustee of  
stock refuses to  
transfer.

23. Where any sole trustee (*l*) of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action, or any interest in respect thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto (*m*), it shall be lawful for the Court of Chancery to make an order vesting the sole right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*n*).

(*l*) Where stock was standing in the names of two trustees, both of whom refused to transfer, it was held that the 23rd and 24th sections did not apply. (*Re Spawforth's Settlement*, 12 W. R. 978.)

Request by  
persons absolutely  
entitled.

(*m*) The person entitled for life to the dividends of stock held in trust requested in writing two executors of a sole deceased trustee, in whose name the trust stock was standing in the bank books, to receive the dividends, and they made default for twenty-eight days in doing so. Upon the petition of the person entitled for life to the dividends, the court declared, that the right to receive the dividends which accrued due prior to such request was vested in the petitioner, but it was held, that the court had no authority to make any order as to any dividends accrued or to accrue subsequent to the date of the request. (*In re Hartnall*, 5 De G. & S. 111; 16 Jur. 33; 21 L. J., Chanc. 384.)

One of several trustees of stock is not a person absolutely entitled within the meaning of the 23rd and 24th sections of this act, nor is a *cestui que trust* who has only a life interest in the dividends, at least where the application is to transfer the stock. (*Mackenzie v. Mackenzie*, 5 De G. & Sm. 338; 16 Jur. 723.)

The surviving trustee of a sum of stock neglected for twenty-eight days after a request in writing had been made to him by persons who had been duly appointed new trustees to transfer the stock to them. The court held, that they were persons absolutely entitled to the stock within the meaning of this act, and ordered the stock to be transferred to them. (*Ex parte Russell*, 1 Sim., N. S. 404.) A trustee having refused to transfer certain shares to new trustees duly appointed, a notice was served upon him under sect. 24, and on a petition being afterwards presented the court made a vesting order. (*Re Baxter's Will*, 2 Sm. & G. App. v.) And where the executor of a surviving trustee had not proved the will, and had neglected to transfer stock on the requisition of new trustees appointed by the court, an order was made vesting the right to transfer stock in the new trustees. (*Re Ellis's Settlement*, 24 Beav. 426.)

Service.

(*n*) A petition under sects. 23 and 24 need not be served on the recusant trustee. (*Re Baxter's Will*, 2 Sm. & G. App. v.; *Ex parte Armstrong*, 16 Sim. 296; see *Re Mount*, 24 L. T., N. S. 290, *post*.)

The case of a trustee refusing to obey an order of the Court of Chancery was not provided for by this act. (*Mackenzie v. Mackenzie*, 5 De G. & Sm. 338.) See now 15 & 16 Vict. c. 55, ss. 4, 5, *post*.

The case of a trustee refusing or neglecting to convey lands is provided for by 15 & 16 Vict. c. 55, s. 2, *post*.

For forms of orders under this section, see Seton, 797, 798.

24. Where any one of the trustees of any stock or chose in action shall neglect or refuse to transfer such stock, or to receive the dividends or income thereof, or to sue for or recover such chose in action according to the directions of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him or her by such person, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, or to sue for and recover such chose in action, in the other trustee or trustees of the said stock or chose in action, or in any person or persons whom the said court may appoint jointly with such other trustee or trustees (o).

13 & 14 Vict.  
c. 60, s. 24.

When one of several trustees of stock refuses to transfer or receive and pay over dividends.

(o) Where two executors of a surviving trustee refused to transfer a trust fund to the persons absolutely entitled, and the third executor was a lunatic, it was held by *James, V.-C.*, that a vesting order could not be made under this section. (*Re Nicholl's Trusts*, 21 L. T., N. S. 818.) On appeal, *Giffard, L. J.*, held that a petition in lunacy must be presented, and expressed an opinion that even if the lunatic executor had been *sui juris*, a vesting order could not have been made by the Court of Chancery. (18 W. R. 443.) On a petition presented in lunacy and chancery, an order was subsequently made vesting the right to transfer the shares in the persons beneficially entitled. (*Re White*, L. R., 5 Ch. 698.) See further the note to sect. 23.

For forms of orders under this section, see Seton, 797, 798.

25. When any stock shall be standing in the sole name of a deceased person, and his or her personal representative shall be out of the jurisdiction of the Court of Chancery, or cannot be found, or it shall be uncertain whether such personal representative be living or dead, or such personal representative shall neglect or refuse to transfer such stock, or receive the dividends or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (p).

When stock is standing in the name of a deceased person.

(p) See *Re Ellis's Settlement*, quoted under sect. 23, *ante*, p. 662; and *Cockell v. Pugh*, 6 Beav. 293, *Re Lunn's Charity*, 15 Sim. 464, decided under 11 Geo. 4 & 1 Will. 4, c. 60. See also 15 & 16 Vict. c. 55, s. 6, *post*. For form of order, see Seton, 798.

26. Where any order shall have been made under any of the provisions of this act vesting the right to any stock (q) in any person or persons appointed by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names or otherwise, or relating to the receipt of the dividends thereof, to the extent and in conformity with the terms of such order; and the Bank of England, and all companies and asso-

Effect of an order vesting the legal right to transfer stock.

13 & 14 Vict.  
c. 60, s. 26.

ciations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order as the said Bank of England, or such companies, associations or persons, would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made; and after notice in writing of any such order of the Lord Chancellor, intrusted as aforesaid, or of the Court of Chancery, concerning any stock, shall have been given, it shall not be lawful for the Bank of England, or any company or association whatever, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made in any matter whatever relating to the transfer of such stock, or the payment of the dividends or produce thereof.

(*q*) See sect. 35, *post*. Where an order was made on petition, directing that the right to certain sums of stock should vest in new trustees appointed under the petition, and that this right should be exercised in obtaining transfers of the sums of stock into their own names, it was held, that in point of form the order should have vested in the trustees the "right to call for a transfer" of the stock. (*Re Smyth's Settlement*, 2 De G. & Sm. 781; 4 De G. & Sm. 499.) See now 15 & 16 Vict. c. 55, s. 6, *post*.

Effect of an  
order vesting  
legal right in a  
chase in action.

27. Where any order shall have been made under the provisions of this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the legal right to sue for or recover any chose in action or any interest in respect thereof in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence and prosecute, in his or their own name or names, any action, suit or other proceeding at law or in equity for the recovery of such chose in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such chose in action.

Effect of an order  
vesting copyhold  
lands, or appoint-  
ing any person to  
convey copyhold  
lands.

28. Whenssoever, under any of the provisions of this act, an order shall be made, either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, vesting any copyhold or customary lands in any person or persons, and such order shall be made with the consent of the lord or lady of the manor whereof such lands are holden, then the lands shall, without any surrender or admittance in respect thereof, vest accordingly (*s*): and whenever under any of the provisions of this act, an order shall be made either by the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, appointing any person or persons to convey or assign any copyhold or customary lands, it shall be lawful for such person or persons to do all acts and execute all instruments for the purpose of completing

the assurance of such lands ; and all such acts and instruments so done and executed shall have the same effect, and every lord and lady of the manor, and every other person, shall, subject to the customs of the manor and the usual payments, be equally bound and compellable to make admittance to such lands, and to do all other acts, for the purpose of completing the assurance thereof, as if the persons in whose place an appointment shall have been made, being free from any disability, had duly done and executed such acts and instruments (*t*).

13 & 14 Vict.  
c. 60, s. 28.

(*s*) An order vesting copyhold lands can be made without the consent of the lord. Thus, where a trustee of copyholds devised them to A. (not his customary heir), and A. disclaimed, the court, upon the petition of the *cestui que trusts*, which was not served on the lord, made an order appointing B. trustee in the place of the testator, and vesting in B. all the estate in the copyholds which would have vested in A., if A. had accepted the devise. It was held, that such an order was properly made without the consent of the lord, and did not prejudice his right to fines. (*Pater-son v. Paterson*, L. R., 2 Eq. 31; *Re Flitcroft*, 1 Jur., N. S. 418; *Re Hurst*, Seton, 799. See, however, *Cooper v. Jones*, 2 Jur., N. S. 59; 25 L. J., Ch. 240, and *Re Howard*, 3 W. R. 605.) Where such an order is made without the lord's consent, the person in whom the property is vested applies for admission as an ordinary surrenderee would have done. (Lewin, 765, n. (*a*)). See the remarks of *Bovill*, C. J., *Bristow v. Booth*, L. R., 5 C. P. 92.)

Order vesting copyholds without consent of lord.

Where a vesting order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord to appear in court ; a verified certificate of his consent is sufficient. (*Ayles v. Cox*, 17 Beav. 584. See *Cooper v. Jones*, 25 L. J., Ch. 240.) For form of consent and verifying affidavit, see Dan. Ch. Forms, 2052.

With consent of lord.

For form of order vesting copyholds, see Seton, 798; *Re Crome's Mortgage*, L. R., 13 Eq. 26.

(*t*) Where a person is appointed to convey copyholds, the person so appointed must surrender, and the surrenderee must be admitted. (Lewin, 765, n. (*a*)). The Court of Queen's Bench will give effect to such an order by a mandamus to the lord. (*Re Lane and Irving*, 12 W. R. 710.) Persons have been appointed to convey, in *Re Collingwood's Trusts*, 6 W. R. 536; *Re Cuming*, L. R., 5 Ch. 72. For form of order appointing a person to convey, see *Re Hey*, 9 Hare, 221.

Order appointing person to convey copyholds.

29. When a decree shall have been made by any court of equity directing the sale of any lands for the payment of the debts of a deceased person, every person seised or possessed of such lands, or entitled to a contingent right therein, as heir or under the will of such deceased debtor, shall be deemed to be so seised or possessed or entitled, as the case may be, upon a trust within the meaning of this act ; and the Court of Chancery is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person (*u*).

When a decree is made for sale of real estate for payment of debts.

(*u*) Where part of a testator's real estate had been contracted to be sold by order of the court, to provide a fund for payment of costs, it was held, that the 29th and 30th sections did not apply. (*Weston v. Filer*, 5 De G. & Sm. 608; 16 Jur. 1010.) This difficulty has been removed by 15 & 16 Vict. c. 55, s. 1, *post*. (See *Wake v. Wake*, 17 Jur. 545.)

Where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the debts of the testator, and an order was made in the cause, pursuant to the 1 Will. 4, c. 47, that

13 & 14 Vict.  
c. 60, s. 29.

the guardian of the infant should surrender them to the purchaser: it was held, that the purchaser was entitled to require that an order should be made discharging the contingent rights of the unborn issue of the infant under this section. (*Wood v. Beetlestone*, 1 Kay & J. 213.)

For forms of orders under this section, see Seton, 799, 800. Applications under this and the following section must be made in chambers. (Cona. Ord. XXXV. 1 (4); *Clark v. Ward*, 14 W.R. 241.) As to which, see Dan. Ch. Pr. 1175 *et seq.*, 5th ed.

Provisions for facilitating the conveyance of the lands of a deceased debtor, where a decree for sale has been made, are also contained in 11 Geo. 4 & 1 Will. 4, c. 47, ss. 11, 12, *ante*, pp. 472, 473.

Court to declare  
what parties are  
trustees of lands  
comprised in any  
suit, and as to  
the interests of  
persons unborn.

30. Where any decree shall be made by any court of equity for the specific performance (*x*) of a contract concerning any lands, or for the partition (*y*) or exchange of any lands, or generally when any decree shall be made for the conveyance or assignment of any lands (*z*), either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said court to declare, that any of the parties to the said suit wherein such decree is made are trustees of such lands or any part thereof, within the meaning of this act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased, who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this act, and thereupon it shall be lawful for the said Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, as the case may be, to make such order or orders as to the estates, rights and interests of such persons, born or unborn, as the said court or the said Lord Chancellor might under the provisions of this act make concerning the estates, rights and interests of trustees born or unborn (*a*).

Specific perform-  
ance.

(*x*) A donee of a power of jointuring under settlement was ordered, in a suit for specific performance instituted by his wife, to execute the power by a deed to be approved by the master, whereby 1,000*l.* per annum was to be appointed as the plaintiff's jointure. On his refusal to obey the decree, it was held, that under the Trustee Acts, 1850, 1852, he might be declared a trustee of all the rights, interests, estates and property acquired by him under the settlement, and the court appointed a person to execute the requisite deeds in his place under this act. (*Wellesley v. Wellesley*, 4 De G., M. & G. 537; 21 L. J., Ch. 966.)

Partition.

(*y*) In a partition suit, instead of giving an infant entitled to a share a day to show cause, the court may declare him to be a trustee of such parts of the property as are allotted to other parties. (*Borra v. Wright*, 4 De G. & Sm. 265.) Where in a suit for partition of lands, to which a lunatic was entitled to an undivided share, a partition had been made and the lunatic had been declared a trustee within this act: it was held, on a petition by the owner of the other undivided moiety, that the court had jurisdiction to carry out the petition by a vesting order under this act, notwithstanding the doubt (*Re Bloomer*, 2 De G. & J. 88) attributed to the court. (*Re Molyneux*, 10 W.R. 512.) And where a decree had been made for partition of lands, an undivided share in which was vested in a lunatic as tenant in tail, an order was made in lunacy and chancery directing the committee to execute all necessary assurances for giving effect to the partition. (*Re Sherard*, 1 De G., J. & S. 421.) Where the shares of the parties to a



partition suit were very minute and complicated, the court declared each of the parties trustees as to the shares allotted to the other of them, and vested the whole in a single trustee with directions to convey to each of the parties their allotted shares. (*Shepherd v. Churchill*, 25 Beav. 21. See form of order, *Ib.*, p. 28; and *Orger v. Sparke*, 9 W. R. 180.)

This section has been extended to cases where in suits for partition the court directs a sale instead of a division of the property. (31 & 32 Vict. c. 40, s. 7, *post.*)

(z) For an order in a foreclosure suit declaring the mortgagor a trustee for the mortgagee, see *Lechmere v. Clamp* and *Smith v. Boucher*, quoted *ante*, p. 654. Where a foreclosure suit was instituted against a mortgagor of unsound mind, an order was made vesting the property in the plaintiff as trustee for the purchaser, without a petition. (*Harrison v. Smith*, 17 W. R. 646.)

Foreclosure.

(a) In the case of sales of realty, where there is only a contract for sale, a suit is necessary to declare the vendor a trustee, but in the case of an executed contract a suit is not necessary. (*Re Cuming*, L. R., 5 Ch. 72, *ante*, p. 660.) As to the infant heir of a vendor, see the cases quoted *ante*, p. 653.

As to the case where a person, declared to be a trustee in a suit, refuses to convey land, see *Knight v. Knight* and *Derham v. Kiernan*, quoted in the note to 15 & 16 Vict. c. 55, s. 2, *post*, p. 681.

The court has declared persons to be constructive trustees of stock without suit. (*Re Angelo*, 5 De G. & Sm. 278, *ante*, p. 661; *Re Davis' Trusts*, L. R., 12 Eq. 214.)

For forms of orders under this section, see Seton, 799—803.

31. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, to make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act shall be exercised; and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this act are enforced (b).

Power to make directions how the right to transfer stock to be exercised.

(b) Under this section the court may order the person in whom the right to transfer stock is vested, to transfer it into court under the Trustee Relief Act. (*Re Draper's Settlement*, 9 W. R. 805; *Re Thornton*, 9 W. R. 475.)

For forms of orders under this section, see Seton, 795—797.

32. Whenever it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said Court of Chancery to make an order appointing a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees (c).

Power to court to make order appointing new trustees.

(c) The court has not jurisdiction under this act to take away the power of appointing new trustees from the donee of the power, where the donee is capable of exercising, and willing to exercise the power, although such donee may have disclosed an intention or desire to exercise his power corruptly. (*Re Hodson's Settlement*, 9 Hare, 118.) Where the donee of the power is a lunatic, the power may be exercised by the committee under an order in lunacy (16 & 17 Vict. c. 70, ss. 186, 137; *Re Bowmer*, 3 De G. & J. 658); and the Court of Chancery has also jurisdiction to make an appointment. (*Re Henphy*, 18 W. R. 1070; *Re Sparrow*, L. R., 5 Ch. 662.) The Master of the Rolls refused in such a case to appoint a new trustee, until a committee had been appointed and served with the petition.

Circumstances causing application to the court.  
(1.) Connected with the power.



13 & 14 Vict.  
c. 60, s. 82.

(*Re Parker's Trusts*, 22 Beav. 580.) Where the donee of the power was in India, the court appointed a new trustee. (*Re Humphry*, 1 Jur., N. S. 921.)

Where it was doubtful whether the power applied to the case which had occurred, the court appointed new trustees. (*Re Woodgate's Settlement*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper v. McDonald*, 14 W. R. 755.) See the further provisions as to powers of appointing new trustees in 23 & 24 Vict. c. 146, ss. 27, 28, *post*.

(3) Connected  
with the trustee.  
Lunacy.

The court will appoint a new trustee in the place of a person of unsound mind (*Re Boyce*, 12 W. R. 359; *Re Chaucery*, 14 W. R. 849); even where the instrument creating the trust contains a power which might without difficulty have been exercised (*Re Cooper*, 4 W. R. 729; *Re Davies*, 3 M. & G. 278). The jurisdiction in such a case, even where the person of unsound mind has not been found a lunatic by inquisition, belongs to the jurisdiction in lunacy (*Re Burton's Trusts*, 1 R., 6 Eq. 270), and, therefore, cannot be exercised by the Court of Chancery of Lancaster. (*Re Ormerod*, 3 Ld. G. & J. 249.) The petition may be presented in lunacy only. (15 & 16 Vict. c. 58, s. 10, *post*; *Re Owen*, L. R., 4 Ch. 782.)

Lunacy.

The court will appoint a new trustee in the place of an infant trustee nominated by a testator (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J., Ch. 482). But the order will be made without prejudice to any application by the infant to be restored to the trusteeship when he comes of age. (*Re Sheldersine*, 33 L. J., Ch. 474.)

Residence abroad.

The court has power under this section to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent. (*Re Bignold*, L. R., 7 Ch. 223.) Where a trustee was resident in Jamaica, but there was no evidence to show that he did not intend to return to this country, *Kindersley, V.-C.*, refused to appoint a new trustee. (*Re Mais*, 16 Jur. 608; 21 L. J., Ch. 875.) A bookseller domiciled in New York for several years was held "incapable of acting" within the words of a power (*Menaard v. Welford*, 1 Sm. & Giff. 426; but see *Re Bignold, sup.*) New trustees of a charity were to be appointed in lieu of those who should depart the United Kingdom from whatever cause or motive, or under whatsoever circumstances; and every such trustee so departing the United Kingdom was immediately, upon his departure, to be and be considered to be discharged from the trust of the charity. A temporary departure from the United Kingdom was held insufficient to vacate the office of trustee. (*Re Moravian Society*, 4 Jur., N. S. 703; 26 Beav. 101. See *Re Watts' Settlement*, 9 Hare, 106; *Re Harrison*, 1 W. R. 58.)

Where a trustee became bankrupt, never surrendered under the bankruptcy, absconded, and had not been heard of for several years, the court, on petition, appointed a new trustee in his place. (*Re Henshaw*, L. R., 4 Ch. 789.)

Bankruptcy.

Where a trustee becomes bankrupt, it is now enacted that this section shall have effect so as to authorize the court to appoint a new trustee in substitution for the bankrupt (whether voluntarily resigning or not), if it appears to the court expedient to do so. (32 & 33 Vict. c. 71, s. 117.) "The Court" means the Court of Chancery. (*Coomes v. Brookes*, L. R., 12 Eq. 61.) Trust property does not pass to the assignees of a bankrupt. (*Stoff v. Surman*, Willes, 402; *Gardner v. Rowe*, 2 S. & St. 346, 5 Russ. 268.)

Penalty.

Where a trustee is convicted of felony, the court can appoint a new trustee under 15 & 16 Vict. c. 58, s. 8, *post*. As to the sequestration of trust property, see note to sect. 46, *post*.

Surviving trustee  
dead intestate  
and no administra-  
tor.

In a case where the surviving trustee of a term of years was dead intestate, and no administration had been taken out to his estate, the court declined to appoint a new trustee, stating that this section only enables the court to appoint a new trustee or trustees "in substitution for or in addition to any existing trustee or trustees," and that the words "if any" in the 34th section did not enlarge this section. (*Re Hateldine*, 16 Jur. 553.) But under this section and 15 & 16 Vict. c. 58, s. 9 (*post*), a new trustee was appointed in such a case. (*Davis v. Hunter*, 6 W. R. 416.) And where the trust property consisted of leaseholds, a vesting order was made by Wood, V.-C.

(*Re Matthews*, 2 W. R. 85) and by the Master of the Rolls, who, however, considered that he had no jurisdiction to make such an order. (*Re Robinson*, 11 W. R. 1035.) A person absolutely entitled to stock was in such a case appointed trustee for his own benefit, and the stock was ordered to be transferred to him. (*Re Dickson*, W. N. 1872, p. 223, *ante*, p. 660.)

13 & 14 Vict.  
c. 60, s. 32.

Where there were no existing trustees, it was doubted whether under this act the court could appoint (see *Re Tyler*, 5 De G. & Sm. 56); but under 15 & 16 Vict. c. 55, s. 9, the court has power to appoint new trustees, whether there be any existing trustee or not at the time of making such order. Where a sole trustee of realty predeceased the testatrix, it was held that the court had no jurisdiction under 13 & 14 Vict. c. 60, in the absence of the heir to appoint a trustee, and to make an order vesting in him the real estate descended (*Gunson v. Simpson*, L. R., 5 Eq. 332); but an order was made where the heir was served. (*Re Smirthwaite*, L. R., 11 Eq. 251.)

No existing trustees.

Where no trustees were originally appointed by a testator, it was held that in an administration suit the court had inherent jurisdiction to appoint trustees. (*Dodkin v. Brunt*, L. R., 6 Eq. 580.) So where, upon petition under the Trustee Acts, certain persons were declared constructive trustees of stock, trustees were appointed in their place, although no trustees had been originally named by the testatrix. (*Re Davis's Trusts*, L. R., 12 Eq. 214.)

No trustees originally appointed.

Where stock, the subject of a suit, was standing in the name of an incorporate body which had ceased to exist, the court, by a decree intitled in the matter of this act, appointed trustees, and empowered and directed them to transfer the fund. (*King of Hanover v. Bank of England*, L. R., 8 Eq. 350.)

Where a trustee who had executed the deed creating the trust declined to act, the court refused to appoint a new trustee in his place without his consent. (*Re Gartz*, 10 L. T., N. S. 331.) Where trustees of a will were unwilling to act, the court appointed new trustees (*Re Sheppard*, 4 De G., F. & J. 423; 11 W. R. 60; *Re Martinez*, 22 L. T., N. S. 403); and it is sufficient that a disclaiming trustee should disclaim at the bar. (*Foster v. Damber*, 1 Dr. & Sm. 172.)

Trustees refusing to act.

Where a trustee misconducts himself, but is desirous of continuing in the trust, the court has not jurisdiction to remove him upon petition under 13 & 14 Vict. c. 60, s. 32. (*Re Blanchard*, 3 De G., F. & J. 131.) And even where the trustee was a solicitor, it was held that the trustee could not, under the summary jurisdiction of the court over solicitors, be removed against his will from the trust for acts done by him not in the character of solicitor, or in any relation immediately arising out of that character, but in the character of trustee. (*Ib.*)

Trustee will not be removed from the trust against his will upon petition.

To remove a trustee resident within the jurisdiction from the trust against his wish, a bill must be filed (*Re Blanchard*, 3 De G., F. & J. 131; *Re Bignold*, L. R., 7 Ch. 223); and the mere fact of there being a dissension between one of the several *cestui que trusts* and the trustee is not a sufficient ground for removal. (*Forster v. Davies*, 10 W. R. 180.) See further, Lewin, 604 *et seq.*

But where new trustees can be appointed on petition, a bill should not be filed. (*Thomas v. Walker*, 18 Beav. 521; *Legg v. Mackrell*, 2 De G., F. & J. 551.)

New trustees had been appointed under a power of trust property, comprising freehold, copyhold and leasehold estates, but the property remained vested in the representatives of a former trustee who had died abroad. A petition was presented for a vesting order under sect. 15 of this act, but the court made an order under sect. 32, re-appointing the trustees who had been already appointed under the power, and ordered that the trust estates should vest in such trustees under sect. 34. (*Re Mundel*, 6 Jur., N. S. 880; 8 W. R. 683; *Re Clay*, W. N. 1873, p. 129.)

Trustees already appointed re-appointed, and vesting order made.

Where the trustees of a will are dead, and there is a question as to the party in whom the legal estate is vested, the court will appoint new trustees, notwithstanding that a receiver has been appointed in the suit, and continue the receiver. (*Reeves v. Nerille*, 10 W. R. 335.)

Where receiver had been appointed.

13 & 14 Vict.  
c. 60, s. 32.

Principles on  
which new  
trustees are  
selected.

Who will be  
appointed.

Number of  
trustees ap-  
pointed.

Trustees of a  
bankrupt's estate.

Severance of  
trusts.

Court will not  
inquire into the  
validity of the  
instrument  
creating the  
trust.

Evidence on  
petition for  
appointment of  
new trustees.

In selecting a new trustee, the court will have regard to the wishes of the author of the trust expressed in or clearly collected from the instrument creating the trust. A person will not be appointed with a view to the interest of some of the *cestui que trusts* in opposition to the interest of others. The court will have regard to the question whether the appointment will promote or impede the execution of the trust; but the mere fact of the continuing trustee refusing to act with the proposed trustee is not sufficient to prevent the appointment. (*Re Tempest*, L. R., 1 Ch. 485.)

The court will not in general appoint a *cestui que trust* to be a trustee. (*Re Roskell*, Seton, 824; *Re Conybeare*, 1 W. R. 458; *Ex parte Clutton*, 17 Jur. 988.) But where the trusts were complicated, and a stranger could not be found, a *cestui que trust* was appointed. (*Re Clissold's Settlement*, 10 L. T., N. S. 642.) The husband of a *cestui que trust* was appointed on undertaking to apply for the appointment of an additional trustee as soon as he became sole trustee. (*Re Hattatt*, 18 W. R. 416. See *Wilding v. Bolder*, 21 Beav. 224.) Where one of two proposed new trustees of a will was an unmarried lady of independent property, and not exercising any calling, the court made the appointment. (*Re Campbell's Trusts*, 31 Beav. 176. But see *Brook v. Brook*, 1 Beav. 531.) Persons resident out of the jurisdiction will not in general be appointed (*Re Guibert*, 16 Jur. 852); but have been appointed under special circumstances. (*Re Curtis*, 1. R., 5 Eq. 429.) Upon petition under 22 & 23 Vict. c. 35, s. 30 (*post*), the court refused to sanction the appointment of trustees resident in New Zealand. (*Re Long*, 17 W. R. 218. But see *Re Smith*, 20 W. R. 695, where an appointment of trustees resident in Canada was sanctioned.) As to aliens, see further the note to sect. 34, *post*.

Two trustees of real estate were appointed by the court in the place of one on a petition under this act (*Ex parte Tunstall*, 4 De G. & S. 421); Vice-Chancellor Kindersley observing, "That trust property ought, if possible, to be prevented from coming into the hands of a sole trustee" (See *Re Welsh*, 3 My. & Cr. 292; *Birch v. Cropper*, 2 De G. & S. 255; *Plenty v. West*, 16 Beav. 356); and new trustees have been added to the original trustees. (*Re Boycott*, 5 W. R. 15; *Grant v. Grant*, 34 L. J., Ch. 641; *Re Brackenbury*, L. R., 10 Eq. 43.) The court will not in general diminish the number of the trustees; but, under special circumstances, two have been appointed in place of three. (*Re Marriott*, 18 L. T., N. S. 749; *Bulkeley v. Earl of Eglinton*, 1 Jur., N. S. 994; *Re Steel*, 54 Law Times, W. N. 478.) And where a trustee wishes to retire and a successor cannot be found, the continuing trustees may be appointed sole trustees. (*Re Stokes*, L. R., 13 Eq. 333.) But the court will not appoint a sole trustee (*Ellison's Trusts*, 2 Jur., N. S. 62; *Porter's Trusts*, *ib.* 349; *Re Dickinson*, 1 Jur., N. S. 724; and see *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 20); except under very special circumstances. (*Re Reynault*, 16 Jur. 283.)

The court has under the Trustee Acts appointed new trustees, where the trustee appointed by creditors to wind up the estate and effects of a bankrupt under 24 & 25 Vict. c. 132, had died (*Re Raphael's Trust Estate*, L. R., 9 Eq. 233); and also, where the trustees of a trust deed, registered under 24 & 25 Vict. c. 134, had all died, and there was no power in the deed of appointing new trustees. (*Re Price's Trust Deed*, L. R., 6 Eq. 460.)

Where by the same will different estates were vested in same trustees upon different trusts, and all the trustees had died, the court, with the consent of the representatives of the surviving trustee, appointed new trustees of one estate only without dealing with the other. (*Re Dennis*, 12 W. R. 575.) Separate trustees have been appointed of a share of a fund. (*Re Cotterill*, W. N. 1869, p. 183; *Re Anderson*, 55 Law Times, W. N. 119.)

Upon an application for the appointment of new trustees, the court will not enter into the question of the validity of the instrument creating the trust. (*Re Matthews*, 26 Beav. 463.)

A petition by a tenant for life for a vesting order to vest property in a new trustee, appointed in the place of a trustee out of the jurisdiction, must be served on the remainderman. It must be proved by affidavit

(*inter alia*), that the event has occurred in which the power could be exercised, and that the proposed trustee is a fit and proper person. (*In re Maynard's Settlement*, 16 Jur. 1084.) An affidavit by the solicitor is not proper evidence of the fitness of the new trustee. (*Grundy v. Buckridge*, 17 Jur. 731; 22 L. J., Ch. 1007.) On petition for the appointment of new trustees under this act, it was asked that the parties named in the petition might be appointed trustees without a reference to the master. Upon an affidavit of their fitness the order was made, but the court required the written consent of the parties proposed to be appointed trustees. (*Re Battersby's Trust*, 16 Jur. 900.) In general the proposed trustees should not appear by counsel. (*Re Draper*, 2 W. R. 440; see *Re Parker*, 21 L. T. 218.)

13 & 14 Vict.  
c. 60, s. 32.

As to fitness of  
proposed trustees.

As to their con-  
sent to act.

In the case of a vesting order, the beneficial title to the property may be proved by the affidavit of a person acquainted with the facts (*Re Hoskins*, 4 De G. & J. 436); but the legal title must be strictly proved. (Dan. Ch. Pr. 1825, 5th ed.)

As to the title to  
the property.

On a petition to appoint new trustees in the place of two who were advanced in age and desirous of retiring, both the old trustees and all the *cestui que trusts* were required to appear. (*Re Sloper*, 18 Beav. 596.) New trustees were appointed on petition in a cause, without requiring service on the heir of the surviving trustee. (*Purvis v. Abraham*, W. N. 1866, p. 126.) The general rule is, that all the *cestui que trusts* must be served or join in the application. (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur., N. S. 62; as to infants, see *Re Fellows (ib.)*; and *Re Young*, 21 L. T., N. S. 556.) But where the parties are numerous, some of the *cestui que trusts* may be represented by others. (*Re Smyth*, 2 De G. & Sm. 781; *Re Blanchard*, 3 De G., F. & J. 131; *Re Sharpley*, 1 W. R. 271.)

Service.

A form of petition for the appointment of new trustees, and for an order vesting lands, the right to call for a transfer of stock, and the right to sue for choses in action is given in Dan. Ch. Forms, 2048. For forms of orders, see Seton, 804—807.

Forms of petition  
and orders.

33. The person or persons who, upon the making of such order as last aforesaid, shall be trustee or trustees, shall have all the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted (*d*).

The new trustees  
to have the  
powers of trustees  
appointed by de-  
cree in suit.

(*d*) See 23 & 24 Vict. c. 45, s. 27, *post*.

34. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to direct that any lands subject to the trust shall vest in the person or persons who upon the appointment shall be the trustee or trustees for such estate as the court shall direct; and such order shall have the same effect as if the person or persons who before such order were the trustee or trustees (if any) had duly executed all proper conveyances and assignments of such lands for such estate (*e*).

Power to court to  
vest lands in  
new trustees.

(*e*) Where the executors of a mortgagee, pursuant to an order in a suit, had transferred the mortgage debt to trustees of a certain settlement, the court, on a petition under this act, said that the trustees of the settlement were, under the circumstances, new trustees of the mortgage, and vested the land in them subject to the equity of redemption. (*Re Hughes*, 2 H. & M. 695.)

The court has authority to make a vesting order under this act, though there may exist a person capable of executing a conveyance of the trust property to the persons appointed trustees by the court. Vesting orders have only been refused where the facts of the particular case rendered it improper to make such an order. (*Re Manning's Trusts*, Kay, App. xxviii.)

Orders vesting  
real estate.

By an order under this act real estate was inadvertently vested in an alien. The court declined varying the order by inserting the name of a

18 & 14 Vict.  
c. 60, s. 34.

natural-born subject without the consent of the crown : but the order was made upon a rehearing, before office found, the crown raising no objection. (*Re Girard*, 32 Beav. 385; see *Re Martinez*, 22 L. T., N. S. 403, *post.*) As to the capacity of an alien to hold and dispose of real property, see now 33 & 34 Vict. c. 14, s. 2; and as to the appointment of foreigners to be trustees, see the note to sect. 32, *ante*.

Leaseholds have been vested in new trustees. (*Re Matthews*, 2 W. R. 85; *Re Mundel*, 8 W. R. 683; but see *Re Robinson*, 11 W. R. 1035.)

Where new facts arise immediately after the making of a vesting order, see, as to the practice, *Re Havelock*, 14 W. R. 26, 174.

In a suit to appoint new trustees, it appeared that of the two remaining trustees of a marriage settlement, one had gone out of the jurisdiction and the other was willing to act. It was held, (overruling *Watts' Settlement*, 9 Hare, 106; and *Re Plyer*, 9 Hare, 220,) that an order would be made vesting the estate in the continuing trustee, and the new trustees as joint tenants, for such estate as was vested in the continuing and the absent trustees. (*Smith v. Smith*, 3 Drew. 72; see *Re Marquis of Bute's Will*, Johns. 15, quoted *ante*, p. 655.)

For forms of orders, see Seton, 804—806.

Power to court  
to vest right to  
sue at law in new  
trustees.

35. It shall be lawful for the said Court of Chancery, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock subject to the trust, or to receive the dividends or income thereof, or to sue for or recover any chose in action, subject to the trust, or any interest in respect thereof, in the person or persons who upon the appointment shall be the trustee or trustees (*f*).

(*f*) See *Re Smyth's Settlement*, 4 De G. & S. 499; 15 & 16 Vict. c. 55, s. 6, *post.* An order was made under this section, vesting in a trustee appointed by the court the right to transfer stock standing in the name of a testator who had no legal personal representative. (*Re Herbert*, 8 W. R. 272.)

Old trustees not  
to be discharged  
from liability.

36. Any such appointment by the court of new trustees, and any such conveyance, assignment, or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Who may apply.

37. An order, under any of the hereinbefore-contained provisions, for the appointment of a new trustee or trustees, or concerning any lands, stock or chose in action subject to a trust, may be made upon the application of any person beneficially interested in such lands, stock or chose in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and that an order under any of the provisions hereinbefore contained concerning any lands, stock or chose in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage (*g*).

(*g*) Where three executors and trustees of a naturalized British subject renounced probate and declined to act, the court, on the petition of the administrator and the persons who would (if not aliens) have been co-heirs,



appointed new trustees and vested the real estate in them, the crown not opposing. (*Re Martinez*, 22 L. T., N. S. 403.)

13 & 14 Vict.  
c. 60, s. 37.

A person who has a contingent interest in real estate may present a petition for the appointment of new trustees. (*Re Sheppard*, 4 De G., F. & J. 423.) Where there are infants *cestui que trusts*, it is not sufficient that the adult *cestui que trusts* should be petitioners; the infants (by their next friend) should join. (*Re Fellows*, 2 Jur., N. S. 62.) A lunatic *cestui que trust* should petition (by his next friend); an order will not be made on the petition of the committee alone. (*Re Bourke*, 2 De G., J. & S. 426.) In the case of a lunatic mortgagee, the petition should be presented by the committee. (*Re Wheeler*, 1 De G., M. & G. 434.)

Infants.

Lunatics.

Creditors who have obtained a decree for the administration of the estate of their debtor, under which a contract for sale of his real estate has been entered into, may apply for a vesting order. (*Re Wragg*, 1 De G., J. & S. 356.) And where a decree for sale had been made, it was held that a petition was properly presented by a purchaser whose money was in court. (*Ayles v. Cox*, 17 Beav. 584; *Gough v. Bage*, 25 L. T., N. S. 738.) Three purchasers of different lots were allowed to join in one petition. (*Roxley v. Adams*, 14 Beav. 130.)

Creditors who  
have obtained  
decree.

Purchasers under  
decree.

38. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, either from the Lord Chancellor, intrusted as aforesaid, or from the Court of Chancery, it shall be lawful for him to exhibit before any one of the masters of the High Court of Chancery a statement of the facts whereon such order is sought to be obtained, and adduce evidence in support thereof; and if such evidence shall be satisfactory to the said master, he shall, at the request of the person adducing such evidence, give a certificate under his hand of the several material facts found by him to be true, and of his opinion that such person is entitled to an order in the form set forth in such certificate (*h*).

Power to go  
before the master  
in the first  
instance.

(*h*) See *Collinson v. Collinson*, 3 De G., M. & G. 409. The office of Master in Chancery has been abolished by 15 & 16 Vict. c. 80, s. 1.

39. Any person who shall have obtained such certificate may apply by motion to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for an order to the effect set forth in such certificate, or for such other order as such person may deem himself entitled to upon the facts found by the master.

Power to apply  
to the court or  
the Lord Chan-  
cellor.

40. Any person or persons entitled in manner aforesaid to apply for an order from the said Court of Chancery, or from the Lord Chancellor, intrusted as aforesaid, may, should he think fit, present a petition in the first instance to the Court of Chancery, or to the Lord Chancellor, intrusted as aforesaid, for such order as he may deem himself entitled to, and may give evidence by affidavit or otherwise in support of such petition before the said court, or the Lord Chancellor, intrusted as aforesaid, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof (*i*).

Power to present  
petition in the  
first instance.

(*i*) As to service in the case of lunatic trustees and mortgagees, see note to sect. 3, *ante*, p. 651; and in the case of infant trustees and mortgagees, see note to sect. 7, *ante*, p. 653. As to service on the mortgagor where a vesting order is asked, see *Re Wise*, 5 De G. & Sm. 415, *ante*, p. 659, and *Re Crowe's Mortgage*, L. R., 13 Eq. 26, *post*: on an incumbrancer,



13 & 14 Vict.  
c. 60, s. 40.

What may be  
done upon peti-  
tion.

Court may dis-  
miss petition  
with or without  
costs.

Power to make  
an order in a  
cause.

Orders made by  
the Court of  
Chancery,  
founded on cer-  
tain allegations,  
to be conclusive  
evidence of the  
matter contained  
in such allega-  
tions.

see *Re Winteringham's Trust*, 3 W. R. 578, *post*: on recusant trustees, see note to sect. 23, *ante*, p. 662: on the lord of a manor, see note to sect. 28, *ante*, p. 665. And as to service in the case of a petition to appoint new trustees, see note to sect. 32, *ante*, p. 671.

41. Upon the hearing of any such motion or petition it shall be lawful for the said court, or for the said Lord Chancellor, should it be deemed necessary, to direct a reference to one of the masters in ordinary of the Court of Chancery to inquire into any facts which require such an investigation, or it shall be lawful for the said court or for the said Lord Chancellor to direct such motion or petition to stand over, to enable the petitioner or petitioners to adduce evidence or further evidence before the said court, or before the said Lord Chancellor, or to enable notice or any further notice of such motion or petition to be served upon any person or persons.

42. Upon the hearing of any such motion or petition, whether any certificate or report from a master shall have been obtained or not, it shall be lawful for the court, or the Lord Chancellor, intrusted as aforesaid, to dismiss such motion or petition, with or without costs, or to make an order thereupon in conformity with the provisions of this act.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by a report of one of the masters of the Court of Chancery, the facts necessary for an order under this act shall appear to such court to be sufficiently proved, it shall be lawful for the said court, either upon the hearing of the said cause, or of any petition or motion in the said cause or matter, to make such order under this act (*j*).

(*j*) An order under this act may be made in a cause without a petition. (*Wood v. Beetlestone*, 1 Kay & J. 213; *Lechmere v. Clamp*, 30 Beav. 218; *Hooper v. Strutton*, 12 W. R. 867; *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19; *Harrison v. Smith*, 17 W. R. 646.) A petition in a cause should be intitled in the matter of the act as well as in the cause. (*Gough v. Bage*, 25 L. T., N. S. 738.)

An order has been made under 15 & 16 Vict. c. 55, s. 4, upon motion. (*Re Holbrook*, 8 W. R. 3, *post*.) Where property is vested in a lunatic, a petition in lunacy is necessary. (*Jeffryes v. Drysdale*, 9 W. R. 428.)

44. Whenever any order shall be made under this act, either by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, for the purpose of conveying or assigning any lands, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the Court of Chancery or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died and it is not known who is his heir or devisee, then in any

of such cases the fact that the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, has made an order upon such an allegation, shall be conclusive evidence of the matter so alleged in any court of law or equity upon any question as to the legal validity of the order: provided always, that nothing herein contained shall prevent the Court of Chancery directing a re-conveyance or re-assignment of any lands conveyed or assigned by any order under this act, or a re-disposition of any contingent right conveyed or disposed of by such order; and it shall be lawful for the said court to direct any of the parties to any suit concerning such lands or contingent right to pay any costs occasioned by the order under this act, when the same shall appear to have been improperly obtained.

13 & 14 Vict.  
c. 60, s. 44.

45. It shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery; to exercise the powers herein conferred for the purpose of vesting any lands, stock or chose in action, in the trustee or trustees of any charity or society over which charity or society the said Court of Chancery would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court of Chancery, or by order made upon a petition to the said court under any statute authorizing the said court to make an order to that effect in a summary way upon petition (*k*).

Trustees of  
charities.

(*k*) The 28th section of the Charitable Trusts Act (16 & 17 Vict. c. 137), confers on the Master of the Rolls and the Vice-Chancellors at chambers the same jurisdiction as they would have exercised before the passing of that act in a suit regularly instituted or upon petition. New trustees having been appointed under that act by the Vice-Chancellor, and the surviving trustee being a lunatic, it is competent for the Vice-Chancellor in chambers to make the vesting order under the Trustee Acts, 1850 and 1852. (*Re Davenport's Charity*, 4 De G., M. & G. 839.)

46. No lands, stock, or chose in action, vested in any person upon any trust or by way of mortgage, or any profits thereof, shall escheat or be forfeited to her Majesty, her heirs or successors, or to any corporation, lord or lady of a manor, or other person, by reason of the attainder or conviction for any offence of such trustee or mortgagee, but shall remain in such trustee or mortgagee, or survive to his or her co-trustee, or descend or vest in his or her representative, as if no such attainder or conviction had taken place (*l*).

No escheat of  
property held  
upon trust or  
mortgage.

(*l*) This section is the same as the 3rd section of 4 & 5 Will. 4, c. 23.

On a petition under that act, praying that the court would appoint a person to transfer certain funds standing in the name of Mr. Fauntleroy as trustee, and which had been forfeited to the crown by his attainder, and also to authorize the Bank to make the transfer accordingly; it was decided that the proper reference would be to inquire and state whether he was a trustee within the meaning of the 4 & 5 Will. 4, c. 23, and also within the meaning of 11 Geo. 4 & 1 Will. 4, c. 60. (*Anon.*, 13 L. J. 73.) An order was made under 4 & 5 Will. 4, c. 23, s. 3, for a reference to inquire whether a person convicted of felony in the year 1822 was a trustee of stock standing in his name for the petitioner, and whether any grant thereof had been made by the crown: it was held not necessary to serve the attorney-general on

References under  
this section.

13 & 14 Vict.  
c. 60, s. 46.

Evidence of no  
grant from crown.

behalf of the crown with notice of the application to the court. (*Re Tyson*, 1 Jur. 281.) In the case of a mere naked trustee, having the legal estate vested in him, the lands do not escheat, but the Court of Chancery, under the provisions of stat. 4 & 5 Will. 4, c. 23, had power to appoint a new trustee in the place of a felon, and all the interests of such felon will become vested in the new trustees. (*Ex parte Tyson*, 1 Jur. 472, cited 3 Y. & Coll. 344.) The affidavit of one of the clerks of the treasury, that he had searched the registry of grants in the office of the Secretary of State, and had found no grant by the crown of the estate of a trustee who had been convicted of forgery, was held sufficient evidence of the non-existence of that grant. (*Ex parte Tyson*, 1 Jur. 472.)

It had been considered that when land or personal property was vested in several trustees, one of whom was attainted, the whole, at least as to chattels, became forfeited to the crown, inasmuch as the crown could not be a joint tenant with any other person. (Co. Litt. 190 a; *Hales v. Petit*, Plowd. 257; 9 Rep. 129 b; 2 Bl. Com. 409; Cro. Eliz. 263; Finch's Law, 178; 10 Mod. 245.)

Power is now given to the court to appoint new trustees in lieu of any joint or sole trustee who has been or shall be convicted of felony. (15 & 16 Vict. c. 55, s. 8, *post*.)

Act not to pre-  
vent escheat or  
forfeiture of bene-  
ficial interest.

47. Nothing contained in this act shall prevent the escheat or forfeiture of any lands or personal estate vested in any such trustee or mortgagee, so far as relates to any beneficial interest therein of any such trustee or mortgagee, but such lands or personal estate, so far as relates to any such beneficial interest, shall be recoverable in the same manner as if this act had not passed (*m*).

(*m*) By 33 & 34 Vict. c. 23, s. 1, it is enacted, that from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony or *felo de se* shall cause any attainder or corruption of blood, or any forfeiture or escheat, but nothing in the act is to affect the law of forfeiture consequent on outlawry. The crown is empowered to appoint an administrator, in whom the convict's property vests (Sects. 9, 10), and provision is made as to the mode in which the property is to be applied. (33 & 34 Vict. c. 23, ss. 12—18.)

Money of infants  
and persons of  
unsound mind to  
be paid into court.

48. Where any infant or person of unsound mind shall be entitled to any money payable in discharge of any lands, stock or chose in action, conveyed, assigned, or transferred under this act, it shall be lawful for the person by whom such money is payable to pay the same into the Bank of England, in the name and with the privity of the accountant-general (*n*), in trust in any cause then depending concerning such money, or, if there shall be no such cause, to the credit of such infant or person of unsound mind, subject to the order or disposition of the said court; and it shall be lawful for the said court, upon petition in a summary way, to order any money so paid to be invested in the public funds, and to order payment or distribution thereof, or payment of the dividends thereof, as to the said court shall seem reasonable; and every cashier of the Bank of England who shall receive any such money is hereby required to give to the person paying the same a receipt for such money, and such receipt shall be an effectual discharge for the money therein respectively expressed to have been received.

(*n*) These words are to be construed as if the paymaster-general, for the time being, were here named. (35 & 36 Vict. c. 44, s. 6.) As to

paying money into court, and investing money paid into court, see the **Chancery Funds Rules, 1872** (L. R., 7 Ch. xxxv); and the Practice under them by Field and Dunn, pp. 12, 24.

13 & 14 Vict.  
c. 60, s. 49.

**49.** Where, in any suit commenced or to be commenced in the Court of Chancery, it shall be made to appear to the court by affidavit that diligent search and inquiry has been made after any person made a defendant, who is only a trustee, to serve him with the process of the court, and that he cannot be found, it shall be lawful for the said court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the court, and had appeared and filed his answer thereto, and had also appeared by his counsel and solicitor at the hearing of such cause: provided always, that no such decree shall bind, affect, or in anywise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators, for or in respect of any estate, right or interest which such person shall have at the time of making such decree for his own use and benefit, or otherwise than as a trustee as aforesaid (*o*).

Court may make a decree in the absence of a trustee.

(*o*) The court will order the clerk of records and writs to certify that a cause is fit to be set down, where a defendant trustee who has not entered an appearance cannot be found. (*Westhead v. Sale*, 6 W. R. 52; *Burrell v. Maxwell*, 25 L. T., N. S. 655.)

**50.** When any person shall, under the provisions of this act, apply to one of the masters of the Court of Chancery in the first instance, and adduce evidence for the purpose of obtaining the certificate of such master as a foundation for an order of the said Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, it shall be lawful for the said master to order service of such application upon any person, or to dismiss such application, and to direct that the costs of any persons consequent thereon shall be paid by the person making the same; and all orders of the master under this act shall be enforced by the same process as orders of the court made in any suit against a party thereto.

Powers of the master.

**51.** The Lord Chancellor, intrusted as aforesaid, and the Court of Chancery, may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments, and transfers to be made in pursuance of this act, or any of them, to be paid and raised out of or from the lands or personal estate, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Lord Chancellor or court shall think proper (*p*).

Costs may be paid out of the estate.

(*p*) Under a power in a settlement of real estate, a new trustee was duly appointed in the place of a sole trustee deceased. The heir of the deceased trustee could not be found, and on petition an order was made to vest the estate in the new trustee, and that upon consent he might pay the costs of the proceedings, and that such costs with interest at 4l. per cent.

Mode of raising costs.

13 & 14 Vict.  
c. 60, s. 51.

might form a charge on the inheritance. (*Ex parte Davies*, 16 Jur. 882.)

Trustees were authorized to raise the costs of an appointment of new trustees by a mortgage of the realty of which the trust estate entirely consisted. (*Re Crabtree*, 14 W. R. 497.)

On the appointment of new trustees of two trust funds, the costs will be paid out of each fund in proportion to the value of the funds. (*Re Grant's Trusts*, 2 Johns. & H. 754.)

Costs by whom  
payable.

If the application be solely for the benefit of a life tenant, he will pay the costs; but the costs of an application for the general benefit of the estate, such as the appointment of new trustees, should be defrayed out of corpus, and as between solicitor and client. (Seton, 817, quoting *Re Parby*, 29 L. T. 72; *Carter v. Sebright*, 26 Beav. 374.) Where a legacy had been bequeathed to a sole trustee upon trust for a tenant for life and then for reversioners absolutely, the costs of a petition by the reversioners for the appointment of an additional trustee were ordered to be paid by the petitioner. (*Re Brackenbury's Trusts*, L. R., 10 Eq. 45.)

Where two petitions for the appointment of new trustees of the same will were presented on the same day by different beneficiaries, but the earlier one only prayed a reference to chambers to make the appointment, while the later one proposed the appointment of two persons whose fitness was proved in the usual way; *Bacon*, V.-C., appointed the two persons proposed, and directed that the costs of the second petition only should be borne by the estate. (*Re Pring*, 55 Law Times, W. N. 27.)

Costs against re-  
spondents.

Upon a petition under this act for the appointment of a new trustee, the court has no jurisdiction to award costs adversely against third parties cited to appear as respondents to the petition. (*Re Primrose*, 23 Beav. 590.) But where a respondent introduced unnecessary charges into his affidavit, he was ordered to pay the costs of such charges. (*Re Willis*, 12 W. R. 97.) And where a trustee improperly opposed a petition for the appointment of new trustees, he was ordered to pay his own costs of the opposition, and the costs occasioned to the other parties by his opposition were deducted from the costs payable to the trustee. (*Re Wiseman*, 18 W. R. 574.)

Between vendor  
and purchaser.

As between vendor and purchaser, the costs of proceedings under this act should be paid by the vendor. (*Bradley v. Muntion*, 16 Beav. 294; *Ayles v. Cox*, 17 Beav. 584.)

As to the costs of proceedings under this act occasioned by the lunacy of a trustee, or of a mortgagee or his heir, see the note to sect. 3, *ante*, p. 651.

Commission con-  
cerning person of  
unsound mind.

52. Upon any petition being presented under this act to the Lord Chancellor, intrusted as aforesaid, concerning a person of unsound mind, it shall be lawful for the said Lord Chancellor, should he so think fit, to direct that a commission in the nature of a writ de lunatico inquirendo shall issue concerning such person, and to postpone making any order upon such petition until a return shall have been made to such commission (*q*).

(*q*) As to the order for inquiry and proceedings thereon, see Elmer, Pr. Lun. 10 *et seq.*, 2nd edit.

Suit may be  
directed.

53. Upon any petition under this act being presented to the Lord Chancellor, intrusted as aforesaid, or to the Court of Chancery, it shall be lawful for the said Lord Chancellor or the said Court of Chancery to postpone making any order upon such petition until the right of the petitioner or petitioners shall have been declared in a suit duly instituted for that purpose (*r*).

(*r*) Two partners in a brewery, part of the property of which consisted of freehold and copyhold estates, covenanted that the survivor should have

the option of purchasing the share of the deceased partner in the property of the partnership at a valuation, and the survivor accordingly exercised such option, and paid to the executors of the deceased partner the amount at which the share was valued. The share of the deceased partner and his legal estate in part of the freehold and copyhold estates of the partnership descended or became vested in his infant heir: but the court refused upon petition or motion under this act, without suit, to declare the infant heir a trustee for the surviving partner. (*Re Burt*, 9 Hare, 289.) In *Re Carpenter*, Kay, 418, *Wood*, V.-C., refused to make an order without suit. Suits were directed in *Re Collinson*, 3 De G., M. & G. 409; *Re Weeding*, 4 Jur., N. S. 707.

13 & 14 Vict.  
c. 60, s. 53.

54. The powers and authorities given by this act to the Court of Chancery in England shall extend to all lands and personal estate within the dominions, plantations, and colonies belonging to her Majesty (except Scotland) (s).

Powers of Court of Chancery to extend to property in the colonies.

(s) The Lord Chancellor of Great Britain sitting in lunacy has not a concurrent jurisdiction over lands in Ireland. (*Re Davies*, 3 Mac. & G. 278.) But vesting orders have been made by the English Court of Chancery as to lands in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt*, W. N. 1870, p. 25), and in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T., N. S. 336).

The provisions of the Trustee Acts have been extended to the private property of the sovereign in England and Ireland. (25 & 26 Vict. c. 87, s. 10.)

55. The powers and authorities given by this act to the Court of Chancery in England shall and may be exercised in like manner, and are hereby given and extended to the Court of Chancery in Ireland with respect to all lands and personal estate in Ireland.

Powers given to Court of Chancery may be exercised by that court in Ireland.

56. The powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall extend to all lands and personal estate within any of the dominions, plantations, and colonies belonging to her Majesty (except Scotland and Ireland).

Powers of Lord Chancellor in lunacy to extend to property in the colonies.

57. The powers and authorities given by this act to the Lord Chancellor of Great Britain, intrusted as aforesaid, shall and may be exercised in like manner by and are hereby given to the Lord Chancellor of Ireland, intrusted as aforesaid, with respect to all lands and personal estate in Ireland (t).

Powers of Lord Chancellor in lunacy may be exercised by Lord Chancellor of Ireland.

(t) See *Re Smith's Trusts*, I. R., 4 Eq. 180.

58. In citing this act in other acts of parliament, and in legal instruments, and in legal proceedings, it shall be sufficient to use the expression, "The Trustee Act, 1850."

Short title.

59. This act shall come into operation on the first day of November, one thousand eight hundred and fifty.

Commencement of act.

60. This act may be amended or repealed by any act to be passed in this session of parliament.

Act may be amended, &c.



## THE TRUSTEE ACT EXTENSION.

15 & 16 VICTORIA, c. 55.

*An Act to extend the Provisions of "The Trustee Act, 1850."*  
[30th June, 1852.]

15 & 16 Vict.  
c. 55, s. 1.

Court of Chancery  
may make an  
order for vesting  
the estate in lieu  
of conveyance by  
a party to the suit  
after a decree or  
order for sale.

WHEREAS it is expedient to extend the provisions of the Trustee Act, 1850: be it therefore enacted,

1. When any decree or order shall have been made by any court of equity directing the sale of any lands for any purpose whatever, every person seised or possessed of such land, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or, being otherwise bound by such decree or order, shall be deemed to be so seised or possessed or entitled (as the case may be) upon a trust within the meaning of the Trustee Act, 1850; and in every such case it shall be lawful for the Court of Chancery, if the said court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such lands or any part thereof, for such estate as the court shall think fit, either in any purchaser or in such other person as the court shall direct; and every such order shall have the same effect as if such person so seised or possessed or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such lands for such estate (*a*).

(*a*) Where a sale has been ordered by decree of property, in which infant and possible unborn children are interested, though such decree was made before the passing of this act, and though the purpose of the sale is not confined to the payment of debts, the court has authority under the Trustee Act, 1850, and this act taken together to make a vesting order. (*Wake v. Wake*, 17 Jur. 545.)

See further the note to 13 & 14 Vict. c. 60, s. 29, *ante*, p. 665.

Power to make an  
order for vesting  
the estate, on  
refusal or neglect  
of a trustee to  
convey or release.

2. That sections numbered seventeen and eighteen in the Queen's printer's copy of the Trustee Act, 1850, be repealed; and in every case where any person is or shall be jointly or solely seised or possessed of any lands or entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance or assignment of such lands, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey or assign the same, or to release such contingent right, it shall be lawful for the Court of Chancery, if the said court shall be

satisfied that such trustee has wilfully refused or neglected to convey or assign the said lands for the space of twenty-eight days after such demand, to make an order vesting such lands in such person, in such manner and for such estate as the court shall direct, or releasing such contingent right in such manner as the court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance or assignment of the lands, or a release of such right, in the same manner and for the same estate (b).

15 & 16 Vict.  
c. 55, s. 2.

(b) An order has been made under this section to defeat an attempt at extortion on the part of the trustee. (*Re O'Donnell's Trust*, 19 W. R. 522.) Cases under this section.

By a decree in a suit A. was declared a trustee of leaseholds for the plaintiff, and ordered to assign the premises to her, but he refused to execute the deed. Notice of motion for an order directing A. to execute the deed within four days, or for a vesting order, was served on A., who did not appear. The motion having stood over for twenty-eight days, a vesting order was made under this section on an *ex parte* application. (*Knight v. Knight*, W. N. 1866, p. 114.) And where the defendant had been declared a trustee for the purpose of executing a lease to the plaintiff, and neglected to do so for twenty-eight days after formal demand, an order was made that on the consideration money being brought into court, the chief clerk should execute the lease. (*Derham v. Kiernan*, I. R., 5 Eq. 217.) See also *Warrender v. Foster*, Seton, 822.

Where a mortgagor covenanted to surrender copyholds to his mortgagee, and neglected to make such surrender for twenty-eight days after demand and tender of engrossment by mortgagee, a vesting order was made on the petition of the mortgagee, without service on the mortgagor being required. (*Re Crowe's Mortgage*, L. R., 13 Eq. 26.) See also, as to the instrument to be tendered in the case of copyholds, *Rowley v. Adams*, 14 Beav. 130.

An order vesting lands, which were subject to an annuity, was made under this section, without requiring service on the annuitant. (*Re Winteringham's Trust*, 3 W. R. 578.)

The case of trustees refusing or neglecting to transfer stock is provided for by 13 & 14 Vict. c. 60, ss. 23, 24.

For form of order under this section, see Seton, 809.

3. When any infant shall be solely entitled to any stock upon any trust, it shall be lawful for the Court of Chancery to make an order vesting in any person or persons the right to transfer such stock, or to receive the dividends or income thereof; and when any infant shall be entitled jointly with any other person or persons to any stock upon any trust, it shall be lawful for the said court to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, either in the person or persons jointly entitled with the infant, or in him or them, together with any other person or persons the said court may appoint (c).

Power to make an order for the transfer or receipt of dividends of stock in name of an infant trustee.

(c) This section of the act is supposed to have been introduced in consequence of the decision, that the court had no jurisdiction to make a vesting order with regard to stock held by an infant sole trustee, who was out of the jurisdiction of the court. (*Cramer v. Cramer*, 5 De G. & S. 312.)

Where a father transferred stock into the joint names of himself, his wife and an infant child, and the evidence showed that no trust was intended, and that the transfer was made under a mistake, the court declared the infant a trustee for the father and made an order under this section.

15 & 16 Vict.  
c. 55, s. 3.

(*Deroy v. Deroy*, 3 Sm. & Giff. 403; followed in *Stone v. Stone*, 3 Jur., N. S. 708.)

Where stock was standing in the names of three trustees and an infant, and two trustees were dead, and the third was out of the jurisdiction, the court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian during the minority. (*Re Morgan*, Seton, 825.)

Under this section an infant was declared a trustee of stock standing in his own name, and to which he was absolutely entitled in order to obtain payment of dividends to his guardian (*Re Westwood*, 6 N. R. 61), but this order was subsequently discharged and an order under 1 Will. 4, c. 65, s. 32, substituted. (6 N. R. 316.)

H., sole trustee of money for A. and an infant, invested it in stock in the joint names of himself and the infant. After the death of H. and A., a suit was instituted in which an order was made as follows:—It appearing that the executors of H. were jointly entitled with the infant to the fund upon a trust within the meaning of the act, the court ordered that the right to call for a transfer should vest in the executors of H. for the purpose of transferring the fund into court. (*Sanders v. Homer*, 25 Beav. 467.)

Where money, in which infants were beneficially interested, was by mistake invested in their names in consols, the court upon a bill filed by executors, who were entitled to the control of the money, declared the infants trustees for the plaintiffs, and directed a vesting order. (*Rives v. Rives*, W. N. 1866, p. 144.)

For forms of orders under this section, see Seton, 795, 796.

On neglect to transfer stock for twenty-eight days, order may be made vesting right to transfer in such person as the court shall appoint.

4. Where any person shall neglect or refuse to transfer any stock, or to receive the dividends or income thereof, or to sue for or recover any chose in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting all the right of such person to transfer such stock or to receive the dividends or income thereof, or to sue for and recover such chose in action, or any interest in respect thereof, in such person or persons as the said court may appoint (*d*).

(*d*) See sect. 23 of Trustee Act, 1850, and note, *ante*, p. 662. An order under this or the following section must not deal with a larger subject-matter than the previous order which it proposes to enforce. (*Skynner v. Pelichet*, 9 W. R. 191.)

A petition for a preliminary order under this section need not be served upon the trustee. (*Re Mount*, 24 L. T., N. S. 290.)

An order under this section has been made upon motion. (*Re Holbrook's Will*, 8 W. R. 8.)

Stock in which the plaintiff was interested was standing in the joint names of A. and B., defendants, and A. not appearing at the hearing, was directed, within seven days after service of the decree upon the solicitor of the defendants, to transfer the stock into court. The decree was served upon the solicitor, but the stock was not transferred, and an order was made upon motion vesting the right to transfer in the defendant's solicitor. The bank objected that there was nothing in the order to show that the court intended service upon his solicitor to be good service upon A. within the meaning of this section, and an order was ultimately made under 13 & 14 Vict. c. 60, s. 22, stating that A. was out of the jurisdiction, or could not be found, and appointing the officer of the bank to transfer the stock. (*Coles v. Benbow*, W. N. 1873, p. 60.)

For forms of orders under this section, see Seton, 810, 811.

5. When any stock shall be standing in the sole name of a deceased person, and his personal representative shall refuse or neglect to transfer such stock or receive the dividends or income thereof for the space of twenty-eight days next after an order of the Court of Chancery for that purpose shall have been served upon him, it shall be lawful for the Court of Chancery to make an order vesting the right to transfer such stock, or to receive the dividends or income thereof, in any person or persons whom the said court may appoint (e).

15 & 16 Vict.  
c. 55, s. 5.

On like neglect by executor, similar order may be made.

(e) See sect. 25 of the Trustee Act, 1850, *ante*, p. 663, n.  
For form of order under this section, see Seton, 798.

6. When any order, being or purporting to be under this act, or under the Trustee Act, 1850, shall be made by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, vesting the right to any stock, or vesting the right to transfer any stock, or vesting the right to call for the transfer of any stock, in any person or persons, in every such case the legal right to transfer such stock shall vest accordingly; and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers of attorney, and to perform all acts relating to the transfer of such stock into his or their own name or names, or otherwise, to the extent and in conformity with the terms of the order; and the Bank of England, and all companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as the said Bank of England, or such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made (f).

Bank of England and companies to comply with such orders.

(f) This provision appears to have been introduced in consequence of the case, *Re Smyth's Settlement*, 4 De G. & S. 499, *ante*, p. 664.

7. Every order made or to be made, being or purporting to be made under this or the Trustee Act, 1850, by the Lord Chancellor, intrusted as aforesaid, or by the Court of Chancery, and duly passed and entered, shall be a complete indemnity to the Bank of England, and all companies and associations whatsoever, and all persons, for any act done pursuant thereto; and it shall not be necessary for the Bank of England, or such company or association, or person, to inquire concerning the propriety of such order, or whether the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery, had jurisdiction to make the same.

Indemnity to bank and companies so obeying.

8. When any person is or shall be jointly or solely seised or possessed of any lands or entitled to any stock upon any trust, and such person has been or shall be convicted of felony, it shall be lawful for the Court of Chancery, upon proof of such conviction, to appoint any person to be a trustee in the place of such convict, and to make an order for vesting such lands, or

Power to appoint new trustees in lieu of persons convicted of felony.

15 & 16 Vict.  
c. 55, s. 8.

the right to transfer such stock, and to receive the dividends or income thereof, in such person to be so appointed trustee; and such order shall have the same effect as to lands as if the convict trustee had been free from any disability, and had duly executed a conveyance or assignment of his estate and interest in the same (*g*).

(*g*) See 13 & 14 Vict. c. 60, s. 46 (*ante*, p. 675), as to the escheat of trust property; and 13 & 14 Vict. c. 60, s. 32 (*ante*, p. 667), as to the appointment of new trustees.

Power to the court to appoint new trustees where there is no existing trustee.

9. In all cases where it shall be expedient to appoint a new trustee, and it shall be found inexpedient, difficult or impracticable so to do without the assistance of the Court of Chancery, it shall be lawful for the said court to make an order appointing a new trustee or new trustees whether there be any existing trustee or not at the time of making such order (*h*).

(*h*) See the note to 13 & 14 Vict. c. 60, s. 32, *ante*, p. 669.

Chancellor may make orders for appointment of trustees, without it being necessary that it should be made in Chancery, &c.

10. In every case in which the Lord Chancellor, intrusted as aforesaid, has jurisdiction under this act, or the Trustee Act, 1850, to order a conveyance or transfer of land or stock, or to make a vesting order, it shall be lawful for him also to make an order appointing a new trustee or new trustees, in like manner as the Court of Chancery may do in like cases, without its being necessary that the order should be made in chancery as well as in lunacy, or be passed and entered by the registrar of the Court of Chancery (*i*).

(*i*) Where a petition is presented under the Trustee Acts, 1850 and 1852, for the appointment of new trustees in the place of trustees, some of whom are dead and the survivor a person of unsound mind, not so found by inquisition, the petition may be presented in lunacy only, and not in chancery. (*Re Owen*, L. R., 4 Ch. 782. See *Re Boyce*, 12 W. R. 359, where Lord Westbury made an order in lunacy and in chancery.)

As to powers of persons intrusted with the care of lunatics.

11. All the jurisdiction conferred by this act on the Lord Chancellor, intrusted by virtue of the Queen's sign manual with the care of the persons and estates of lunatics, shall and may be had, exercised and performed by the person or persons for the time being intrusted as aforesaid (*k*).

(*k*) See 15 & 16 Vict. c. 87, s. 15, *ante*, p. 650.

Act to be construed as part of Trustee Act, 1850.

12. This act shall be read and construed according to the definition and interpretations contained in the second section of the Trustee Act, 1850, and the provisions of the said last-mentioned act (except so far as the same are altered by or inconsistent with this act) shall extend and apply to the cases provided for by this act, in the same way as if this act had been incorporated with and had formed part of the said Trustee Act, 1850 (*l*).

(*l*) See *ante*, pp. 647—649.

All orders made under Trustee Act, 1850, or this

13. Every order to be made under the Trustee Act, 1850, or this act, which shall have the effect of a conveyance or assign-

ment of any lands, or a transfer of any such stock as can only be transferred by stamped deed, shall be chargeable with the like amount of stamp duty as it would have been chargeable with if it had been a deed executed by the person or persons seised or possessed of such lands, or entitled to such stock; and every such order shall be duly stamped for denoting the payment of the said duty (*m*).

15 & 16 Vict.  
c. 55, s. 13.

act to be chargeable with the same stamp duty as deeds of conveyance.

(*m*) The Commissioners of Inland Revenue have intimated to the chancery registrars that in their opinion the following descriptions of orders made under the Trustee Acts are chargeable, under 33 & 34 Vict. c. 97, with the following duties:—(1) Order appointing new trustees, one stamp of 10s.; (2) Order appointing new trustees, and vesting in them the right to transfer stock, one stamp of 10s.; (3) Order appointing new trustees, and vesting land in them, two stamps of 10s. each; (4) Order appointing new trustees, and vesting in them the right to sue for choses in action, two stamps of 10s. each. When the choses in action are in the nature of a mortgage, bond, debenture, covenant, or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment, and the total amount thereby secured is under 2,000*l.*, an *ad valorem* stamp at the rate of sixpence per 100*l.* is to be substituted for the second stamp of 10s. (33 & 34 Vict. c. 97, sched. tit. "Mortgage," par. 3). In no case where new trustees are appointed, and a vesting order made, are more than two 10s. stamps required. No stamp is required in respect of any order merely vesting the right to call for a transfer of and to transfer any stock. (Registrar's Notice, March, 1871. W. N. 1871, Pt. 2, p. 112.)



## LEASES AND SALES OF SETTLED ESTATES.

19 &amp; 20 VICTORIA, c. 120.

*An Act to facilitate Leases and Sales of Settled Estates (a).*  
[29th July, 1856.]

19 & 20 Vict.  
c. 120, s. 1.

WHEREAS it is expedient that the Court of Chancery should have power in certain cases to authorize leases and sales of settled estates where it shall deem that such leases or sales would be proper and consistent with a due regard for the interests of all parties entitled under the settlement; and it is also expedient that persons in possession of land for certain limited interests should have power to grant agricultural or occupation leases thereof, at rack rent, for a reasonable period: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, as follows:

(a) See Smith's Ch. Pr., pp. 1128—1139, 7th ed.

Interpretation of  
certain terms.

1. The word "settlement," as used in this act, shall signify any act of parliament, deed, agreement, copy of court roll, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons, by way of succession (b), including any such instruments affecting the estates of any one or more of such persons exclusively; and the term "settled estates," as used in this act, shall signify all hereditaments of any tenure, and all estates or interests in any such hereditaments which are the subject of a settlement; and for the purposes of this act a tenant in tail after possibility of issue extinct shall be deemed to be a tenant for life.

Settled estates  
within the act.

(b) It was held by *Stuart*, V.-C., that the interest which may arise by way of accruer, is a limitation "by way of succession" within this act (*Re Goodwin*, 3 Giff. 620); but where there was a limitation in a will to trustees upon trust for such children of A. as should attain twenty-one, and if but one who should attain twenty-one, the whole to such one, with trusts for maintenance and a gift over, it was held by *Kindersley*, V.-C., that this was not a limitation "by way of succession" within the act (*Re Bardin*, 7 W. R. 711); and this decision was affirmed. (*Re Burdin*, 5 Jur., N. S. 1878.)

A testator devised his real estate, and bequeathed the residue of his personal estate to trustees upon trust, at their discretion, to sell the real estate, and convert the personalty and invest the proceeds, and pay the income to his wife during her widowhood, for the maintenance of his

children during their minorities; and upon the death or marriage of his wife, the fund and the income thereof were to be in trust for his children absolutely in equal shares. It was held, that this was a settled estate within the act. (*Re Laing*, L. R., 1 Eq. 416; *Re Greene*, 10 Jur., N. S. 1098; *Collett v. Collett*, L. R., 2 Eq. 203.)

19 & 20 Vict.  
c. 120, s. 1.

Land was vested in a trustee upon trust during the joint lives of the husband and wife, for the separate use of the wife without power of anticipation; and after her death, if she should predecease her husband, in trust for her appointees by will, and in default, in trust for the person or persons whom she should leave her heir or co-heirs at law, and the heirs and assigns of such person or persons respectively; but if she should survive her husband, in trust for her appointees by deed or will, and in default upon the trusts declared in the event of her predeceasing her husband without having appointed. It was held, that these limitations constituted a settlement within the act. (*Beioley v. Carter*, L. R., 4 Ch. 230.)

Where a testator devised an estate to trustees in fee upon trust to let and manage it during the life of his wife and the minority of any of his children, and to pay a moiety of the net rents to his wife for life, and subject thereto in trust for his children in fee in equal shares, it was held, that the entirety of the estate was a settled estate within the act. (*Re Shephard*, L. R., 8 Eq. 571.) It seems that if an undivided share of an estate is settled, the entirety is a settled estate within the act. (*Ib.*)

Where parties absolutely entitled under a settlement joined with parties whose interests were still contingent, in a petition under this act, the court made an order for the sale of the whole property. (*Re Goodwin*, 3 Giff. 620.)

As to estates in remainder and reversion not disposed of by the settlement, and reverting to a settlor or descending to the heir of a testator, see 21 & 22 Vict. c. 77, s. 1, *post*.

In determining the question what are settled estates within the act, it was doubtful to what period reference must be had. (*Re Goodwin*, 3 Giff. 620; *Re Birtle*, 11 W. R. 739.) It is now laid down that the question must be determined with reference to the time of the settlement taking effect. (27 & 28 Vict. c. 45, s. 3, *post*.)

2. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases (*c*) of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed:

Power to Court of Chancery to authorize leases of settled estates, subject to certain conditions.

First, every such lease shall be made to take effect in possession (*d*) at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease twenty-one years, for a mining lease (*e*) or a lease of water, water-mills, wayleaves, waterleaves, or other rights or easements, forty years, and for a building lease (*f*) ninety-nine years, or where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant building leases for longer terms, then for such term as the court shall direct (*g*):

Secondly, on every such lease shall be reserved the best rent (*h*) or reservation in the nature of rent, either uni-

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form or not, that can be reasonably obtained, to be made payable half-yearly, or oftener, without taking any fine or other benefit in the nature of a fine :

Thirdly, where the lease is of any earth, coal, stone or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned ; namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate, or by virtue of any declaration in the settlement, is entitled to work such earth, coal, stone or mineral for his own benefit, one-fourth part of such rent, and otherwise, three-fourth parts thereof ; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise, as the court shall deem expedient :

Fourthly, no such lease shall authorize the felling of any trees, except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations or other works authorized by the lease :

Fifthly, every such lease shall be by deed, and the lessee shall execute a counterpart thereof ; and every such lease shall contain a condition for re-entry on non-payment of the rent for a period not less than twenty-eight days after it becomes due.

(c) As to the power of the court to authorize leases of infants' estates, see 11 Geo. 4 & 1 Will. 4, c. 65; Dan. Ch. Pr. 1917 *et seq.*; and as to the powers of lords of settled manors to give licences to their copyhold or customary tenants to grant leases, see 21 & 22 Vict. c. 77, s. 3, *post*.

(d) Where an existing lease was surrendered, and an underlease granted by the surrendering lessee was unexpired, it was held that a new lease might be granted, and that such lease would take effect in possession within the meaning of this section. (*Re Ford*, L. R., 8 Eq. 309.)

(e) Where a mining lease is granted under the act, the lease may include the use of contiguous lands necessary for the effective working of the minerals. (*Re Reveley*, 11 W. R. 744.)

(f) The term "building lease" includes a repairing lease for a term not exceeding sixty years. (21 & 22 Vict. c. 77, s. 2, *post*.)

(g) The trustees of a dissenting chapel at St. Helen's, in the county of Lancaster, presented a petition, praying that power to grant building leases of property in that place, for any term not exceeding 600 years, might be vested in them. Sir J. Romilly, M. R., on proof that it was customary to grant building leases for 999 years of land in that neighbourhood, authorized the endorsement of a power to grant such leases for 600 years on the deed declaring the trusts of the dissenting chapel. (*Re Cross's Charity*, 27 Beav. 592.) The court authorized the granting of building leases of settled estates for 999 years or at fee farm rent, upon evidence that, according to the custom of the country, that was the mode of disposing of property for building purposes, and that it could not be beneficially disposed of for such purposes on any other terms. (*Re Carr*, 7 Jur., N. S. 1267; 6 W. R. 776.) And see 21 & 22 Vict. c. 77, s. 4, *post*.

(h) Under sect. 5 (*post*), existing leases may be surrendered, and new leases of the property surrendered may be granted. In estimating the "best rent" in sect. 2, the value of the lease surrendered may be taken into account. (*Re Rawlins*, L. R., 1 Eq. 286.)

A testator in his lifetime entered into contracts for leases of parts of his

estate for building purposes. The contracts provided for granting separate leases of the houses when built, apportioning the whole ground rent among some of them, and leaving the rest to be demised at a peppercorn rent. He devised the estate in strict settlement, without any power under which the leases could be granted: it was held, that this act could not safely be resorted to for granting these leases. The court granted leave to the petitioners to apply to parliament for a private act. (*Cust v. Middleton*, 3 De G., F. & J. 33.)

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c. 120, s. 2.

3. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise.

Leases may contain special covenants.

4. The power to authorize leases conferred by this act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Parts of settled estates may be leased.

5. Any leases granted under this act may be surrendered, either for the purpose of obtaining a renewal of the same or not; and the power to authorize leases conferred by this act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease (*i*).

Leases may be surrendered and renewed.

(*i*) This section is extended to all leases, whether granted in pursuance of this act or otherwise. (21 & 22 Vict. c. 77, s. 5, *post*.) And see as to this section, *Re Rawlins*, L. R., 1 Eq. 286 (*sup*).

6. The power to authorize leases conferred by this act shall extend to authorize preliminary contracts to grant any such leases; and any of the terms of such contracts may be varied in the leases (*k*).

Power to authorize leases to extend to preliminary contracts.

(*k*) For form of order approving an agreement to grant a particular lease, see Seton, 532.

7. The power to authorize leases conferred by this act may be exercised by the court, either by approving of particular leases, or by ordering that powers of leasing, in conformity with the provisions of this act, shall be vested in trustees in manner hereinafter mentioned (*l*).

Mode in which leases may be authorized.

(*l*) For form of order to grant a particular lease, see Seton, 532.

8. When application is made to the court, either to approve of a particular lease, or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized.

What evidence to be produced on an application to authorize leases.

9. When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to ope-

After approval of a lease, court to direct who shall be the lessor.

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c. 120, s. 10.

Powers of leasing  
may be vested in  
trustees.

Conditions re-  
quiring leases to  
be settled in  
chambers, or made  
conformable with  
model lease.

Wayleaves.

General power re-  
fused where all  
parties did not  
consent.

Court may autho-  
rize sales of set-

rate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct.

10. Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to this act should be vested in trustees, it may by order vest any such power accordingly, either in the existing trustees of the settlement or in any other persons; and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power (*m*), and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

(*m*) In orders under this section no condition shall be inserted requiring that the leases shall be settled by the court, or made conformable with a model lease, except the parties desire or there is some special reason. And such conditions already inserted may be struck out by the court. (27 & 28 Vict. c. 45, s. 12, *post*.) See *Re Hoyle*, 12 W. R. 1125; *Re Dorning*, 14 W. R. 125, there quoted.

Before this act it was decided that leases to be granted by trustees under this act must be settled in the judge's chamber. (*Re Procter*, 5 W. R. 645; and see *Re Jones*, 5 W. R. 643; *Re Earl Jersey*, 9 W. R. 609.)

It was also decided that a model lease would, in cases where expense might thus be saved, be directed to be settled and adopted for each lease, without the necessity of applying to chambers in every case. (*Re Hemingway*, 7 W. R. 279; 33 Law T. 103, where the following order was made:—"It is ordered, that general powers of leasing the estates in the petition mentioned, subject to the provisions and restrictions in the act contained, be vested in \_\_\_\_\_ and \_\_\_\_\_ in the petition mentioned, such powers to be exercised with the consent in writing of \_\_\_\_\_; and such leases to be in such terms and conditions, and to contain such covenants, conditions and stipulations, as shall be approved of by the judge to whose court this cause is attached.") It has been suggested, that, under this order, the proceeding would be as follows: the parties would, by an affidavit of the surveyors employed, state the terms and conditions upon which it was proposed to grant the leases; and the intended covenants, conditions and stipulations would also be stated, and a certificate approving of these particulars would answer every purpose: thus, the minimum rent per foot, the class of houses, the period to be allowed for building, the nature of the covenants for repairing, insuring, &c., would all be settled. This being done with care would render any further application unnecessary, unless a very different class of lease was required. (See *Chambers' Settled Estates*, 28 Beav. 653; *Att.-Gen. v. Christ Church, Oxford*, 3 Giff. 514.)

Where a general power of granting mining leases was given to trustees, the court empowered them for the purposes of such leases to grant wayleaves over any part of the said settled estates. (*Re Wallace*, W. N. 1869, p. 66.)

A general power of granting mining leases was refused where several tenants for life in remainder of the settled estates refused their consent. (*Re Hutchinson*, 14 W. R. 473.)

For form of order vesting right to grant mining leases, see Seton, 529; and to grant building leases, see Seton, 532; and as to appointing trustees, see Seton, 533.

11. It shall be lawful for the Court of Chancery in England, so far as relates to estates in England, and for the Court of

Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates; and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court (*n*).

19 & 20 Vict.  
c. 120, s. 11.

ttled estates and of  
timber.

(*n*) It seems that the court has jurisdiction to order a sale under the act, notwithstanding the existence of powers under which the proposed sale may be effected. (*Re Thompson*, Johns. 418.) But where a certain consent is by the settlement rendered necessary to the exercise of a power, the court will not act under this statute, so as to enable the consent to be dispensed with. (*Re Hurle*, 2 H. & M. 196.) *Wood*, V.-C., held, that an order under the act was wrong so far as it directed a sale of property which was not settled. (*Re Thompson*, Johns. 418; and see *Grey v. Jenkins*, 26 Beav. 356.) But even where property is not settled, a purchaser obtains (under sect. 28), by a conveyance under the act, an indefeasible title, except against persons beneficially interested whose concurrence has not been obtained. (*Re Shephard*, L. R., 3 Eq. 571, per *Malins*, V.-C.)

On sales under this act, the court may make such orders for sale with an indefeasible title as under the Lands Transfer Act. (25 & 26 Vict. c. 53, s. 49.)

The court refused to authorize a sale to a tenant for life of the settled property without an inquiry (*Re Hilton*, W. N. 1866, p. 107), or to give trustees a general power of sale. (*Re Peacock*, *Id.* 329; 15 W. R. 100.)

This act empowers the court to authorize the sale and conveyance of minerals situate under a settled estate apart from the surface thereof. (*Re Lam*, 7 Jur., N. S. 511.) The contract for sale was ordered to be carried into effect by a grant, with a provision limiting the time within which the coal was to be worked out. (*Re Mallin*, 9 W. R. 588; 3 Giff. 126; 30 L. J., Ch. 929.) And where mines are sold, rights of using the surface for the workings may be granted, and a rent reserved in respect of the surface damaged from time to time. (*Re Milward*, L. R., 6 Eq. 248.)

For form of order authorizing a sale, see Seton, 534. Where part of the land was copyhold, the court made an order directing the copyholds to be enfranchised, the whole to be sold as freehold, and that the costs of the enfranchisement should be paid out of the proceeds of the sale. (*Re Adair*, W. N. 1873, p. 113.)

Where land is sold, pursuant to an order of the court under this act, the conveyance must be settled by the judge, whether the parties differ or not. But where land is to be sold in lots, and one conveyance has been settled by the conveyancing counsel of the court, it may be adopted by the chief clerk for all the rest in which no special circumstances exist to render such a course improper. (*Re Eyre*, 4 K. & J. 268.) See further, as to sales under a decree of the court, Dan. Ch. Pr. 1148 *et seq.*

12. When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve.

Consideration for  
land sold for  
building may be a  
fee-farm rent.

13. On any sale of land any earth, coal, stone or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants, or submit to any restrictions, which the court may deem advisable.

Minerals, &c. may  
be excepted from  
sales.

14. It shall be lawful for the Court of Chancery in England,

Court may autho-  
rize dedication of



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c. 120, s. 14.

parts of settled  
estates for roads,  
&c.

so far as relates to estates in England, and for the Court of Chancery in Ireland, so far as relates to estates in Ireland, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to and vested in any other trustees, upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees, when required, as by the court shall be deemed advisable (*o*).

(*o*) Under this act the court will not authorize the sale of a portion of the estate for raising money to make the necessary roads on building; but it will authorize leases on the terms of the lessee's making such roads. (*Re Chambers*, 28 Beav. 653.) The court will not direct roads to be made except where they are beneficial to the property in its actual state, or required for houses to be built on leases then immediately contemplated. (*Re Hurle*, 2 H. & M. 196.) The court will not always require plans to be laid before it. (*Re Hargreaves*, 15 W. R. 54.) For forms of orders as to laying out roads, see Seton, 533, 534.

How sales and  
dedications are to  
be effected under  
the direction of  
the court.

15. On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of revocation and appointment of the use, or otherwise as the court shall direct (*p*).

(*p*) Real estate, the equity of redemption in which was devised in strict settlement, was ordered to be sold, and an order was made appointing A. and B. to convey under this act. A subsequent order declared that the order should bind the mortgagees. After this the mortgagees conveyed the legal estate in the real estate to the trustees of the will: it was held, that, notwithstanding such conveyance by the mortgagees, A. and B. had power to convey, and that the concurrence of the trustees of the will was unnecessary. (*Eyre v. Saunders*, 5 Jur., N. S. 703; 28 L. J., Ch. 439; 7 W. R. 366.) Where the legal estate was vested in eleven persons, the court held that it had no power to direct that one of such persons should convey to the purchaser in order to save expense. (*Re Hole*, W. N. 1868, p. 70.)

Application by  
petition to exer-  
cise powers con-  
ferred by this act.

16. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, may apply to the court, by petition in a summary way, to exercise the powers conferred by this act (*q*).

(*q*) Leasehold interests in mines were limited to trustees for twenty-one years upon trust to work the mines and invest the profits, and subject thereto upon trust for A. for life, with remainders over. On a petition for sale being presented by A., it was held, that during the term an order for sale under this act could not be made on the petition of A. alone. The trustees having been joined as co-petitioners, an order for sale was subsequently made. (*Ex parte Puzley*, 1 R., 2 Eq. 237.)

Where a testator leaves property to his widow for life or during widowhood, and she and the parties entitled in remainder join in a petition under this act, that is a sufficient compliance with the terms of this section. (*Williams v. Williams*, 9 W. R. 888.) Persons may apply although their interests are incumbered. (Sect. 41, *post*.) As to the title of petition, see Cons. Ord. XLI., rules 14, 15, *post*. Forms of petitions are given in Dan. Ch. Forms, 2054, 2055. It seems that a petition is necessary although a suit is pending. (*Harvey v. Clark*, 25 Beav. 7.)

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c. 120, s. 16.

17. Subject to the exception contained in the next section, every application (*r*) to the court must be made with the concurrence or consent of the following parties; namely,

With whose consent such application to be made.

Where there is a tenant in tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant in tail, or if there is more than one such tenant in tail then the first of such tenants in tail, and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant in tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant in tail;

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child (*s*).

(*r*) These words refer only to applications under the act for the sale of estates, and not to petitions dealing with the purchase-money. (*Re Duke of Cleveland's Harte Estates*, 1 Dr. & S. 481; and see *Re Sexton Barnes Estates*, 10 W. R. 416, under sect. 20, *post*.)

(*s*) The expression "persons entitled" in this act, means persons beneficially entitled; and all persons entitled must concur. Trustees can only consent for unborn children; but trustees, with a power of sale, may join in a sale which will bind all persons claiming under their trust. (*Grey v. Jenkins*, 26 Beav. 351.) And where estates were settled on A. for life, and then to trustees, with powers of sale, in trust for the children of A., and there were children in existence, it was held, that the trustees were the proper parties to be served. (*Re Potts*, 15 W. R. 29.) It was held, by Wood, V.-C., in *Eyre v. Saunders* (4 Jur., N. S. 830), that where the *cestui que trusts* "beneficially interested" (being persons having portions secured on the lands to be sold) were numerous, and the trustees had power to give receipts for the monies payable, the consent of the latter to the sale was sufficient. It was held by the M. R., that parties beneficially interested under the trust of a term for raising portions must be served. (*Re Boughton*, 12 W. R. 84.)

Service on persons remotely entitled was dispensed with. (*Re Marquis of Cholmondeley*, W. N. 1866, p. 388.)

It was held by Malins, V.-C., that the granting of a lease under the act could not be sanctioned in the face of the opposition of any person beneficially interested in the estate. (*Re Merry*, 15 W. R. 307.) A lease was, however, sanctioned by Stuart, V.-C., without the consent of certain tenants for life. (*Re Hutchinson*, 14 W. R. 473.)

The persons whose consent are required by this section to an application for a sale are persons whose consents are capable of being obtained. Therefore, where freeholds were limited in trust for A. for life, with remainder (subject to a general power of appointment by A.) in trust for the person whom A. should leave her heir-at-law in fee, it was held, that an order for sale made on the application of A., with the concurrence of the trustee of the settlement, was not invalid by reason of the non-concurrence of the

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c. 120, s. 18.

unascertained contingent remainderman. (*Beioley v. Carter*, L. R., 4 Ch. 230.)

Petition may be granted without consent, saving rights of non-consenting parties.

18. Provided nevertheless, that, unless there shall be a person entitled to an estate of inheritance whose consent or concurrence shall have been refused or cannot be obtained, it shall be lawful for the court, if it shall think fit, to give effect to any petition, subject to and so as not to affect the rights, estate or interest of any person whose consent or concurrence has been refused or cannot be obtained, or whose rights, estate or interest ought in the opinion of the court to be excepted (*t*).

(*t*) Where a great number of legatees had charges upon the estates sought to be leased, an order was made under this section without service on the legatees; but *Kindersley*, V.-C., directed the words "subject to and so as not to affect the rights, estates and interest of any person whose consent and concurrence could not be obtained" to be inserted therein. (*Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462.) And services of notice on a person of weak mind, not found a lunatic by inquisition, who had a remote contingent interest in the property, were dispensed with where there were others in the same interest who had concurred. (*Re Franklin*, 7 W. R. 45; *Re Turbutt*, 2 N. R. 158.) For form of order reserving rights, see Seton, 534. Where a testator gave a tenant for life power of granting building leases, to be exercised with the consent of a certain person, the court refused to act under this statute, so as to enable such consent to be dispensed with. (*Re Hurlie*, 2 H. & M. 196.)

Notice of application to be served on all trustees, &c.

19. Notice of any application to the court under this act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice.

Notice of application to be given in newspapers.

20. Notice of any application to the court under this act shall be inserted in such newspapers as the court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the Court of Chancery by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this act; and the court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner, as it shall think fit (*u*).

(*u*) This section does not apply to applications under the act as to the reinvestment of the money arising from the sale of settled estates in the purchase of other lands. (*Re Sexton Barnes Estates*, 10 W. R. 416.)

After the petition has been presented, application is to be made in chambers for directions as to the notices. (Cons. Ord. XLI., rule 16, *post*, p. 706.) As to the advertisements, see the cases there quoted.

As to the time for motions under sect. 20 and the order thereon; and as to the applicant obtaining a copy of the petition, see Cons. Ord. XLI., rules 17, 18, *post*. As to the hearing of the petition, see Cons. Ord. XLI., rule 19, *post*; and Dan. Ch. Pr. 1846.

No application under this act to be granted where a similar applica-

21. The court shall not be at liberty to grant any application under this act in any case where the applicant, or any party entitled, has previously applied to either house of parliament

for a private act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred (*v*).

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c. 120, s. 21.

(*v*) Where, therefore, a petitioner had several times applied to parliament for similar powers of leasing settled property as were asked for by the petition, and such applications were rejected: it was held, that the court had no power to grant such an application. (*Re Wilson*, 1 L. T., N. S. 25.) See Cons. Ord. XLI., rule 21, *post*.

tion has been re-  
jected by parlia-  
ment.

22. The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient, for preventing fraud or mistake (*x*).

Notice of the  
exercise of powers  
to be given by the  
court.

(*x*) See Cons. Ord. XLI., rule 24, *post*.

23. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same shall be paid into the Bank of England or Ireland, as the case may be, to the account of the Accountant-General of the Court of Chancery (*y*), *ex parte* the applicant in the matter of this act, and in either case such money shall be applied as the court shall from time to time direct to some one or more of the following purposes; (namely,)

Court may ap-  
point trustees to  
receive and apply  
monies arising  
from sales.

The purchase or redemption of the land tax, or the discharge or redemption of any incumbrance affecting the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*z*).

(*y*) Where under any act any money is capable of being paid to the account of the Accountant-General of the Court of Chancery in England, the same after the 7th day of January, 1872, is to be paid to the account of the paymaster-general for the time being on behalf of the Court of Chancery, and is to be subject to the like trusts, &c., as if he were the Accountant-General of the Court of Chancery. (35 & 36 Vict. c. 44, s. 6.) See further, as to the practice on payment into Court, Dan. Ch. Pr. 1636 *et seq.*, 5th ed.; Chancery Funds Rules, 1872, rule 9; (L. R., 7 Ch. xxxviii.)

(*z*) An estate was sold by the direction of the court under this act, and the proceeds paid into court. On the petition of the tenant for life, with the consent of the tenant in tail, the court made an order for liberty to invest the purchase-money on mortgage. (*Wall v. Hall*, 11 W. R. 298.) And the court has ordered purchase-money to be applied in repairs and improvements for the permanent benefit of the settled estate. (*Re Clitheroe*, 17 W. R. 345.)

Where lands settled in trust for the separate use of a married woman for life without power of anticipation, and after her death in trust for sale, were in the lifetime of the tenant for life ordered to be sold under this act,

19 & 20 Vict.  
c. 120, s. 23.

the proceeds of the sale were ordered to be paid to the trustees of the settlement, to be held upon the trusts declared of purchase-money by the settlement. (*Re Morgan*, 9 W. R. 587.)

Where purchase-money had been laid out in land and there was no trustee of the settled estate which had been sold in existence, the court required new trustees to be appointed, and the conveyance of the lands purchased to be made to such new trustees. (*Re Sexton Barnes Settled Estates*, 10 W. R. 416.)

Where a party became absolutely entitled as tenant in tail to a fund paid into court under this act, and executed a disentailing deed, the court refused to allow the money to be paid out to her without an affidavit of no incumbrances. (*Thornhill v. Milbank*, 12 W. R. 523.) See for orders directing money set aside to be paid into court and invested, Seton, 531; and appointing trustees, Seton, 533.

Trustees may apply monies, in certain cases, without application to court.

24. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without application to the court (a), or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land (b).

(a) *Re Peacock*, 15 W. R. 100.

(b) Petitions having been presented under this act, and under a private act, respecting money in court to which an infant remainderman was entitled, the court directed that a guardian *ad litem* should be appointed to represent the infant remainderman, and also that the trustees of the will, under which the property was settled, should have their costs of appearing upon the petition. (*Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 46.)

In the case of petitions dealing with purchase-money, the consents required by sect. 17 are not necessary (*Re Duke of Cleveland's Harte Estates*, 1 Dr. & Sm. 481); nor are the notices required by sect. 20. (*Re Sexton Barnes Settled Estates*, 10 W. R. 416.)

But where a private act provided that sales of certain settled estates should be made under the provisions of this act, and contained a proviso precisely similar to sect. 24, it was held by *Stuart, V.-C.*, that a petition presented under the private act by the tenant for life for the re-investment of the purchase-money, must be served on the parties interested under the settlement down to the first tenant in tail. (*Re Bolton Estates Act*, 19 W. R. 429.)

Until money can be applied, to be invested, and dividends to be paid to parties entitled.

25. Until the money can be applied as aforesaid, the same shall be from time to time invested in Exchequer Bills, or in Three per Centum Consolidated Bank Annuities, as the court shall think fit; and the interest and dividends of such exchequer bills or bank annuities shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land (c).

(c) It seems that purchase-money of land sold under this act may not be invested in any of the investments in which cash under the control of the court may be invested. (*Re Shaw*, L. R., 14 Eq. 9; *Re Boyd*, 21 W. R. 667; contra, *Re Cook*, L. R., 12 Eq. 12; *Re Thorold*, L. R., 14 Eq. 31.) As to these investments, see 23 & 24 Vict. c. 38, s. 10, and the general order made thereunder (*post*).

The direction as to investment contained in this section must be taken to mean an investment according to the course of the court. An undivided moiety in land was ordered under this act to be sold, and the proceeds to be paid into court and invested in consols. The sale was made and the

money paid into court; but there being no request to invest left at the office, the money according to the practice of the office remained uninvested. A motion for leave to bring an action against the accountant-general, or to examine the precedents in the office, was refused with costs. (*Re Woodcock*, L. R., 13 Eq. 183.)

19 & 20 Vict.  
c. 120, s. 25.

For the practice as to the investment of money paid into court, see Dan. Ch. Pr. 1639 *et seq.*, and Chancery Funds Rules, 1872, r. 24. (L. R., 7 Ch. xliii.)

26. The court shall be at liberty to exercise any of the powers conferred on it by this act, whether the court shall have already exercised any of the powers conferred by this act in respect of the same property, or not; but no such powers shall be exercised if an express declaration or manifest intention that they shall not be exercised is contained in the settlement, or may reasonably be inferred therefrom, or from extrinsic circumstances or evidence: provided always, that the circumstances of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this act, if it shall think that the powers contained in the settlement ought to be extended (*d*).

Court may exercise powers repeatedly; but may not exercise them if expressly negatived.

(*d*) See *Re Thompson* (Johns. 418) and *Re Hurlb* (2 H. & M. 196), quoted under sect. 11, *ante*.

27. Nothing in this act shall be construed to empower the court to authorize any lease, sale or other act beyond the extent to which in the opinion of the court the same might have been authorized in and by the settlement by the settlor or settlors.

Court not to authorize any act which could not have been authorized by the settlor.

28. After the completion of any lease or sale, or other act, under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same; except that no such lease, sale or other act shall have any effect against any person whose concurrence in or consent to the application ought to have been obtained, and was not obtained (*e*).

Acts of the court in professed pursuance of this act, not to be invalidated.

(*e*) It is competent to a purchaser under this act to object, at any time before completion, that the order for sale was in excess of the jurisdiction of the court. It seems, nevertheless, that the conveyance when completed will give an indefeasible title by virtue of this section, notwithstanding any excess of jurisdiction. (*Re Thompson*, Johns. 418; *Re Shephard*, L. R., 8 Eq. 571; but see *Re Burdin*, 5 Jur., N. S. 1878.)

29. It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement, and subject to the same limitations; and the court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct (*f*).

Costs.

(*f*) Where an agreement to demise settled estates was approved, and the costs directed to be a charge on the property, the court directed the name



19 & 20 Vict.  
c. 120, s. 29.

of the person advancing the money, necessary for the payment of such costs, to be inserted in the order. (*Re Tunstall*, 14 L. T., N. S. 352.) For form of order as to costs, see Seton, 536.

Power to Lord  
Chancellor, &c.  
to make rules and  
orders.

30. The Lord Chancellor of Great Britain, with the advice and assistance of the English Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or of any three of them, so far as relates to proceedings in England, and the Lord Chancellor of Ireland, with the advice and assistance of the Irish Master of the Rolls and of the Lord Justice of the Court of Appeal in Chancery in Ireland, or of any two of them, so far as relates to proceedings in Ireland, may, if he shall think fit, from time to time make general rules and orders for carrying the purposes of this act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers and solicitors of the court in respect to such matters; and such rules and orders may from time to time be rescinded or altered by the like authorities respectively; and all such rules and orders shall take effect as general orders of the court (*g*).

(*g*) See 21 & 22 Vict. c. 77, s. 7, and the orders made in pursuance of this act, *post*.

Rules and orders  
to be laid before  
parliament.

31. All general rules and orders made as aforesaid shall, immediately after the making and issuing thereof, be laid before both Houses of Parliament, if parliament be then sitting, or if parliament be not then sitting, within twenty-one days after the next meeting thereof; and it shall be lawful for either of the Houses of Parliament, by any resolution passed within thirty-six days after such rules or orders have been laid before it, to resolve that the same or any part thereof ought not to continue in force, and thereupon the same shall cease to be binding.

Tenants for life,  
&c. may grant  
leases for twenty-  
one years.

32. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for life, or for a term of years determinable with his life, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time, for any term not exceeding twenty-one years to take effect in possession: provided, that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that

such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment for a period not less than twenty-eight days of the rent thereby reserved, and on non-observance of any of the covenants or conditions therein contained; and provided a counterpart of every deed of lease be executed by the lessee (*h*).

19 & 20 Vict.  
c. 120, s. 32.

(*h*) As to this section, see 3 Davidson, Conv. 535, n. (*p*), 3rd ed. A form of lease by a tenant for life pursuant to this section is given in Woodfall, L. & T. 1022.

33. Every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same (*i*).

Against whom  
such leases shall  
be valid.

(*i*) See 21 & 22 Vict. c. 77, s. 8, *post*, p. 703.

34. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act.

Evidence of exe-  
cution of lease by  
lessee.

35. The act of the thirty-second year of King Henry the Eighth, chapter twenty-eight, intituled "Lessees to enjoy the Farm against the Tenants in Tail," and the act of the parliament of Ireland of the tenth year of King Charles the First, session three, chapter six, intituled "An Act that Lessees shall enjoy their Farms against Tenants in Tail or in Right of their Wives, &c.," are hereby repealed, except so far as relates to leases made by persons having an estate in the right of their churches.

Repeal of 32 Hen.  
8, c. 28, and 10  
(1st. 1, sess. 3, c. 6  
(Ireland), except  
as to ecclesiastical  
leases.

36. All powers given by this act, and all applications to the court under this act, and consents to such applications, may be exercised, made or given by guardians on behalf of infants, and by committees on behalf of lunatics, and by assignees of bankrupts or insolvents: provided nevertheless, that in the cases of infant or lunatic tenants in tail no application to the court or consent to any application may be made or given by any guardian or committee without the special direction of the court (*k*).

Provision as to  
infants, lunatics,  
&c.

(*k*) See Cons. Ord. XLI., rule 23, and see Regul. 8 Aug. 1857, rules 21, 22, *post*, p. 707, as to the appointment of guardians.

The consent of the father of infant petitioners is not sufficient, though he has not an adverse interest to the infants. (*Re Cuddick*, 7 W. R. 334.) Nor is the consent of the testamentary guardian sufficient. (*Re James*, L. R., 5 Eq. 334.)

Where a person whose consent was necessary to an application under the act was of unsound mind, not so found by inquisition, the Master of the Rolls, on an *ex parte* application, appointed a guardian to consent on his behalf. (*Re Venner*, L. R., 6 Eq. 249.) But where a purchaser objected that the consent of the guardian in such a case was invalid,

19 & 20 Vict.  
c. 120, s. 36.

*James*, L. J., held the objection well founded. (*Re Clough*, L. R., 15 Eq. 284.)

The committee of a lunatic must obtain the permission of the Court of Lunacy before he consents to an application under this act. An application must be made to the Master in Lunacy, whose report must be approved by the Lords Justices. (*Re Woodcock*, L. R., 3 Ch. 229; see *Re Wade*, 1 H. & T. 202.) For forms of orders, see Seton, 528.

A married woman applying to the court to be examined apart from her husband.

37. Where a married woman shall apply to the court, or consent to an application to the court, under this act, she shall first be examined apart from her husband touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband, or not; and no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding (*l*).

No clause, &c. in settlement restraining anticipation to prevent court from exercising powers of this act.

(*l*) A married woman entitled to a jointure, charged on settled estates, must be examined under this section. (*Re Turbutt*, 2 N. R. 487.) And a married woman who is under age must be examined (*Re Broadwood*, L. R., 7 Ch. 323). But the examination of a married woman has been dispensed with where her interest was remote, and sufficiently represented by trustees who consented (*Re Lord de Tabley*, 11 W. R. 936; *Re Tibbett*, 17 W. R. 394); and where the court was satisfied that the order would be beneficial and that the delay necessary for the examination would be prejudicial. (*Re Halliday*, L. R., 12 Eq. 199; *Re Thorne*, 20 W. R. 587; but see *Re Johnson*, W. N. 1869, p. 87.)

Time of examination.

The examination of a married woman ought not to take place until the petition has been presented and answered, and carried into the chambers of the judge by whom it is to be heard; but it ought to take place before any judicial step has been taken by him upon it. The issuing of advertisements under the 20th section, before the examination, will not invalidate the proceedings; but, as a general rule, it is desirable that the examination should take place immediately after the petition has been carried into chambers. (*Re Foster*, 24 Beav. 220; 1 De G. & J 386.)

Where the married woman is herself a petitioner, her examination by the court may be taken at any time before an order is made. (*Re Packer*, 39 L. J., Ch. 220.) Her examination was ordered to be taken in court when the petition came on to be heard. (*Re Taylor*, L. R., 14 Eq. 557.)

The examination of a married woman was allowed to be taken after the order was made on the petition, but before it was drawn up, the petition being ordered to be mentioned again after the examination. (*Re Turbutt*, 2 N. R. 487.)

Such examination to be either by the court or by a solicitor.

38. The examination of such married woman shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify, under his hand, that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same (*m*).

(*m*) This section, in requiring the appointment of a solicitor to examine a married woman abroad, meant a solicitor of the Court of Chancery in

England, and therefore the court refused to direct a commission to a barrister and solicitor of a court in Canada for that purpose. (*Turner v. Turner*, 2 De G. & J. 584.) But where the married woman is resident out of the jurisdiction, any person, whether a solicitor of the court or not, may now be appointed to take the examination. (21 & 22 Vict. c. 77, s. 6, *post.*)

19 & 20 Vict.  
c. 120, s. 38.

The solicitor appointed must be a solicitor in actual practice, and not the solicitor of the husband. (*Re Noyes*, 6 W. R. 7.) And he should be an independent solicitor, not one concerned in the proceeding. (*Re Brealy*, 24 Beav. 220.)

39. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

As to consent of married women under age.

40. Nothing in this act shall be construed to create any obligation at law or in equity on any person to make or consent to any application to the court, or to exercise any power.

No equity to compel any one to apply to the court.

41. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein.

Tenants for life, &c. may exercise powers notwithstanding incumbrances.

42. Provided always, that nothing in this act shall authorize any sale or lease beyond the term of twenty-one years of any settled estates in which, under the act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "To embar feigned Recovery of Lands wherein the King is in Reversion," or under any other act of parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the crown (n).

Exception as to entails created by acts of parliament.

(n) See *ante*, p. 323, n.

43. Nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor.

Saving rights of lords of manors

44. The provisions of this act shall extend to all settlements, whether made before or after it shall come in force, except those as to demises to be made without application to the court, which shall extend only to settlements made after this act shall come in force.

To what settlements this act to extend.

45. This act shall not extend to Scotland.

Extent of act.

46. This act shall come in force on the first day of November, one thousand eight hundred and fifty-six.

Commencement of act.

LEASES AND SALES OF SETTLED ESTATES  
AMENDMENT ACT.

21 & 22 VICTORIA, C. 77.

*An Act to amend and extend the Settled Estates Act of 1856.*  
[2nd August, 1858.]

21 & 22 Vict.  
c. 77, s. 1.

WHEREAS it is expedient to amend and extend the Settled Estates Act of 1856 (nineteenth and twentieth Victoria, chapter one hundred and twenty), in certain particulars: be it enacted, as follows:—

Definitions of  
"settlement" and  
"settled estates."

1. For the purposes of the definitions of "settlement" and "settled estates" contained in the first section of the said act, all estates or interests in remainder or reversion not disposed of by the settlement, and reverting to a settlor, or descending to the heir of a testator, shall be deemed to be estates coming to such settlor or heir under or by virtue of the settlement (a).

(a) See *ante*, p. 686.

"Building lease"  
to include repair-  
ing lease.

2. The term "building lease" in the said act shall be deemed to include a repairing lease, so that no repairing lease shall be made for a term exceeding sixty years (b).

(b) See *ante*, p. 687.

Powers of leasing  
to extend to copy-  
hold and cus-  
tomary tenants of  
manors.

3. All the powers to authorize and to grant leases contained in the said act and this act shall be deemed to include powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under the said act and this act.

Extension of  
power under  
sect. 2 of recited  
act as to term for  
building leases (c).

4. The power given to the court by the second section of the said act to extend the term thereby prescribed for building leases, where it shall be satisfied that it is the usual custom of the district, and beneficial to the inheritance, to grant building leases for longer terms, shall be extended and may be exercised with respect to all the other leases in the same section mentioned, except agricultural leases, provided the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such leases for longer terms.

(c) See *ante*, p. 687.

As to surrender of  
leases (d).

5. The power conferred by the fifth section of the said act to surrender leases granted under the provisions of the said act shall be deemed to extend to all leases, whether granted in pursuance of the said act or otherwise.

(d) See *ante*, p. 689.

6. Whenever a married woman is resident out of the jurisdiction of the Court of Chancery of England or the Court of Chancery of Ireland respectively, as the case may be, her examination, under the thirty-eighth section of the act, may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court; and the appointment of any such person, not being a solicitor, shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the court (*f*).

21 & 22 Vict.  
c. 77, s. 6.

As to taking examinations of married women (*e*).

(*e*) See *ante*, s. 38, p. 700.

(*f*) The decision in *Turner v. Turner* (2 De G. & J. 534), led to the introduction of this section.

7. The power contained in the said act to make and rescind general rules and orders shall extend to the matters to which this act relates; and such rules and orders may, so far as may be found expedient, alter the procedure prescribed by the said act and this act (*g*).

Extension of power to rescind general rules and orders.

(*g*) See *ante*, s. 80, p. 698.

8. In addition to the persons expressly enumerated in the thirty-third section of the said act against whom demises authorized by the thirty-second section are to be valid, such demises, in the case of unsettled estates, shall be valid against the wife of any husband making such demise of estates to which he is entitled in right of such wife (*h*).

As to validity of demises under sect. 33 of recited act.

(*h*) See *ante*, p. 699.

## LEASES AND SALES OF SETTLED ESTATES FURTHER AMENDMENT ACT, 1864.

27 & 28 VICTORIA, c. 45.

*An Act to further amend the Settled Estates Act of 1856.*  
[14th July, 1864.]

WHEREAS by the tenth section of the act passed in the parliament holden in the nineteenth and twentieth years of her Majesty's reign, intituled "An Act to facilitate Leases and Sales of Settled Estates," it was enacted, that when the Court of Chancery should deem it expedient that any general powers of leasing any settled estates, conformably to the said act, should be vested in trustees, it might, by order, vest any such power accordingly either in the existing trustees of the settlement, or in any other persons, and that in every such case the court, if it should think fit, might impose any conditions as to

27 & 28 Vict.  
c. 45, s. 1.



27 & 28 Vict.  
c. 45, s. 1.

consents or otherwise on the exercise of such power: and whereas, in order to protect the interests of persons interested in the settled estates affected by such powers, the practice of the said court has been to require that leases granted in pursuance of a power vested in any trustees or other persons, under the provisions of the said tenth section of the said act, should be settled by the said court, or by a judge thereof, or otherwise should be made conformable with a model lease, deposited in the chambers of the judge: and whereas the introduction of such a condition has been found to occasion delay and expense and so to create great difficulties in carrying into execution the objects of the act, and such conditions may in general be safely omitted, and it is therefore expedient that the said act should be amended as hereinafter mentioned: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, as follows:

Conditions that leases shall be settled by the court not to be inserted in orders under sect. 10 of recited act.

1. In orders to be hereafter made under the said tenth section for vesting any powers of leasing in any trustees or other persons, no condition shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the said court or a judge thereof, or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court that there is some special reason rendering the insertion of such a condition necessary or expedient (*a*).

(*a*) As to this and the following section, see *ante*, p. 690.

Conditions already inserted may be struck out by court.

2. In all cases of orders already made in pursuance of the said tenth section, in which any such condition as aforesaid has been inserted, it shall be lawful for any party interested to apply to the court to alter and amend such order, by striking out such condition, and the court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the court to act under this clause in any case in which, from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why in the case in question such a condition is necessary or expedient (*b*).

(*b*) Where an order had been made authorizing leases to be granted by trustees, a condition that the leases should be granted with the approbation of the judge in chambers was struck out, and the following words inserted:—"The Lord Chancellor doth not think fit to insert a condition requiring the leases thereby authorized to be submitted to or settled by the court, or a judge thereof, or to be made conformable with a model lease deposited in a judge's chambers." (*Re Hoyle*, 12 W. R. 1125.) Where an order had been made vesting in trustees powers of granting mining leases, a clause requiring the lease to be settled at chambers was expunged. (*Re Dorn- ing*, 14 W. R. 125.)

3. And whereas doubts are entertained whether, in the construction of the first section of the said act; the court is bound by the state of facts existing at the period of the settlement taking effect, or by the state of facts at the time of an application to the court under the said act, and it is desirable that such doubts should be removed: be it enacted, that the said court, in determining what are settled estates within the said act, shall be governed by the state of facts and by the trusts or limitations of the settlement at the time of the said settlement taking effect (c).

27 & 28 Vict.  
c. 45, s. 3.

Removal of doubts  
as to construction  
of sect. 1 of recited  
act.

(c) See *ante*, p. 687.

4. This act shall be construed and dealt with as part of the said former act as amended by the act of the twenty-first and twenty-second years of her Majesty's reign, chapter seventy-seven, and all proceedings under this act shall be subject to the same rules and orders, and shall be conducted in the same manner, as proceedings under the said former acts.

Act to be con-  
strued with re-  
cited act.

5. This act shall extend to Ireland but not to Scotland.

Extent of act.

ORDERS MADE UNDER 19 & 20 VICT. c. 120.

[*Consolidated Orders of the Court of Chancery, Order XLI.*  
rules 14—25.]

Proceedings under the statute 19 & 20 Vict. c. 120, relating to leases and sales of settled estates:—

(14.) Every petition under the act and every public and private notice required by the act shall set forth the name, address and description of the petitioner, and also a place in London, Westminster, or the borough of Southwark, or within two miles from the record and writ clerks' office, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of the petition. (15 Nov. 1856, Ord. 1.) (a)

Name, &c. of and  
place for service  
on petitioner.

(a) Advertisements were held sufficient where the addresses of some of the petitioners were omitted. (*Re Bourne*, 16 W. R. 1115; *Re Whiteley*, L. R., 8 Eq. 574; *Re Snell*, 19 W. R. 1000; *Re Burley*, W. N. 1868, p. 148.)

(15.) All petitions and notices, and also all affidavits and other proceedings under the act shall be entitled in the matter of the act and in the matter of the property in question, mentioning the county and parish or place in which it is situate, and describing it by general terms, and every such petition shall be marked with the words "Master of the Rolls," or with the title of the vice-chancellor before whom it is intended to be heard. (15 Nov. 1856, Ord. 2.) (b)

Title of petitions,  
&c. under the act.

(b) See the title of the petitions given in Dan. Ch. Forms, 2054, 2055. The particular settlement need not be specified, provided the property be sufficiently identified and shown to be under settlement. (*Re Thompson*, Johns. 418.) The title of the advertisements must correspond exactly with the title of the petition. (*Re Bateman*, 13 W. R. 513.) But slight discrepancies have been disregarded. (*Re Nune*, W. N. 1867, p. 109; *Re Bicknell*, L. R., 14 Eq. 467, and the cases quoted under rule 14, *sup.*)

19 & 20 Vict.  
c. 120.

Advertisements.

(16.) After any such petition has been presented, application may be made ex parte, and in chambers, to the judge before whom it is intended to be heard, for directions in what newspapers the notices required by the act are to be inserted. (15 Nov. 1856, Ord. 3.) (c)

(c) As to the mode in which the direction of the judge is to be obtained, see Regul. 8 Aug. 1857, r. 23, *post*. Where the petition is amended, the court will not necessarily direct fresh advertisements to be issued unless the amendment involves new facts and new parties, so as to give the petition a new character. (*Re Bunbury*, 13 W. R. 370; *Ex parte Puzley*, L. R., 2 Eq. 237.) Fresh advertisements have been dispensed with in several cases. (*Re Horton*, 34 Beav. 386; *Re Corbet*, W. N. 1866, p. 318; *Re Wilkinson*, L. R., 9 Eq. 71; *Re Marshall*, L. R., 15 Eq. 66; *Re Wilkinson*, 21 W. R. 537.) Where a leasing power had been granted to a tenant who died, and a petition was presented by the succeeding tenant for life and her husband, praying that the power might vest in one of the trustees of the will under which she claimed: it was held, under the circumstances, that the advertisements need not be repeated. (*Re Kentish Town Estate*, 1 J. & H. 230.) Advertisements were also dispensed with in the case of a petition that a power of leasing given to trustees of a will by a former order might be transferred to a tenant for life who had recently attained his majority. (*Wheeler v. Tootel*, 16 W. R. 273. See *Re Wilkinson*, L. R., 9 Eq. 71.)

For the usual directions as to advertisements, see Dan. Ch. Pr. 1844; *Browne v. Pennefather*, 4 N. R. 221. In bespeaking the order, the newspapers containing the advertisements, and any interlocutory orders which may have been made relating thereto, must be left with the registrar. (33rd Regul. 15 March, 1860.)

Time for motions  
under sect. 20,  
service of order  
thereon.

(17.) Motions under the 20th section of the act may be made ex parte within seven clear days after the publication of the advertisement which may be last inserted in the newspaper, but not later, except by special leave of the court, and every order made on any such motion must be served on the petitioner within four days after the making thereof. (15 Nov. 1856, Ord. 4.) (d)

(d) Where the seven days has expired some sufficient excuse must be given for not applying in time. It is sufficient excuse that the applicant was out of the jurisdiction. (*Re Merry*, 14 W. R. 665.) For order giving leave to appear, see Seton, 529.

Application for  
copy of petition,  
how made.

(18.) If the person obtaining such order shall require a copy of the petition such person shall at the time of serving such order make a written application to the petitioner for such copy, with an undertaking to pay all proper charges for the same. (15 Nov. 1856, Ord. 5.)

Delivery and pay-  
ment of copy.

(19.) Within two clear days after such application a copy of the petition shall be ready to be delivered, and shall be delivered on demand, and on payment for the same after the rate of fourpence per folio. (15 Nov. 1856, Ord. 6.)

Petition, when  
heard.

(20.) No petition under the act shall be set down for hearing until after the expiration of twenty-one days from the publication of the last of the advertisements. (15 Nov. 1856, Ord. 7.) (e)

(e) Where a petition is presented under the act 19 & 20 Vict. c. 120, before it can come on to be heard, the secretary of the Lord Chancellor must certify that the advertisements ordered have been inserted, and that the twenty-one days since the last advertisement required by the General Order XLI., r. 20, have expired. (*Re Blake*, 6 Jur., N. S. 724; 8 W. R. 539; *Re Mallin's Settled Estate*, 3 Giff. 126; 6 Jur., N. S. 809.)

Where the publication of the last of the advertisements required by the act would not expire in time to allow the twenty-one days necessary to elapse before setting down the petition for a hearing, so that the petitioner would be thrown over the long vacation, the court allowed the petition to be

set down on the last day of petitions before the vacation. (*Re Adam*, 6 L. T., N. S. 604; *Re Bower*, 18 W. R. 1085; *Re Taylor*, L. R., 14 Eq. 557; but see *Re Townsend*, L. R., 14 Eq. 433.)

19 & 20 Vict.  
c. 120.

(21.) Upon every application under the act the court must be satisfied by sufficient evidence that no such previous application to parliament, as is mentioned in the 21st section of the act, has been made and rejected, or reported against. (15 Nov. 1856, Ord. 8.) (*f*)

Court must be satisfied that no previous application to Parliament has been made.

(*f*) *Ante*, p. 695.

(22.) On every application under the act for authority to sell, the court must be satisfied by sufficient evidence who are the parties interested in the estate, whose consent is required by the act, and what are the circumstances which render the proposed sale proper and expedient. (15 Nov. 1856, Ord. 9.) (*g*)

Evidence of parties interested, and propriety of sale.

(*g*) See 19 & 20 Vict. c. 120, s. 17, *ante*, p. 693.

(23.) Where under the provisions of the 36th section (*ante*, p. 699) of the act it shall be necessary to obtain the special directions of the court for any application to the court, or any consent to such application, such special directions may be obtained *ex parte* by summons, at the chambers of the judge to whose court the application may be intended to be made, or may have been made. (15 Nov. 1856, Ord. 10.) (*h*)

Special directions under sect. 36 obtained by summons *ex parte*.

(*h*) See the 21st and 22nd Regulations of 8 Aug. 1857, below, as to the mode in which the application is made.

(24.) Every order of the court made in pursuance of the powers conferred on it by the act shall specify on what document or documents (if any) the notice referred to by the 22nd section (*ante*, p. 695) of the act shall be placed or indorsed; and the judge may, if he thinks fit, require that such document or documents so indorsed shall be produced in court for his inspection, and in case of any such order relating to lands in a register county or district, the court may order a duplicate or a memorial of the same to be registered. (15 Nov. 1856, Ord. 11.) (*i*)

Documents on which notice under sect. 22 is indorsed to be specified in order.

(*i*) Where the probate of a will could not be found, the court directed the order to be indorsed on a deed of appointment of new trustees. (*Re Burley*, W. N. 1868, p. 148.)

(25.) The fees and allowances to all officers and solicitors of the court, in respect of the matters under the act, shall be such fees and allowances as by the practice of the court and Orders 38 and 39, they are entitled to take and charge for business of a similar nature. (15 Nov. 1856, Ord. 12.)

Fees and allowances to officers and solicitors.

## REGULATIONS AS TO BUSINESS.

8 August, 1857.

(*Not having the force of General Orders.*)

Rules 21—23.

(21.) For the purpose of procuring the appointment of a guardian to infants under the act of parliament of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI., r. 23 (*supra*), a summons

Appointment of guardians under 19 & 20 Vict. c. 120, and Ord. 41, r. 23.

19 & 20 Vict.  
c. 120.

Evidence.

should be taken out in the names of the infants by a next friend in the form used for originating proceedings in chambers, intituled in the same manner as the petition or intended petition, that —, or some other proper person or persons may be appointed guardian or guardians of the said infants, for the purpose of making an application on behalf of the said infants [or consenting on behalf of the said infants to an application] to the court under the provisions of the above act. In case the application to the court is to be made on behalf of the infants, the guardian must be appointed before the petition is presented (*k*). If the guardian is to consent to an application, the guardian may be appointed either before or after the petition is presented. Upon the application to appoint such guardian the following evidence is to be adduced. 1. The age of the infant. 2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery. 3. Where and under whose care the infant is residing, and at whose expense he is maintained. 4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed. 5. That the proposed guardian has no interest in the intended application, or if he has, the nature of his interest, and that it is not adverse to the interest of the infant. 6. The consent of the guardian to act. 7. The nature of the intended application to the court.

(*k*) The regulations of the 8th of August, 1857, are not absolutely binding as orders. Therefore, though those regulations direct that a guardian to an infant petitioner must be appointed before the petition is presented, the court authorized such an appointment on an application after the petition had been presented and answered. (*Re Longstaffe*, 1 Drew. & Sm. 142; *Re Hargreaves*, 7 W. R. 156.)

Leave to make or consent to application on behalf of infants, &c. under 19 & 20 Vict. c. 120, and Ord. 41, r. 23.

(22.) For the purpose of procuring the direction of the judge for leave to make or consent to an application on behalf of infants or lunatics under the said act of 19 & 20 Vict. c. 120, and the Consolidated General Order XLI., r. 23 (*ante*, p. 707), a summons is to be taken out after the petition is presented in the ordinary form, intituled in the same manner as the petition, by the guardian of the infant or committee of the lunatic, that he may be at liberty on behalf of the infant or lunatic to make the application [or consent to the application] to the court proposed to be made by the petition presented to the Lord Chancellor [or Master of the Rolls] on the — day of —. Upon this application the guardian or committee should make an affidavit that he believes it to be proper and for the benefit of the infant or lunatic that the application proposed to be made should be made [or consented to] on behalf of the said infant or lunatic, and such other evidence, if any, should be adduced as the circumstances of the case may require, to show the propriety of the application so far as the infant or lunatic is concerned, and the petition should be produced.

Procuring directions of judge under Ord. 41, r. 16.

(23.) For the purpose of procuring the directions of the judge pursuant to the General Order XLI., r. 16 (*ante*, p. 706), a summons is to be taken out after the petition has been answered, intituled in the same manner as the petition, that directions may be given in what newspapers the notices required by the act are to be inserted. The petition is to be produced on the return of the summons, and the judge's direction will be written on the petition, and signed by his chief clerk.

## LAW OF PROPERTY AND TRUSTEES RELIEF AMENDMENT.

22 & 23 VICTORIA, C. 35.

*An Act to further amend the Law of Property and to relieve  
Trustees.* [13th August, 1859.]

BE it enacted as follows :

### *Leases.*

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispunishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done (*a*).

22 & 23 Vict.  
c. 35, s. 1.

Restriction on  
effect of licence to  
alien.

(*a*) Leases often contain a covenant on the part of the lessee that he will not assign, or that he will not underlet the premises without the consent of the lessor. This, like all other covenants, is usually accompanied by a condition for re-entry on the breach of it. The jealousy which always prevailed in our law against allowing restraints on alienation led to the discouragement of this kind of restriction, and it was accordingly decided, that when, under a condition restraining assignment without licence, a licence had been once given, the condition was determined; and the law was the same with respect to a covenant to the like effect, although there seems to be no reason why such a covenant or condition should not be held to run with the land, and be binding from time to time on such persons as might become assigns with the consent of the landlord. (See *Weatherall v. Geering*, 12 Ves. 511; 3 Real Prop. Rep. 49.) As to covenants and conditions not to assign or underlet without licence, see further, Woodfall, Landlord and Tenant, 549 *et seq.*, 9th ed.; *Varley v. Coppard*, L. R., 7 C. P. 505. Such covenants run with the land where assigns are named. (*Williams v. Earle*, L. R., 3 Q. B. 739. See *West v. Dobb*, L. R., 4 Q. B. 634; 5 Q. B. 460.)

Covenants and  
conditions not to  
assign or underlet  
without licence.



22 & 23 Vict.  
c. 85, s. 1.

*Dumpor's case.*

In *Dumpor's case* (4 Co. 119 b) it was decided that a condition in a lease that the lessee or his assigns shall not alien without the special licence of the lessor, is determined by an alienation with licence; and no subsequent alienation is a breach of the condition, nor does it give a right of entry to the lessor. (See 4 Taunt. 735.) So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation with licence by one of the lessees determined the condition as to all. So a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only, for the condition could not be apportioned or divided by the parties. The doctrine of *Dumpor's case* was disapproved by distinguished judges, but never overruled. In *Brummell v. Macpherson* (14 Ves. 175), Lord Eldon said, "Though *Dumpor's case* always struck me as extraordinary, it is the law of the land at this day;" and accordingly in that case his lordship decided that a proviso in a lease for re-entry, upon assignment by the lessee, his executors, administrators or assigns, without licence, ceased by assignment with licence, though to a particular individual. (See Dyer, 152, pl. 7.) As to the doctrine in *Dumpor's case*, see further, 1 Smith, L. C. 30 *et seq.*, 6th ed.; 1 Wms. Saund. 445 *et seq.* (ed. 1871); *Saunders v. Merryweather*, 13 W. R. 814.

It does not appear to have been expressly decided that this doctrine applies to any other covenant or condition than that against alienation, but it would seem to be equally applicable on principle to covenants and conditions, restrictive of carrying on particular trades, or converting lands from pasture to arable, and to all covenants and conditions by which the licence or consent of the lessor is made requisite for doing any particular act. (See 8 Real Prop. Rep. 50. See Lord Eldon's remarks in *Macher v. The Foundling Hospital*, 1 Ves. & B. 191.)

The inconvenience resulting from the doctrine laid down in *Dumpor's case* has been remedied by the above section. The doctrine had previously been restricted from applying to licences granted to tenants of crown lands by 8 & 9 Vict. c. 99, s. 5.

As to waiver, see 23 & 24 Vict. c. 38, s. 6, *post*.

Restricted operation of partial licences.

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence (b).

(b) See the note to sect. 1, *ante*.

Apportionment of conditions of re-entry in certain cases.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or

other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him (c).

22 & 23 Vict.  
c. 35, s. 3.

(c) The rule of law, that conditions are entire and cannot be apportioned by the act of the parties (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Weatherall v. Geering*, 12 Ves. 511), had been found very inconvenient in practice, where the object of the parties has been to grant a partial dispensation with a condition, or to give the benefit of it to several grantees of the reversion (*Knight's case*, 5 Rep. 55 b; see *Brummell v. Macpherson*, 14 Ves. 173; 4 Taunt. 736; 1 V. & B. 191; 3 Real Prop. Rep. 49); for the severance of any part of the reversion destroyed the whole condition, giving one entire right of entry into the premises on nonpayment of rent or the like (*Knight's case*, 5 Rep. 55 b; *Dumpor's case*, 4 Rep. 120 b; Co. Litt. 215 a); and if a lessor assigned the reversion of part of the premises to one, his right of entry would be gone (*Twynam v. Pickard*, 2 B. & Ald. 112), although it had been decided that an action of covenant will lie by the assignee of the reversion of *part* of the demised premises against the lessee for not repairing. (*S. C.*, *Ib.* 105; see Shepp. T. 176.)

Old rule as to apportionment of conditions.

There are two modes of apportioning rent, one by granting the reversion of part of the land out of which the rent issues; the other by granting part of the rent to one person and part to another. (*Bliss v. Collins*, 1 D. & R. 291; 5 B. & Ald. 882.) If the lessor dispose of part of the lands in reversion, either by will or deed, and the lessee attorn to such grantee, the rent is apportionable, but the lessee's concurrence to the apportionment is necessary. (*West v. Lascelles*, Cro. Eliz. 851; 13 Rep. 57 a.) Rent service may be devised by will, and divided from the reversion, so as to enable a devisee of part of the rent to maintain an action of debt. (*Ards v. Watkin*, Cro. Eliz. 637, 651.)

Apportionment of rent service.

Rent was apportioned where a man seised of two acres, one in fee and another in tail, made a lease for life or years, and died, and the issue in tail avoided the lease. (Co. Litt. 148 b.) So where a lease of lands of which the lessor was seised in fee, and of other lands of which he was tenant for life with a power of leasing, was granted at a certain rent, but the lease was not well executed according to the power: it was held, that the lease as to the lands held in fee was good, because the rent might be apportioned. (*Doe v. Meyler*, 2 Maule & S. 276.)

In an action of covenant against the assignee of a lease for nonpayment of an entire rent, the defendant pleaded in bar, an eviction of a moiety of the demised premises by title paramount. Held, that the plea was bad, because the rent might be apportioned. (*Stevenson v. Lambard*, 2 East, 575.)

In replevin against the assignee of the reversion of part of the premises demised, the defendant may avow at common law, stating the facts specially and leaving the apportionment of the rent to be made by the jury; or he may avow in the general form given by 11 Geo. 2, c. 19, s. 22, as upon a holding at a certain rent; and if he avow under the statute for the entire rent, or with a deduction from the entire rent greater or less than the proportion properly belonging to his interest in the reversion, the judge at Nisi Prius may direct the avowry to be amended, either by converting it into an avowry at common law, or leaving it as an avowry under the statute by describing the rent in conformity with the proportionate value of the respective particles or parts into which the reversion has been divided. It seems that the judge or the court, substituted by consent of parties for the judge at Nisi Prius, may make such amendment, although first prayed for after the verdict is delivered, and before it is recorded. (*Roberts v. Snell*, 1 Mann. & G. 577.) The assignee of part of the reversion may distrain as well as an assignee of the reversion in part of the premises. (*Neale v. Mackenzie*,

22 & 23 Vict.  
c. 35, s. 3.

Eviction by title  
paramount.

1 M. & W. 747, 757; *Stevenson v. Lambard*, 2 East, 575; 2 Inst. 503; *Jacob v. Kirk*, 2 M. & Rob. 221.)

If part of the land out of which a rent-charge issues is evicted by a title paramount, the rent will be apportioned; and if a rent service is chargeable on land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel the others to contribution. The same doctrine will apply to co-tenants of the land, or of different parts of the land. (Co. Litt. 146, 148, 149; Com. Dig. Suspension, E. G.; 2 Inst. 119; Bac. Abr. Rent, M. 1, 2; *Averall v. Wade*, Lloyd & G. temp. Sngd. 252.)

If the lessee be evicted from part of the land by title paramount to the landlord, the rent may be apportionably diminished according to the proportion of the land evicted. But if the lease be bad as to part of the land by the *act of the lessor*, he will not be entitled to an apportioned rent in respect of so much of the land as is well demised.

A lessee of one hundred acres of land accepted the lease and entered upon the land: upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the eight acres until half-a-year's rent became due, and excluded the lessee from the enjoyment during that period, the lessee continuing in possession of the remainder. It appeared from the dates of and averments in the pleadings, that the prior lease was for a term extending beyond the duration of the latter lease. It was held, on error (reversing the judgment of the Court of Exchequer), that the latter demise was wholly void as to the eight acres; and that the rent was not apportionable; and that the lessor was not entitled to distrain for the whole rent or any part of it. (*Neale v. Mackenzie*, 1 Mees. & W. 747; 2 Cr. M. & R. 84. See *Tomlinson v. Day*, 5 Moore, 558; 2 Brod. & B. 681.)

Statutory provisions for apportionment of rent.

Statutory provisions have been made for the apportionment of rent where land is taken for certain public purposes. See 8 & 9 Vict. c. 18, s. 119; 12 & 13 Vict. c. 49; 17 & 18 Vict. cc. 32, 97, 116.

As to the apportionment of rent service, see further, Woodfall, L. & T. 362 *et seq.*, 9th ed. And as to the apportionment of rent-charges, see the note to 23 & 24 Vict. c. 35, s. 10, *post*.

### Policies of Insurance.

Relief against forfeiture for breach of covenant to insure in certain cases.

4. A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court in conformity with the covenant to insure, upon such terms as to the court may seem fit (*d*).

Relief in equity.

(*d*) The court has jurisdiction to relieve against a breach of covenant to insure committed after the passing of this act, arising on a lease dated before the passing of the act. (*Page v. Bennett*, 2 Giff. 117; 6 Jur., N. S. 419; 29 L. J., Ch. 398; 8 W. R. 339.) Where a tenant had allowed judgment in ejectment to go by default, and then filed a bill for relief, the court relieved against the judgment on payment by the plaintiff of the taxed costs at law, the arrears of rent, the amount due for repairs and insurance, and 50*l.* costs in equity, and ordered the defendant to account for the rent. (*Bamford v. Creasy*, 3 Giff. 675.)

Relief at common law against forfeiture for non-insuring.

By the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2, in the case of any ejectment for a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, the court or a judge shall have power upon rule or summons to give relief in a summary manner, but subject to appeal as mentioned in sects. 4 to 11, in all cases in which such relief may now be obtained in the Court of Chancery under the provi-

sions of the 23 & 24 Vict. c. 35, and upon such terms as would be imposed in such court. By sect. 3, where such relief shall be granted, the court or a judge shall direct a minute thereof to be made by indorsement on the lease or otherwise.

22 & 23 Vict.  
c. 35, s. 4.

5. The court, where relief shall be granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.

When relief granted the same to be recorded.

6. The court shall not have power under this act to relieve the same person more than once in respect of the same covenant or condition ; nor shall it have power to grant any relief under this act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief.

Court not to relieve any person more than once in respect of the same covenant, &c.

7. The person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant.

Lessor to have benefit of an informal insurance.

8. Where, on the bonâ fide purchase after the passing of this act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase ; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant.

Protection of purchaser against forfeiture under covenant for insurance against fire in certain cases.

9. The preceding provisions shall be applicable to leases for a term of years absolute, or determinable on a life or lives or otherwise, and also to a lease for the life of the lessee or the life or lives of any other person or persons.

Preceding provisions to apply to leases for a term of years absolute, &c.

### *Rent-charges.*

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditament released without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release (e).

Release of part of land charged not to be an extinguishment.

(e) A person having a rent-charge, by releasing all his right in part of

Release of rent-charges.

22 & 23 Vict.  
c. 35, s. 10.

Extinguishment  
of rent-charges.

Apportionment of  
rent-charges.

the land charged extinguishes the whole rent, because it issues out of every part, and cannot be apportioned. (18 Vin. Abr. 504.) But a person having a rent-charge may release part of it to the tenant of the land, and reserve part, for the grantee deals only with that which is his own, namely, the rent, and not with the land. (Co. Litt. 148 a; 3 Vin. Abr. 10, 11.) So if the lessee surrender part of the land to the lessor, the rent services will be apportioned. (Co. Litt. 148.)

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222), because the rent is entire and against common right, and issuing out of every part of the land (Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152), although it is otherwise where part of the lands out of which the rent issues descends on the grantee. (1 Roll. Abr. 236, pl. 5.) If the grantee of a rent-charge purchases part of the land, and the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, this amounts to a new grant. (Co. Litt. 147 b.) A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge. (*Dennet v. Pass*, 1 Bing. N. C. 388; 5 Moor. & S. 218.)

As to the apportionment of a rent-charge charged on lands devised to trustees, see *Mills v. Cobb*, L. R., 2 C. P. 95. A rent-charge was payable out of property part of which comprised mines and was settled upon the eldest son, and part was agricultural land, and was settled upon the younger children. The mining property produced a larger income, but being of a fluctuating nature, and liable to great diminution, was valued at seven years' purchase, and the agricultural property at thirty years' purchase. It was held, that the two properties must contribute to the rent-charge in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value. (*Ley v. Ley*, L. R., 6 Eq. 174.)

For conditions of sale apportioning a rent-charge, where the property charged is sold in lots, see 1 *Prideaux Conv.* 58, 7th ed. And for a deed containing mutual covenants by several purchasers in such a case, see 2 *Prideaux Conv.* 667, 7th ed.

### Judgments.

Release of part of  
land charged not  
to affect judg-  
ment.

11. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release (f).

(f) In 1824, judgments were obtained against A., tenant in tail of Whiteacre, which was, subsequently on A.'s marriage in the same year, settled upon A. for life, with remainders over, and a recovery suffered to the uses of the settlement. In 1825, A. purchased the fee of Blackacre. In 1829, the plaintiff agreed to lend 2,000*l.* on mortgage of Blackacre in fee and of A.'s life estate in Whiteacre, provided the judgment creditors would release Blackacre. The judgment creditors accordingly executed a deed poll, reciting that A. had requested them to release Blackacre from the incumbrances thereon by their judgments, and that they being satisfied that the residue of A.'s land was a sufficient security for their judgments had agreed thereto; and by the operative part of the deed they released, exonerated, and for ever discharged Blackacre from their respective judgments, and from all writs of execution and executions, and every other writ then sued out or thereafter to be sued out against Blackacre by virtue of their respective judgments or otherwise in relation thereto, and they agreed for their respective judgments only to indemnify A. for all costs, damages and expenses which should at any time be incurred by reason of



Blackacre being attached in execution under those judgments. The mortgage was subsequently executed. It was held, that both at law and in equity the operation and effect of the deed poll of 1829 was to exonerate Whiteacre as well as Blackacre from the rights and remedies of the judgment creditors. The Lord Chancellor said that the case was analogous to that of a rent-charge, where by law a release of part of the land charged will discharge the whole. (*Handcock v. Handcock*, 1 Ir. Ch. R. 444.)

22 & 23 Vict.  
c. 35, s. 11.

A provision similar to that contained in the above section was applied to Ireland by the act 11 & 12 Vict. c. 48, s. 72. Irish Act.

A., who had contracted to purchase real estate from B., made default in payment of the purchase-money, and the estate was resold to B. under a decree of the court in a suit for specific performance. Several judgment creditors of A. claimed interests in the property, and A. filed a bill against them praying that the property might be declared free from their claims. Before the hearing, all the defendants except C. agreed to release their claims; and at the hearing the court granted the relief prayed, and ordered C. to pay all the costs of the suit. (*Moscrop v. Sandeman*, 9 Jur., N. S. 1146.)

Where a tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt, it was held that his tenancy by elegit on the rest of the lands was extinguished, and that his judgment was satisfied. (*Hele v. Lord Beazley*, 17 Beav. 14.)

Purchase by judgment creditor of part of land extended.

### Powers.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend (g).

Mode of execution of powers.

(g) At common law signing is not essential to the validity of a deed, though sealing is. And, accordingly, the common form of attestation to a deed used to be "sealed and delivered by the party in the presence of us." It was decided, however, in *Wright v. Wakeford* (17 Ves. 454; 4 Taunt. 213), where a power was required to be executed with a consent testified by writing under hand and seal attested by two or more credible witnesses, and the attestation clause did not express that the witnesses attested the signing as well as the sealing and delivery of the deed; that the power was not well executed. *Preston's Act* (54 Geo. 3, c. 168) was passed to cure the defect thus arising as to all instruments intended to exercise powers and executed before the 30th July, 1814. The above section was passed to provide a further remedy. See, further, Sugden on Powers, 234 *et seq.*, 8th ed.

*Wright v. Wakeford.*

*Preston's Act.*

By 1 Vict. c. 26, s. 10, *ante*, p. 511, an appointment by will is to be exe-

Appointments by will.



22 & 23 Vict.  
c. 35, s. 18.

cutted like other wills and to be valid, although other required solemnities are not observed.

Sale under power  
not to be avoided  
by reason of mis-  
taken payment to  
tenant for life.

18. Where under a power of sale a bonâ fide sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal monies and interest, under the direction of the court, upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him (*h*).

(*h*) Before this act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale. (*Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; *S. C.* nom. *Cockerell v. Cholmley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60. See 25 & 26 Vict. c. 108, *post*.)

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[The 14th, 15th, 16th, 17th and 18th sections of this act are inserted *ante*, pp. 484—488.]

[The 19th and 20th sections of this act, as to inheritance, are inserted *ante*, p. 442.]

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### Assignment of Personalty.

Assignment to  
self and others.

21. Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another (*i*).

(*i*) At common law a man could not assign personalty to himself and another: a rule which occasioned inconvenience in the transfer of trust property. Thus where leaseholds were held upon trust, and on the retirement of a trustee it was wished to vest the trust property in the continuing and a new trustee, according to the course formerly adopted, the leaseholds were assigned by the continuing and retiring trustees to a provisional trustee, and by him re-assigned to the continuing and new trustees. By virtue of the above section the continuing and retiring trustees can assign directly to the continuing and new trustees. (See 4 Davidson, Conv. 600, 2nd ed.)

As to the means by which a man can convey real estate to himself, see Williams' Real Prop. 173, 7th ed.

[The 22nd section of this act is inserted *ante*, p. 607. And the 23rd section is inserted *ante*, p. 488.] 22 & 23 Vict.  
c. 35, s. 24.

24. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser [*or mortgagee*] (*k*), or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this act conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser [*or mortgagee*], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of her Majesty's attorney-general, or in case that office be vacant of her Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

Punishment of vendor, &c. for fraudulent concealment of deeds, &c. or falsifying pedigree.

(*k*) This section of the act shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in this section. (23 & 24 Vict. c. 38, s. 8, *post*.)

25. In the construction of the previous provisions in this act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

Interpretation of terms.

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every per-

22 & 23 Vict.  
c. 35, s. 25.

son by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge or charge as aforesaid is made or transferred:

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments (*l*).

(*l*) See 1 & 2 Vict. c. 110, s. 18, *ante*, p. 589.

### *Trustees and Executors.*

Trustee, &c.  
making payment  
under power of  
attorney not to be  
liable by reason of  
death of party  
giving such power.

26. No trustee, executor or administrator making any payment or doing any act *bonâ fide* under or in pursuance of any power of attorney shall be liable for the moneys so paid or the act so done by reason that the person who gave the power of attorney was dead at the time of such payment or act, or had done some act to avoid the power, provided that the fact of the death, or of the doing of such act as last aforesaid, at the time of such payment or act *bonâ fide* done as aforesaid by such trustee, executor or administrator, was not known to him: provided always, that nothing herein contained shall in any manner affect or prejudice the right of any person entitled to the money against the person to whom such payment shall have been made, but that such person so entitled shall have the same remedy against such person to whom such payment shall be made as he would have had against the trustee, executor or administrator, if the money had not been paid away under such power of attorney (*m*).

(*m*) According to the old common law, a power of attorney is instantly revoked by the death of the grantor, and acts afterwards done under it are invalid. (*Watson v. King*, 4 Camp. 272.) In equity, however, before this act it seems that acts done under a power of attorney after the death of the grantor, *bonâ fide* and without notice, were considered valid. (*Bailey v. Collett*, 18 Beav. 179, and cases there quoted.)

Powers of attorney issued by the Bank of England for the transfer of stock contain a clause making the transfer valid, notwithstanding the previous death of the grantor; as to which see *Kiddill v. Farnell*, 3 Sm. & Giff. 428.

Where a legacy was bequeathed to a married woman, who was abroad with her husband, and the husband required the legacy to be paid under a power of attorney, it was held that the executor was justified in paying the money into court, because until reduction into possession by the husband, the wife's right might have accrued by the death of the husband, which would have been a revocation of the power. (*Re Jones*, 8 Drew. 680.)

As to the liability of a trustee in paying trust funds to an agent of the *cestui que trust*, see Lewin, 284 *et seq.*, 5th ed. And as to powers of attorney generally, see 1 Davidson Conv. 408, note (*a*), 3rd ed.; 8 Jarman Conv., Powers of Attorney, by Stokes.

As to liability of  
executor or ad-  
ministrator in re-  
spect of rents, co-  
venants or agree-  
ments.

27. Where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the as-

22 & 23 Vict.  
c. 35, s. 27.

signment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease ; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease ; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed (n).

(n) As to the liability of the executor of a lessee in respect of the rents, covenants and agreements of his testator, see 2 Wms. Exors. 1617, 1244, 6th ed.

Where the estate of the lessee is administered by the court and such a liability exists, it was laid down that the court would not order the assets to be distributed without providing a sufficient indemnity, or without impounding a sufficient part of the residuary estate for that purpose. (2 Wms. Exors. 1247 ; Dan. Ch. Pr. 1099.)

Administration by  
the court.

It has been held, however, by the Master of the Rolls, that where an executor fairly states the facts and pays over the assets under the direction of the court in an administration suit, he is fully indemnified against all existing or contingent demands on the estate. (*Dean v. Allen*, 20 Beav. 1 ; *Waller v. Barrett*, 24 Beav. 413.) And this principle has been accepted by other judges. (*Bennett v. Lytton*, 2 J. & H. 155 ; *Smith v. Smith*, 1 Dr. & Sm. 384 ; *Williams v. Headland*, 4 Giff. 505.)

Executor fully  
protected by the  
decree of the  
court.

It seems that it is now improper in the case of administration by the court to impound any part of the residuary estate, either on the ground of indemnity to the executor, or for the protection and benefit of the lessor. (*Dodson v. Sammell*, 1 Dr. & Sm. 575 ; see the judgment of *Kindersley*, V.-C.)

Under the circumstances mentioned in this section an executor obtains protection without the necessity of applying to the court. The section is retrospective. (*Smith v. Smith*, 1 Dr. & Sm. 384 ; *Re Green*, 2 De G., F. & J. 121, overruling *Dodson v. Sammell*, 8 W. R. 252.)

Section is retro-  
spective.

Where an indemnity fund was set apart in 1857 by the court in respect of leasehold property belonging to a testator, the Master of the Rolls, in 1861, held, that it was done for the security of the ground landlord, and not for the protection of the executors ; and that the parties beneficially interested were not entitled to have it paid out under this section without the consent of the ground landlord. (*Bunting v. Marriott*, 7 Jur., N. S. 565 ; 9 W. R. 264.)

Payment out of  
indemnity fund.

Such a fund, however, was ordered to be paid out to a residuary legatee by *Kindersley*, V.-C., on the ground that since this section such an indemnity is no longer necessary. (*Dodson v. Sammell*, 1 Dr. & Sm. 575.) And, in 1865, the Master of the Rolls ordered such a fund, which had been set apart in 1857, to be distributed among an intestate's next of kin, it appearing

22 & 23 Vict.  
c. 35, s. 27.

Right to follow  
assets.

As to liability of  
executor, &c. in  
respect of rents,  
&c. in convey-  
ances on rents-  
charge.

that all his leases had either been sold or surrendered. (*Reilly v. Reilly*, 84 Beav. 406.)

As to the right of a creditor to follow assets into the hands of a legatee and compel him to refund, see 2 Wms. Exors. 1344, 6th ed. As to the right, where personal assets have been aliened by the person who has received them, see *Dilkes v. Broadmead*, 2 De G., F. & J. 566; and where real assets have been aliened, see *Spackman v. Timbrell*, ante, p. 468, and *Kinderley v. Jervis*, ante, p. 478.

28. In like manner, where any executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed (o).

(o) See note to sect. 27, ante.

As to distribution  
of the assets of  
testator or intestate  
after notice  
given by executor  
or administrator.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of

which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be ; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively (*p*).

22 & 23 Vict.  
c. 35, s. 29.

(*p*) An executor or administrator cannot as plaintiff administer an estate on summons (15 & 16 Vict. c. 86, ss. 45, 47), but he may file a bill for administration (15 & 16 Vict. c. 86, s. 42, rule 6) ; or he may obtain an account of the debts and liabilities of the deceased upon motion or petition of course, or upon summons (13 & 14 Vict. c. 35, s. 19 ; 23 & 24 Vict. c. 38, s. 14, *post*), or he may proceed under this section.

Proceedings by an executor or administrator.

As to the protection obtained by an executor who acts under a decree of the court, see note to sect. 27, *ante*. An executor who distributes assets, after taking the steps pointed out by section 29, is entitled to the same protection as if he had administered the estate under a decree of the court. (*Clegg v. Rowland*, L. R., 3 Eq. 368.) Where an executor appropriated assets for the benefit of *cestui que trusts*, and retained them as trustee, it was held that he was no longer liable *quâ* executor. (*Ib.*)

Protection afforded to an executor.

As to providing for the liabilities of a testator, certain or contingent, see Dan. Ch. Pr. 1099, 5th ed.; 13 & 14 Vict. c. 35, s. 23 ; *Hughes v. Young*, 3 N. R. 690 ; 4 N. R. 17 ; *Re Forest*, W. N. 1868, p. 194, and the note to sect. 27, *ante*.

As to the notices usually given by the Court of Chancery in an administration suit, see Dan. Ch. Pr. 1091, 5th ed.; and for a form of notice under this section, see Dan. Ch. Forms, 1219, and note (*c*).

Notices.

Where executors issued no notices in the "London Gazette," but issued notices in local newspapers in the neighbourhood where the testator resided, directing claims against the estate to be sent in within three weeks : it was held the notices were insufficient. (*Wood v. Weightman*, L. R., 13 Eq. 434.)

Where advertisements had been issued under this section, and an administration suit was subsequently instituted, it was held unnecessary to issue fresh advertisements. (*Cuthbert v. Wharmby*, W. N. 1869, p. 12.)

Where executors of a shareholder in a company, who did not know that the testator was possessed of the shares, issued advertisements under this section and distributed the assets, and the company was subsequently wound up, they were placed on the list of contributories, on the ground that they might have further assets come to their hands. (*Russell's Executors' Case*, *Albert Arbitration*, 15 S. J. 790.) Lord Cairns said that the time for the act being prayed in aid by the executors would be on the accounts being taken; and that under the act, when all the terms were complied with, the executors would be under no liability with regard to that which they had paid away. (*Ib.*)

Liability on shares.

A contributory died before his liability was discharged, and his executrix published advertisements under this section, but the liquidator sent in no claim. It was held, that the executrix had notice of this claim, and could not by advertisements avoid satisfying it, and she was placed on the list as executrix. (*Markwell's Case*, 21 W. R. 135.)

30. Any trustee, executor or administrator (*q*) shall be at liberty, without the institution of a suit, to apply by petition to any judge of the High Court of Chancery, or by summons upon a written statement to any such judge at chambers (*r*) for the opinion, advice, or direction of such judge on any question respecting the management or administration of the trust property

Trustee, executor, &c. may apply by petition to judge of Chancery for opinion, advice, &c. in management, &c. of trust property.



22 & 23 Vict.  
c. 35, s. 30.

or the assets of any testator or intestate, such application to be served upon or the hearing thereof to be attended by all persons interested in such application, or such of them as the said judge shall think expedient; and the trustee, executor or administrator, acting upon the opinion, advice or direction given by the said judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor or administrator in the subject-matter of the said application: provided nevertheless, that this act shall not extend to indemnify any trustee, executor or administrator, in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee, executor or administrator, shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice and direction; and the costs of such application as aforesaid shall be in the discretion of the judge to whom the said application shall be made (s).

Who may apply.

(q) An order has been made under this section on the petition of a *cestui que trust* (*Re Ward*, 14 W. R. 96) and of one of several trustees (*Re Muggeridge*, Johns. 625). Where the domicile of a testator and one of the trustees of his will was Irish, and the domicile of the other trustee and of the tenant for life under the will was English, and the trustees (there having been no previous application to the Irish Court of Chancery) made an application under this section to the English Court of Chancery with reference to certain investments, the court made the order. (*Re French*, L. R., 15 Eq. 68.)

Form of petition  
&c.

(r) In applications under this section the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel. (23 & 24 Vict. c. 38, s. 9, *post*, p. 726.)

All petitions, summonses, statements, affidavits and other written proceedings under this section shall be intitled in the matter of the act, and in the matter of the particular trust, will or administration; and every such petition and statement shall be marked in manner directed by the 6th of the Consolidated General Orders, rule 6; and every such petition or statement shall state the facts concisely, and shall be divided into paragraphs numbered consecutively; and every such summons shall, except as to its title, be in the form of the general summons in schedule (K.), No. 1, subjoined to the Consolidated General Orders. (Order, March 20, 1860, rule 1.) Morgan, 618, 4th ed. (For form of petition, summons and statement, see Dan. Ch. Forms, 2177—2179; and for forms of orders, see Seton, 773, 774.)

At the time when any such summons is sealed, the statement upon which the same is grounded shall be left at the chambers of the judge, and shall on the conclusion of the proceedings be transmitted to the registrar by the chief clerk with the minutes of the opinion, advice or direction given by the judge, and the registrar shall cause such statement to be transmitted to the Report Office to be there filed. (Rule 2, *Ib.*)

Service.

Every such petition or summons shall be served seven clear days before the hearing thereof, unless the person served shall consent to a shorter time. (Rule 3, *Ib.*)

Wood, V.-C., laid down that a petition under this section ought not in the first instance to be served upon any one, but an application should be made in chambers as to the persons upon whom the petition should be served. (*Re Muggeridge*, Johns. 625.) But *Kindersley*, V.-C., decided that the petitioners must serve such persons as they think proper, and must not bring on the petition merely in order to ascertain who ought to be served (*Re Green*, 6 Jur., N. S. 530; 29 L. J., Ch. 716; 8 W. R. 403); and the usual foot note as to service should be added. (*Ib.*)

From the words of the section it seems that the petition should be served

on all persons interested in the application. Where trustees of a will made an application with reference to a sale of certain mining and bank shares of the testator, *Malins*, V.-C., held the children need not be served. (*Re Tuck*, W. N. 1869, p. 15; and see *Re French*, L. R., 15 Eq. 68.)

22 & 23 Vict.  
c. 35, s. 30.

The opinion, advice or direction of the judge shall be passed and entered and remain as of record in the same manner as any order made by the court or judge, and the same shall be termed "a judicial opinion," or "judicial advice," or "judicial direction," as the case may be. (Order, March 20, 1860, rule 4.) As to passing and entering orders, see Dan. Ch. Pr. 869 *et seq.*

Passing and entering opinion of judge.

The fees of court and the fees and allowances to solicitors on proceedings under this section shall be the same as are now payable under the Consolidated General Orders 38 and 39, and by the practice of the court for business of a similar nature. (Rule 5, *Ib.*; Morgan, 619, 4th ed.)

Costs.

(s) On such a petition the court will not direct an inquiry at chambers. (*Re Mockett*, Johns. 628.) No affidavits can be read on such a petition. (*Re Muggerridge*, Johns. 625; *Re Barrington*, 1 J. & H. 142.)

Under this section court will not direct an inquiry, nor receive affidavits, nor deal with matters of detail,

The court will not give an opinion under this section upon matters of detail which cannot be properly dealt with without the superintendence of the court and the assistance of affidavits. Therefore, where trustees of a settlement having a power of purchasing lands on the request of tenants for life, desired the opinion of the court as to the propriety of applying 1,200*l.* on such request in repairs and permanent improvement, no answer was given on the petition. (*Re Barrington*, 1 J. & H. 142.)

The court will not give an opinion on an hypothesis: therefore, where a petition was presented under this section to obtain the advice of the court as to the mode in which calls not yet made on account of certain shares specifically bequeathed by the testator were to be met, the court ordered the petition to stand over till the call had been actually made (*Re Box*, 11 W. R. 945); but after a call had been made, the court dealt with the question. (1 H. & M. 552.)

or an hypothesis.

Questions of construction were at first in some cases decided upon petitions under this section. (*Re Petts*, 27 Beav. 576; *Re Michel*, 28 Beav. 39; *Re Davies*, 29 Beav. 93; *Re Jacob*, *id.* 402; *Re Green*, 1 Dr. & Sm. 68; *Re Elmore*, 9 W. R. 66; *Re Lang*, *id.* 589.) But *Kindersley*, V.-C., laid down that the court would not upon a petition presented by a trustee or an executor under this section for the opinion, advice, or direction of the court, construe an instrument or make any order affecting the rights of parties to property, and that such petitions should relate only to the management and investment of trust property. (*Re Lorenz*, 1 Dr. & Sm. 401.) The Master of the Rolls has refused, on a petition under this section, to construe an instrument (*Re Hooper*, 29 Beav. 656), or to decide whether an intestate's estate was liable upon a covenant to be implied in his marriage settlement (*Re Evans*, 30 Beav. 232); and *Wood*, V.-C., has laid down that where an important and difficult question is involved, the proper course is to file a bill instead of presenting a petition. (*Re Mockett*, Johns. 628; *Re Barrington*, 1 J. & H. 142; *Re Burnett*, 10 Jur., N. S. 1099; *Re Box*, 1 H. & M. 552.) See, however, *Re Ware*, 20 W. R. 142, when, under the circumstances, *Bacon*, V.-C., decided a question of construction on a petition under this section.

Questions of construction.

Suits were subsequently instituted, and the questions of construction determined in that manner in *Re Mockett*, Johns. 628; *Re Barrington*, 1 J. & H. 142; see *Marsh v. Att.-Gen.*, 2 J. & H. 61.

On petition under this section the court has decided questions as to the appointment of foreign trustees. (*Re Long*, 17 W. R. 218; *Re Smith*, 20 W. R. 695.) As to the power of trustees to mortgage with power of sale (*Re Channon*, L. R., 8 Eq. 569); to lease (*Re Shaw*, L. R., 12 Eq. 124); to fix reserve biddings on a sale by auction (*Re Peyton*, 30 Beav. 252), and to lay out personalty in improving the estate (*Re Dennis*, 5 Jur., N. S. 1388; *Re Hotham*, L. R., 12 Eq. 76; *Re Pearson*, 21 W. R. 401; and see *Re Barrington*, 1 J. & H. 142). As to investments (*Re Knowles*, 18 L. T., N. S. 809; *Re Peyton*, L. R., 7 Eq. 463; *Re Langdale*, L. R., 10 Eq. 89). As to the exercise of a power of advancement (*Re Long*, 17

Questions decided under this section.

22 & 23 Vict.  
c. 35, s. 80.

Nature of the indemnity.

Section is retrospective.

Every trust instrument to be deemed to contain clauses for the indemnity and reimbursement of the trustees.

Operation of usual indemnity clause.

As to investments by trustees.

W. R. 218; *Re Kershaw*, L. R., 6 Eq. 322) and maintenance (*Re Tilt*, 17 W. R. 304). As to the appropriation and payment of legacies (*Re Murray*, W. N. 1868, p. 195; *Re Hellmann*, L. R., 2 Eq. 363). As to the distribution of the estate (*Re Green*, 2 De G., F. & J. 121). And a question of apportionment (*Re Rogers*, 1 Dr. & Sm. 338).

The opinion of the court upon a petition under this section gives an indemnity to the trustees only upon the facts stated in the petition, is subject to no appeal, and will not preclude the filing a bill. (*Re Mockett*, Johns. 628.)

This section is retrospective. (*Re Simpson*, 1 J. & H. 89.)

31. Every deed, will, or other instrument creating a trust, either expressly or by implication, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following; that is to say, "That the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such monies, stocks, funds, and securities, as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person, with whom any trust monies or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss, unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves, or himself, or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument" (t).

(t) The usual indemnity clause "while it informs the trustee of the general doctrines of the court, adds nothing to his security against the liabilities of his office." (Lewin on Trusts, 225, 5th ed. See further as to this clause, 3 Davidson, Conv. 246 *et seq.*, 3rd ed.) A clause is now usually inserted in settlements supplemental to the indemnity clause, empowering trustees to lend on securities with less than a marketable title; as to which see 3 Davidson, Conv. 720, 8rd ed. As to the liability of a trustee for the acts and receipts of his co-trustee, see note to *Townley v. Sherborne*, and *Brice v. Stokes*, 2 L. C., Eq. 873 *et seq.*, 4th ed.

A testator provided that each trustee should be answerable only for losses arising from his own default and not for involuntary acts, or for the acts or defaults of his co-trustees or co-trustee, and particularly that any trustee who should pay over to his co-trustee, or should concur in any act enabling him to receive any moneys for the general purposes of the will, or for any definite purpose authorized by the will, should not be obliged to see to the due application thereof, nor be rendered responsible by express notice of misapplication of the moneys; but that this clause should not restrict the right of any trustee to require an account from his co-trustee or to make him replace moneys misapplied. Two trustees handed over the trust fund for investment to a third who misapplied it: it was held that the two were not liable to make good the fund. (*Wilkins v. Hogg*, 3 Giff. 116; affirmed by Lord Westbury, 10 W. R. 47. See 4 Davidson, Conv. 52, 2nd ed.)

32. When a trustee, executor, or administrator shall (u) not, by some instruments creating his trust, be expressly forbidden

to invest any trust fund on real securities, in any part of the United Kingdom, or on the stock of the Bank of England or Ireland, or on East India stock (*v*), it shall be lawful for such trustee, executor, or administrator, to invest such trust fund on such securities or stock; and he shall not be liable on that account as for a breach of trust, provided that such investment shall in other respects be reasonable and proper (*x*).

22 & 23 Vict.  
c. 35, s. 32.

(*u*) It was held that this section was not retrospective (*Re Miles*, 27 Beav. 579), but it has since been enacted that the section shall operate retrospectively. (23 & 24 Vict. c. 38, s. 12, *post*. See *Hume v. Richardson*, there quoted.)

Section retrospec-  
tive.

Where the trust fund is already invested in Bank Annuities, and the trustee has no power independently of the act to vary investments, this section does not apply. (*Re Warde*, 2 J. & H. 191.)

(*v*) It was doubted whether the words "East India Stock" included East India Stock created after the 13th August, 1859. (*Re Colne Valley and Halstead R. Co.*, 1 De G., F. & J. 53; *Re Fromow*, 8 W. R. 272.) But by 30 & 31 Vict. c. 132, s. 1, it was enacted that the words "East India Stock," in the said act passed in the session holden in the twenty-second and twenty-third years of her Majesty, chapter thirty-five, shall include and express as well the East India Stock, which existed previously to the thirteenth day of August, one thousand eight hundred and fifty-nine, when the said act received the assent of her Majesty, as East India Stock, charged on the revenues of India, and created under and by virtue of any act or acts of parliament which received her Majesty's assent on or after the thirteenth day of August, one thousand eight hundred and fifty-nine: and it shall be lawful for every trustee, executor or administrator, to invest any trust fund in his possession or under his control in the stock created by the last-mentioned act or acts to the same extent, and for the same purposes and objects, as he can now invest such trust fund in the East India Stock, which existed previously to the thirteenth day of August, one thousand eight hundred and fifty-nine. (See also 32 & 33 Vict. c. 106, s. 16.)

East India Stock.

(*x*) Where an application was made for the opinion of the court whether under a trust for investment in government or other approved securities, the trustees would be justified in investing in East India Stock or railway debentures, or on mortgage of freeholds, copyholds or leaseholds, the court approved of an investment on freeholds in England or Wales, but declined to give any answer sanctioning investments in the other securities mentioned. (*Re Simson*, 1 J. & H. 89.)

As to investments by trustees generally, see Lewin, 250 *et seq.*, 5th ed., and 23 & 24 Vict. c. 38, ss. 10, 11, *post*. Trustees are empowered by 30 & 31 Vict. c. 132, s. 2 (when not forbidden by some instruments creating their trust) to invest trust funds in securities, the interest of which is guaranteed by parliament. And where trustees have power to invest trust funds in the mortgages or bonds of a railway or other company, they may invest the trust funds in the debenture stock of the company. (34 & 35 Vict. c. 27, s. 1. See also sect. 40 of 28 & 29 Vict. c. 78, which act has been amended by 33 & 34 Vict. c. 20.)

Investments by  
trustees generally.

As to the investment on real securities of trust funds, held for public and charitable purposes, see 33 & 34 Vict. c. 34.

33. This act shall not extend to Scotland.

Act not to extend  
to Scotland.

## FURTHER AMENDMENT OF LAW OF PROPERTY.

23 &amp; 24 VICTORIA, c. 38.

*An Act to further amend the Law of Property.*

[23rd July, 1860.]

23 & 24 Vict.  
c. 38, s. 6.

Restriction of  
effect of waiver.

BE it enacted as follows :

[The 1st, 2nd, 3rd, 4th and 5th sections of this act, as to the registration of judgments, are inserted *ante*, pp. 618—621.]

6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear (*a*).

(*a*) As to waiver of forfeiture, see the notes to *Duppa v. Mayo*, 1 Wms. Saund. 443 *et seq.*, ed. 1871.

Provision for  
cases of future  
and contingent  
uses.

7. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere (*b*).

(*b*) As to the doctrine of scintilla juris, see Sugden, Powers, 18 *et seq.*, 8th ed.

Sect. 24 of 22 & 23  
Vict. c. 35, ex-  
tended to mort-  
gages.

8. The section twenty-four (*c*) in the act of the session of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in the said section.

(*c*) *Ante*, p. 717.

Form of applying  
for advice of  
judge, &c. under  
sect. 30 of 22 & 23  
Vict. c. 35.

9. Where any trustee, executor or administrator shall apply for the opinion, advice or direction of a judge of the court of Chancery under the thirtieth section of the act of the twenty-second and twenty-third of her present Majesty, chapter thirty-

five (d), the petition or statement shall be signed by counsel, and the judge by whom it is to be answered may require the petitioner or applicant to attend him by counsel either in chambers or in court where he deems it necessary to have the assistance of counsel.

23 & 24 Vict.  
c. 38, s. 9.

(d) *Ante*, p. 722.

10. It shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners for the custody of the Great Seal of England, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors of the said court, or any three of them, and for the Lord Chancellor of Ireland, with the advice and assistance of the Lord Justice of Appeal and the Master of the Rolls in Ireland, to make such general orders from time to time as to the investment of cash under the control of the court, either in the three per cent. consolidated or reduced or new bank annuities, or in such other stocks, funds or securities as he or they shall, with such advice or assistance, see fit; and it shall be lawful for the Lord Chancellor, Lord Keeper or Lords Commissioners in England, and for the Lord Chancellor in Ireland, to make such orders as he or they shall deem proper for the conversion of any three per cent. bank annuities now standing or which may hereafter stand in the name of the accountant-general of the said Court of Chancery, in trust in any cause or matter, into any such other stocks, funds or securities upon which, by any such general order as aforesaid, cash under the control of the court may be invested; all orders for such conversion of bank annuities into other funds or securities to be made upon petition to be presented by any of the parties interested in a summary way, and such parties shall be served with notice thereof as the court shall direct (e).

Power to Lord Chancellors, &c. of England and Ireland to make general orders as to investment of cash under the control of the court.

(e) The following General Order was issued under this section on February 1st, 1861:—

General order.

1. "Cash under the control of the court may be invested in Bank Stock, East India Stock, Exchequer Bills and £2 : 10s. per Cent. Annuities, and upon mortgage of freehold and copyhold estates respectively in England and Wales as well as in Consolidated £3 per Cent. Annuities, Reduced £3 per Cent. Annuities and New £3 per Cent. Annuities."

2. "Every petition for the purpose of the conversion of any £3 per Cent. Bank Annuities into any of the other stocks, funds or securities hereinbefore mentioned shall be served upon the trustees, if any, of such Bank £3 per Cent. Annuities, and upon such other persons, if any, as the court shall think fit."

Upon applications under this order, the court at first sanctioned investments in East India Stock, upon the petition of the tenant for life, even though the market price of investment exceeded the rate at which the stock will be redeemable in 1874, viz. 200l. per cent. (*Equitable Reversionary Interest Society v. Fuller*, 1 Johns. & H. 379; *Bishop v. Bishop*, 9 W. R. 549.) But subsequently the Lord Chancellor and Lords Justices refused an application on the ground that it would work an injury to the remainderman. Lord Campbell, C., observed, that no more precise rule could safely be laid down than "that in the absence of any special circumstances which might make the desired transfer asked by the tenant for life beneficial to those in remainder irrespective of pecuniary calculations, the transfer ought

Investments in East India Stock at first sanctioned.

Afterwards refused.



23 & 24 Vict.  
c. 88, s. 10.

Sanctioned under  
special circum-  
stances.

Investments in  
Bank Stock.

Cases to which  
above powers of  
investment are  
applicable.

Order may be  
made in decree in  
suit.

Trustees, &c. to  
invest trust funds  
in the stocks, &c.  
in which cash  
under the control  
of the court may  
be invested.

not to be permitted, if on pecuniary calculations it might be injurious to those in remainder." And *Turner*, L. J., appears to have assented to this view, giving as an instance in which the court might properly make such investment, where "from the exigency of a family it would be desirable for the children that the income of the parents should be increased." (*Cockburn v. Peel*, 8 De G., F. & J. 170; *Re Boyce*, 15 W. R. 827.)

Where an order had been made for maintenance out of a fund invested in consols, and the fund became diminished when the infants had nearly attained their majority, the court ordered the fund to be invested in East India Stock. (*Hurd v. Hurd*, 11 W. R. 50.) An investment in East India Stock has been sanctioned on the petition of the tenant for life, where it was improbable the tenant for life would have issue. (*Vidler v. Parrott*, 12 W. R. 976; *Montefiore v. Guedalla*, W. N. 1868, p. 87.) Such an investment has also been sanctioned to raise a certain annual income which it was the primary object of the settlement to secure. (*Mortimer v. Picton*, 12 W. R. 292.)

The court refused an investment in East India Stock, but sanctioned a change of investment from New £3 per Centa. into Bank Stock. (*Re Langford*, 2 J. & H. 458; and see *Cohen v. Waley*, 9 W. R. 137.) Where a tenant for life had a wife and five children, and his income exclusive of the dividends on the fund in court (£6,357 : 15s. 2d. Consols), was only 70l. per annum, the court thought these circumstances sufficient to justify an investment in Bank of England Stock, and made the order accordingly. (*Peillau v. Brooking*, 4 L. T., N. S. 731.)

Where the petitioner was poor the court dispensed with a provision in the order, to prevent the party entitled receiving more than two dividends in twelve months. (*Re Ingram*, 11 W. R. 980.)

For the form of order in the case of an investment on real security, see *Ungless v. Tuff*, 9 W. R. 729.

Orders have been made under this section for the investment in consols of money paid into court under a private act which directed investment in Exchequer Bills (*Re Birmingham Blue Coat School*, L. R., 1 Eq. 632); and for the investment in East India Stock of money paid into court under a special act which directed investment in Consols or Reduced Annuities. (*Re Wilkinson*, L. R., 9 Eq. 343; see *Re Adams*, W. N. 1868, p. 58.)

The powers of investment given by this section are not applicable to money deposited in the Bank of England pursuant to the Parliamentary Deposits Act, 9 Vict. c. 20 (*Ex parte Great Northern R. Co.*, L. R., 9 Eq. 274); nor to the purchase-money of land sold under the Settled Estates Act. (*Re Shaw*, L. R., 14 Eq. 31; *Re Boyce*, 21 W. R. 667; *contra*, *Re Cook*, L. R., 12 Eq. 12; *Re Thorold*, L. R., 14 Eq. 31.)

Notwithstanding the latter part of this section, the court may make an order sanctioning a change of investment in a decree in a suit. (*Lucas v. Rudd*, 16 W. R. 325.)

For the present practice as to investing cash under the control of the court, see 35 & 36 Vict. c. 44; the Chancery Funds Rules, 1872 (L. R., 7 Ch. p. xxxv), and the Practice under them by Field & Dunn, p. 19 *et seq.*

11. When any such general order as aforesaid shall have been made it shall be lawful for trustees, executors or administrators having power to invest their trust funds upon government securities, or upon parliamentary stocks, funds or securities, or any of them, to invest such trust funds, or any part thereof, in any of the stocks, funds or securities in or upon which by such general order cash under the control of the court may from time to time be invested (*f*).

(*f*) With reference to sections 10 and 11, *Turner*, L. J., said, that if the Court of Chancery was called upon to exercise its discretion as to the mode of investment, it would look to the interests of the tenant for life and remainderman as between themselves. But where the trustees had

exercised their discretion, and there was nothing to show that they did not exercise it *bonâ fide*, the court would presume that they paid due regard to the interests both of the tenant for life and the remainderman, and would uphold what they had done. The decision in *Cockburn v. Peel* (*sup.*) was not intended to fetter the discretion of trustees as to making such an investment in cases where they consider it to be for the benefit of all parties. (*Hume v. Richardson*, 4 De G., F. & J. 82. See the facts of that case stated in the note to the next section.)

23 & 24 Vict.  
c. 38, s. 11.

12. Clause thirty-two of the said act of the twenty-second and twenty-third of Queen Victoria, chapter thirty-five, shall operate retrospectively (*g*).

Clause 32 of 22 &  
23 Vict. c. 35 to  
act retrospec-  
tively.

(*g*) Section 32 of 22 & 23 Vict. c. 35, was made retrospective for the purpose of making it applicable to instruments which would not otherwise have been included in it, but not for the purpose of altering rights which had already accrued. A testator directed his trustees to convert his personal estate and invest it in the purchase of lands to be settled in strict settlement, and in the meantime to invest it in the funds and pay the dividends to the persons who would have been entitled to the rents of the lands if purchased. The testator died shortly before the passing of 22 & 23 Vict. c. 35, possessed of Bank stock and East India stock. Held, after the passing of 23 & 24 Vict. c. 38, that the trustees were justified in retaining the above stocks in their present state, and investing other monies in like stocks until a suitable investment in land could be found; and that the tenant for life was entitled to the whole income arising from them subsequent to 23 & 24 Vict. c. 38, but that for the period between the death of the testator and 23 & 24 Vict. c. 38, the tenant for life was entitled only to such income as she would have received had the stocks been converted at the testator's death and invested in consols. (*Hume v. Richardson*, 4 De G., F. & J. 29.)

[Section 13 is inserted *ante*, p. 236.]

14. The order to take an account of the debts and liabilities affecting the personal estate of a deceased person, pursuant to the nineteenth section of the act of the thirteenth and fourteenth years of Victoria, chapter thirty-five (*h*), may be made immediately, or at any time after probate or letters of administration shall have been granted; and such order may be made either by the Court of Chancery upon motion or petition of course, or by a judge of the said court, sitting at chambers, upon a summons in the form used for originating proceedings at chambers; and after any such order shall have been made, the said court or judge may, on the application of the executors or administrators, by motion or summons, restrain or suspend, until the account directed by such order shall have been taken, any proceedings at law against such executors or administrators by any person having, or claiming to have, any demand upon the estate of the deceased, by reason of any debt or liability due from the estate of the deceased, upon such notice and terms and conditions (if any) as to the said court or judge shall seem just; and the judge, in taking an account of debts and liabilities pursuant to any such order, shall, on the application of the executors or administrators, be at liberty to direct that the particulars only of any claim or claims which may be brought in pursuant to any such order shall be certified by his chief clerk, without any adjudication thereon; and any notices for creditors

Order to take account of debts, &c. of deceased person under sect. 19 of 13 & 14 Vict. c. 35, may be made immediately after probate granted.

23 & 24 Vict.  
c. 38, s. 14.

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to come in which may be published in pursuance of any such order shall have the same force and effect as if such notices had been given by the executors or administrators in pursuance of the twenty-ninth section of the act of the twenty-second and twenty-third years of Victoria, chapter thirty-five.

13 & 14 Vict.  
c. 35, s. 19.

(A) This act enacted, that it shall be lawful for the said court upon the application of the executors or administrators of any deceased person by order to be made upon motion or petition of course, and to be in the form or to the effect set forth in the schedule thereto, with such variations as circumstances may require, to refer it to one of the masters of the said court to take an account of the debts and liabilities affecting the personal estate of such deceased person and to report thereon: provided always, that no such order shall be made until the expiration of one year next after the death of such deceased person, or pending any proceedings to administer the estate of such person, and that in case at any time after the making of such order any decree or order for administering the estate of such deceased person shall be made, it shall be lawful for the said court by such decree or order to stay or suspend the proceedings under such order of course on such terms and conditions, if any, as to the said court shall seem just. (13 & 14 Vict. c. 35, s. 19.) As to this act, see Morgan, Ch. Acts, 126, 4th ed., and Dan. Ch. Pr. 1076 *et seq.*

Where an administratrix was sued by a creditor, it was held that she might obtain an order for taking the accounts and then for an injunction to restrain the action, pending taking the accounts. *Malins, V.-C.*, treated the injunction as an *ex parte* injunction, and said that the plaintiff must undertake to be answerable in damages. (*Re Cole*, 17 L. T., N. S. 490.)

Section 14 of 23 & 24 Vict. c. 38 has been repealed from the first day of Michaelmas Term, 1867. (30 & 31 Vict. c. 44, ss. 52, 195.) Inasmuch, however, as the act 30 & 31 Vict. c. 44 was passed to amend the constitution, practice, and procedure of the Court of Chancery in Ireland it would seem that the repeal was not intended to extend to England. The injunction in *Re Cole (sup.)* was granted on the 27th Jan. 1868.

Act not to extend  
to Scotland, &c.

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

## TRUSTEES AND MORTGAGEES ACT.

23 & 24 VICTORIA, c. 145.

*An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages and Wills.*  
[28th August, 1860.]

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: be it enacted as follows:

23 & 24 Vict.  
c. 145, s. 1.

### PART I.

#### *Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.*

1. In all cases where by any will, deed or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale (a), either generally, or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

(a) These sections of the act strictly apply to those cases only where there is a power of sale; but it is probable that a trust for sale would also be within the act. (8 Davidson, Conv. 565, n. (u), 3rd ed.) Mr. Waley considered that there was no reason why reliance should not, in general, be placed on the implied powers given by the act to trustees having a power of sale and exchange, as a substitute for the express powers usually inserted, recourse being had to the power of introducing variations or limitations under the 32nd section (*post*), when it was desired to add to, alter, or restrict the statutory scheme without introducing any extensive and important deviation. But that where there would be a considerable deviation from the structure of the statutory power, it was

23 & 24 Vict.  
c. 145, s. 1.

the better course to insert full express powers. (3 Davidson, Conv. 569, 8rd ed.) For the power of sale and exchange usually inserted in settlements, see 3 Davidson, Conv. 1011, 8rd ed. And for clauses to be inserted where it is desired to rely on the statutory provisions, see *id.* 1014 and 1061.

These sections do not apply to trusts created before the 28th August, 1860. As to the powers and duties of trustees for sale, see generally, Lewin on Trusts, 812 *et seq.*, 5th ed.

Sale may be made  
under special con-  
ditions, and trus-  
tees may buy in,  
&c.

2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

Trustees exercis-  
ing power of sale,  
&c. empowered to  
convey.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

Moneys arising  
from sales, &c. to  
be laid out in  
other lands ;

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed or other instrument of settlement in which the power of sale or exchange was contained ; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges ; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall

as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents and purposes, powers, provisoes and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

23 & 24 Vict.  
c. 145, s. 4.

5. Provided nevertheless, that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

or in payment of  
incumbrances.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no lands situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.

Money arising  
from sales, &c.  
not to be laid out,  
nor lands ex-  
changed, else-  
where than in the  
country in which  
lands sold or ex-  
changed is  
situated.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made (*b*).

Until purchase of  
lands, &c. money  
to be invested at  
interest.

(*b*) As to the mode in which money arising from sales under the Settled Estates Act is to be applied, see *ante*, pp. 695, 696. And as to the securities in which trust funds can be invested, see *ante*, pp. 724, 728.

8. It shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit, and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be

Trustees of re-  
newable lease-  
holds may renew.



**23 & 24 Vict.  
c. 145, s. 8.**

**Restriction.**

**Expenses of  
renewal.**

**Money for  
equality of ex-  
change and for  
renewal of leases  
may be raised by  
mortgage, &c.**

**No sale, &c. to be  
made without  
consent of tenant  
for life, &c.**

lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same (c).

(c) The present rule adopted by courts of equity as to the proportions in which a tenant for life and remainderman must bear the expenses of renewal (where there is no express direction), is that they contribute in proportion to their actual enjoyment of the renewed lease. (3 Davidson, Conv. 611 *et seq.*, 8rd ed. It is not clear whether renewals under the act would be subject to this rule. (*Id.* 623.) As to the manner in which the expenses of renewal are to be raised and paid, see further, Lewin on Trusts, 295 *et seq.*, 5th ed.; and as to the obligation of trustees to renew sale, *id.* 292 *et seq.*

9. In case any money shall be required for the purpose of paying for equality of exchange as aforesaid, or for renewal of any lease as aforesaid, it shall be lawful for the persons effecting such exchange or renewal to pay the same out of any money which may then be in their hands in trust for the persons beneficially interested in the lands to be taken in exchange, or comprised in the renewed lease, whether arising by any of the ways and means hereinbefore mentioned or otherwise, and notwithstanding the provisions for the application of money arising from sales or exchanges hereinbefore contained; and if they shall not have in their hands as aforesaid sufficient money for the purposes aforesaid, it shall be lawful for such persons to raise the money required by mortgage of the hereditaments to be received in exchange or contained in the renewed lease (as the case may be), or of any other hereditaments for the time being subject to the subsisting uses or trusts to which the hereditaments taken in exchange or comprised in the renewed lease (as the case may be) shall be subject, and for the purpose of effecting such mortgage such persons shall have the same powers of conveying or otherwise assuring as are herein contained with reference to a conveyance on sale; and no mortgagee advancing money upon such mortgage purporting to be made under this power shall be bound to see that such money is wanted, or that no more is raised than is wanted for the purposes aforesaid.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed or other instrument, to have been intended that such sale, exchange or purchase,

should be made by the person or persons making the same without the consent of any other person.

23 & 24 Vict.  
c. 145, s. 10.

PART II.

*Powers of Mortgagees (d).*

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns, shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,

Powers incident  
to mortgages.

1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property, from time to time, in like manner:

To sell.

2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest:

To insure.

3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned.

To appoint receiver.

(d) Where it is intended that the mortgagee should not have all or any of the powers conferred by the act, it may be prevented by express declaration. (Sect. 32, *post*.) It was Mr. Waley's opinion that when the act is not relied on, the powers and incidents of the act should not be excluded, except in cases where a positive reason for exclusion exists; but that (without special reference) the resources of the act should be left available as auxiliary, and, if required, supplemental to those expressly conferred by the instrument. (2 Davidson, Conv. 756, 3rd ed.) A clause varying the statutory provisions is given, *id.* 865. And see a precedent where powers of sale and insurance are supplied by reference to the act. (Davidson, Conc. Prec. 150, 7th ed.)

The statutory provisions are in some particulars more beneficial, and in others less beneficial to the mortgagee than the provisions of an ordinary mortgage deed. (See 2 Davidson, Conv. 637, 3rd ed.)

12. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Receipts for purchase-money sufficient discharges.

13. No such sale as aforesaid shall be made until after six

Notice to be given

23 & 24 Vict.  
c. 145, s. 13.

before sale; but  
purchaser relieved  
from inquiry as to  
circumstances of  
sale.

Application of  
purchase-money.

Conveyance to the  
purchaser.

Owner of charge  
may call for title  
deeds and convey-  
ance of legal  
estate.

months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given; but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling.

14. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows; first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal monies then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators or assigns, as the case may be.

15. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed (e).

(e) Where leaseholds are mortgaged by demise it was suggested by Mr. Waley that a question might be raised under this section, whether the mortgagee could convey to a purchaser the reversion left in the mortgagor. (2 Davidson, Conv. 976, n. (e), 3rd ed.) It has since been decided by the Master of the Rolls that in such a case this section enables the mortgagee to convey the reversion. (*Hiatt v. Hillman*, 19 W. R. 694.)

As to the effect of this section where the mortgagor has registered with an indefeasible title under 25 & 26 Vict. c. 53, see *Re Richardson*, L. R., 12 Eq. 898; 13 Eq. 142.

16. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

23 & 24 Vict.  
c. 145, s. 17.

Appointment of  
receiver.

18. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Receiver deemed  
to be the agent of  
the mortgagor.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property, of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of.

Powers of re-  
ceiver.

20. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver may be  
removed.

21. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount.

Receiver to re-  
ceive a commis-  
sion not exceed-  
ing five per cent.

22. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable.

Receiver to in-  
sure, if required.

23. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns.

Application of  
moneys received  
by him.

23 & 24 Vict.  
c. 145, s. 24.

This part to relate to charges by way of mortgage only.

24. The powers and provisions contained in this part of this act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

### PART III.

#### *Provision as to Investment of Trust Funds, appointment and powers of Trustees and Executors, &c.*

On what securities trust funds may be invested.

25. Trustees having trust money in their hands which it is their duty to invest at interest shall be at liberty, at their discretion, to invest the same in any of the parliamentary stocks or public funds, or in government securities, and such trustees shall also be at liberty, at their discretion, to call in any trust funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature: provided always, that no such original investment as aforesaid (except in the Three per Cent. Consolidated Bank Annuities), and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person (*f*).

(*f*) Further provisions as to investments are contained in 22 & 23 Vict. c. 85, s. 82, *ante*, p. 724; 23 & 24 Vict. c. 38, ss. 10, 11, *ante*, pp. 727, 728. Lord St. Leonards observes, it is not likely that the provisions of the 25th section will be acted upon after the powers which have been conferred on trustees by the statutes referred to. (Sugd. on Statutes, p. 308, 2nd ed.)

Trustees may apply income of property of infants, &c. for their maintenance.

26. In all cases where any property is held by trustees in trust for an infant, either absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event previously to his attaining that age, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such infant, or otherwise to apply for or towards the maintenance or education of such infant, the whole or any part of the income to which such infant may be entitled in respect of such property, whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education, or not; and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in proper securities, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen: provided always, that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year (*g*).

(*g*) In cases not within the above section, and where there is no express power in a settlement authorizing maintenance, it is usual to apply to the

Court of Chancery for an order for the maintenance of an infant; as to which see Daniell, Ch. Pr. 1198 *et seq.*, 5th ed.

23 & 24 Vict.  
c. 145, s. 26.

According to the decisions before this act, in the case of a legacy given to a class, where some or all of the class must eventually take the fund, or where the persons entitled in remainder consent, the court will allow maintenance to the individuals composing the class, even before their shares have become absolutely vested. (Lewin, 422, 5th ed.; 3 Davidson, Conv. 175, 3rd ed.)

It is not considered that the above clause dispenses with the necessity of inserting in settlements the ordinary maintenance and accumulation clauses. (2 Prideaux, Conv. 175, 7th ed.; 3 Davidson, Conv. 178, 3rd ed.)

27. Whenever any trustee, either original or substituted, and whether appointed by the Court of Chancery or otherwise, shall die, or desire to be discharged from or refuse or become unfit or incapable to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor or administrators or administrator of the last surviving and continuing trustee, or for the last retiring trustee, by writing, to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid (*h*); and so often as any new trustee or trustees shall be so appointed as aforesaid all the trust property (if any) which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors or administrators of any trustee, shall with all convenient speed be conveyed, assigned and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee, as the case may require; and every new trustee or trustees to be appointed as aforesaid, as well before as after such conveyance or assignment as aforesaid, and also every trustee appointed by the Court of Chancery either before or after the passing of this act, shall have the same powers, authorities and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the deed, will or other instrument creating the trust (*i*).

Provisions for  
appointment of  
new trustees on  
death, &c.

(*h*) The usual indemnity clause is supplied by 22 & 23 Vict. c. 85, s. 31, *ante*, p. 724.

As to the construction of the common power to appoint new trustees, see 3 Davidson, Conv. 228 *et seq.*, 3rd ed.; and as to the points of difference between the common power and the power contained in the above section, see 3 Davidson, Conv. 721, 3rd ed. Where an instrument contains no express power to appoint new trustees, and the power given by this section does not apply, an application must be made to the court; as to which, see *ante*, p. 667 *et seq.* It is considered that this section gives a sufficient and convenient power to appoint new trustees in ordinary cases. (See 3 Davidson, Conv. 228, 3rd ed.) It is usual, however, in marriage settlements of personal estate to add a clause specifying by whom the power is to be exercised. (3 Davidson, Conv. 720, 3rd ed.) As to marriage settlements of



23 & 24 Vict.  
c. 145, s. 27.

real estate, see *id.* 1026. And in both marriage settlements of personal estate and in wills, it is usual to add a clause enabling the number of trustees to be augmented or reduced. (3 Davidson, Conv. 720, 3rd ed.)

This section does not take away the jurisdiction of the Court of Chancery to increase the original number of trustees. (*Viscountess D'Athens v. Bertrand*, 35 Beav. 19.)

Where an instrument contains an express power to appoint new trustees in more restricted terms than the statutory power, it seems doubtful whether the latter is excluded. (See *Re Jackson*, 16 W. R. 572; and sect. 32, *post*.) Where a will contained an express power exercisable by the surviving or continuing trustees, and all the trustees having died, an application was made to the court to appoint new trustees, *Malins*, V.-C., made the order, although it was opposed on the ground, that under this section the executor of the surviving trustee was competent to make the appointment. (*Ib.*) But where a deed of separation contained no express power, and one of the trustees having died, the husband applied that a trustee, whom he had himself selected, should be appointed by the court, Lord *Rossilly* dismissed the petition with costs, on the ground that by this section the power was conferred on the surviving trustee. (*Re Soulby*, 21 W. R. 256.)

(i) Before this act trustees appointed by the court could not exercise a power operating under the Statute of Uses, nor a power to appoint new trustees, nor a power which indicated personal confidence. (3 Davidson, Conv. 242, 3rd ed.)

Appointment of  
new trustees in  
cases herein  
named.

28. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator (*k*).

(*k*) Where a trustee became insane during the life of a testator, Lord *Selborne* held that the power given by sect. 27 did not apply. (See *Newton v. Newton*, noticed in 55 L. T. 56.)

Trustees' receipts  
to be discharges.

29. The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*l*).

(*l*) As to a purchaser's obligation to see to the application of his purchase-money in the case of sales to pay debts or legacies, see the note to 22 & 23 Vict. c. 35, s. 23, *ante*, p. 488.

Before these statutes a purchaser was obliged, in the case of a sale by trustees, himself to see to the application of the purchase-money, except where the trustees had either an express or implied power to sign receipts. Such a power was implied (1) where there was a trust for immediate sale; (2) where a special trust was annexed to the purchase-money. See further, *Lewin on Trusts*, 334 *et seq.*, 5th ed.

Executors may  
compound, &c.

30. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever, relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

## PART IV.

## General Provisions.

23 & 24 Vict.  
c. 145, s. 31.

31. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein (*m*).

Tenants for life, &c. may execute powers, notwithstanding incumbrances.

(*m*) As to the effect of incumbrances upon a power of leasing and a power to consent to a sale, see the cases quoted *ante*, pp. 374, 375.

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates or circumstances, shall take effect or be exerciseable if it is declared in the deed, will or other instrument creating such offices, estates or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations (*n*).

Powers, &c. hereby given may be negatived by express declaration.

(*n*) This is an option which will probably be frequently acted upon, more particularly owing to the latter portion of the section, to which Lord St. Leonards always entertained and expressed a strong objection; for nothing can be more difficult, not to say dangerous, than to attempt to amalgamate the powers in the settlement and the powers in the act, or to engraft the latter in the former. Where the settlement is purposely silent as to the powers conferred by the act, and the settlor approves of and chooses to rely upon them, the only inconvenience will be that the settlement itself will not inform the persons claiming under it of the powers vested in them, but it will be necessary to refer to the act for that purpose. (Sugden on Powers, 877, 878, 8th ed.; Sugden on Statutes, 301, 2nd ed.)

33. Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

No persons other than those entitled under the settlement, &c. to be affected.

34. The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Commencement of act.

35. This act shall not extend to Scotland.

Extent of act.

23 & 24 Vict.  
c. 143, s. 27.

real estate, see *id.* 1026. And in both marriage settlements of personal estate and in wills, it is usual to add a clause enabling the number of trustees to be augmented or reduced. (3 Davidson, Conv. 720, 3rd ed.)

This section does not take away the jurisdiction of the Court of Chancery to increase the original number of trustees. (*Viscountess D'Athamer v Bertrand*, 35 Beav. 19.)

Where an instrument contains an express power to appoint new trustees in more restricted terms than the statutory power, it seems doubtful whether the latter is excluded. (See *Re Jackson*, 16 W. R. 572; and sect. 32, *post*.) Where a will contained an express power exercisable by the surviving or continuing trustees, and all the trustees having died, an application was made to the court to appoint new trustees, *Malins*, V.-C., made the order, although it was opposed on the ground, that under this section the executor of the surviving trustee was competent to make the appointment. (*ib.*) But where a deed of separation contained no express power, and one of the trustees having died, the husband applied that a trustee, whom he had himself selected, should be appointed by the court, Lord Romilly dismissed the petition with costs, on the ground that by this section the power was conferred on the surviving trustee. (*Re Soulby*, 21 W. R. 256.)

(i) Before this act trustees appointed by the court could not exercise a power operating under the Statute of Uses, nor a power to appoint new trustees, nor a power which indicated personal confidence. (3 Davidson, Conv. 242, 3rd ed.)

Appointment of  
new trustees in  
cases herein  
named.

28. The power of appointing new trustees hereinbefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator (*k*).

(*k*) Where a trustee became insane during the life of a testator, Lord Selborne held that the power given by sect. 27 did not apply. (See *Newton v. Newton*, noticed in 55 L. T. 56.)

Trustees' receipts  
to be discharges.

29. The receipts in writing of any trustees or trustee for any money payable to them or him by reason or in the exercise of any trusts or powers reposed or vested in them or him shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof (*l*).

(*l*) As to a purchaser's obligation to see to the application of his purchase-money in the case of sales to pay debts or legacies, see the note to 22 & 23 Vict. c. 35, s. 23, *ante*, p. 488.

Before these statutes a purchaser was obliged, in the case of a sale by trustees, himself to see to the application of the purchase-money, except where the trustees had either an express or implied power to sign receipts. Such a power was implied (1) where there was a trust for immediate sale; (2) where a special trust was annexed to the purchase-money. See further, Lewin on Trusts, 334 *et seq.*, 5th ed.

Executors may  
compound, &c.

30. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security, real or personal, for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims and things whatsoever, relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

## PART IV.

## General Provisions.

23 & 24 Vict.  
c. 145, s. 31.

**31.** For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein (*m*).

Tenants for life,  
&c. may execute  
powers, notwith-  
standing incum-  
brances.

(*m*) As to the effect of incumbrances upon a power of leasing and a power to consent to a sale, see the cases quoted *ante*, pp. 374, 375.

**32.** None of the powers or incidents hereby conferred or annexed to particular offices, estates or circumstances, shall take effect or be exerciseable if it is declared in the deed, will or other instrument creating such offices, estates or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations (*n*).

Powers, &c.  
hereby given may  
be negatived by  
express declara-  
tion.

(*n*) This is an option which will probably be frequently acted upon, more particularly owing to the latter portion of the section, to which Lord St. Leonards always entertained and expressed a strong objection; for nothing can be more difficult, not to say dangerous, than to attempt to amalgamate the powers in the settlement and the powers in the act, or to engraft the latter in the former. Where the settlement is purposely silent as to the powers conferred by the act, and the settlor approves of and chooses to rely upon them, the only inconvenience will be that the settlement itself will not inform the persons claiming under it of the powers vested in them, but it will be necessary to refer to the act for that purpose. (Sugden on Powers, 877, 878, 8th ed.; Sugden on Statutes, 301, 2nd ed.)

**33.** Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

No persons other  
than those en-  
titled under the  
settlement, &c. to  
be affected.

**34.** The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date.

Commencement  
of act.

**35.** This act shall not extend to Scotland.

Extent of act.

## CONFIRMATION OF SALES.

25 & 26 VICTORIA, C. 108.

*An Act to confirm certain Sales, Exchanges, Partitions, and Enfranchisements by Trustees and others.*

[7th August, 1862.]

25 & 26 Vict.  
c. 108, s. 1.

WHEREAS trustees and others, in the intended exercise of trusts or powers authorizing them to dispose of land by sale, exchange, partition, or enfranchisement, have disposed of land subject to such trusts or powers, with an exception or reservation of minerals, and either with or without rights and powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, or have so disposed of minerals with or without such rights and powers separately from the residue of the land, such mode of disposition not being expressly authorized nor forbidden by the instrument creating the trust or power: and whereas it is expedient to confirm such dispositions as aforesaid: be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same as follows:

Powers of sale,  
&c. not to be in-  
valid on the  
ground of want of  
express mention  
of exception or  
reservation of  
minerals, &c.

1. No sale, exchange, partition, or enfranchisement at any time heretofore of land by any trustee or other person, expressed or intended to be made in exercise of any trust or power authorizing the sale, exchange, partition, or enfranchisement of land, and not forbidding the reservation of minerals, and which sale, exchange, partition, or enfranchisement shall have been made with an exception or reservation of minerals, and with or without rights or powers for or incidental to the working, getting, and carrying away of such minerals, or otherwise relating thereto, shall be invalid on the ground only that the trust or power did not expressly authorize such exception or reservation, but such sale, exchange, partition, or enfranchisement shall be deemed to have taken effect in the same manner as if the exception or reservation had been authorized by the trust or power; and no sale, exchange, or partition heretofore made as aforesaid of any minerals separately from the residue of the land subject to the trust or power intended to have been exercised, and either with or without such rights or powers as aforesaid, shall be invalid on the ground only that the trust or power did not expressly authorize such sale, exchange, or partition, but such sale, exchange, or partition shall be deemed to have taken effect

in the same manner as if such minerals, rights, and powers (if any) had been expressly authorized to be so dealt with separately from the residue of such land; but this enactment shall not be deemed to confirm any sale, exchange, partition, or enfranchisement already declared by a court of competent jurisdiction to be invalid, nor to confirm or affect any sale, exchange, partition, or enfranchisement as to the validity of which any suit or other proceeding is now pending (a).

25 & 26 Vict.  
c. 108, s. 1.

Not to confirm sales, &c. declared invalid or pending.

(a) Where a testator devised lands to trustees for a term, and subject thereto to his son for life with remainders in strict settlement; and gave the trustees power to demise all or any part of the lands, and all or any of the mines then opened or thereafter to be opened, and to sell all or any part of the lands, the Master of the Rolls, on the authority of *Cholmeley v. Paxton* (3 Bing. 207, ante, p. 716), held, that under the power the trustees could not sell the lands with a reservation of the minerals. (*Buckley v. Howell*, 29 Beav. 546.) In consequence of this decision this act was passed.

2. And whereas it is expedient that trusts and powers to dispose of land by way of sale, exchange, partition, or enfranchisement should be extended in the manner hereinafter appearing:

Trustees may dispose of land or minerals separately, without the residue, &c.

Every trustee and other person now or hereafter to become authorized to dispose of land by way of sale, exchange, partition, or enfranchisement may, unless forbidden by the instrument creating the trust or power, so dispose of such land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of such minerals, or may (unless forbidden as aforesaid) dispose of by way of sale, exchange, or partition the minerals with or without such rights or powers separately from the residue of the land, and in either case without prejudice to any future exercise of the authority with respect to the excepted minerals, or (as the case may be) the undisposed-of land; but this enactment shall not enable any such disposition as aforesaid without the previous sanction of the Court of Chancery, to be obtained on petition in a summary way of the trustee or other person authorized as aforesaid, which sanction once obtained shall extend to the enabling from time to time of any disposition within this enactment of any part or parts of the land comprised in the order to be made on such petition, without the necessity of any further or other application to the court (b).

Sanction of Court of Chancery requisite.

(b) Mortgagees are within this act, and may obtain the sanction of the court, authorizing them to sell under their power of sale with a reservation of the mines and minerals. (*Re Beaumont*, L. R., 12 Eq. 86; *Re Wilkinson*, L. R., 13 Eq. 634.)

Mortgagees are within the act.

The court will sanction a sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale. (*Re Willway*, 32 L. J., Ch. 226; *Re Wynn*, 28 L. T., N. S. 615; *S. C.* 21 W. R. 695.)

Where a petition is presented for the sanction of the court to a sale of the land apart from the minerals, it seems that the beneficiaries should be served or be made parties to the application. (*Re Brown*, 11 W. R. 19; *Re Palmer*, L. R., 13 Eq. 408.) But where trustees, with a power of sale

Service.



**25 & 26 Vict.** exercisable with the consent of the tenant for life, presented a petition for  
**c. 108, s. 2.** leave to sell the land and minerals separately, *Malins*, V.-C., held that  
service on the beneficiaries entitled in remainder was unnecessary. (*Re Pryse*, L. R., 10 Eq. 531; see *Re Wynn*, *sup.*) A petition by mortgagee under the act need not be served on subsequent incumbrancers. (*Re Beaumont*, L. R., 12 Eq. 86.)

For form of petition under this section, see Dan. Ch. Forms, 2190.

**Extent of act.**

**8.** This act shall not extend to Ireland or Scotland.

## SALES OF REVERSIONS.

31 VICTORIA, C. 4.

*An Act to amend the Law relating to Sales of Reversions.*  
[7th December, 1867.]

WHEREAS it is expedient to amend the law, as administered in Courts of Equity, with respect to sales of reversions : 31 Vict. c. 4,  
s. 1.

Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons in this present parliament assembled, and by the authority of the same as follows :

1. No purchase, made bonâ fide and without fraud or unfair dealing, of any reversionary interest in real or personal estate shall hereafter be opened or set aside merely on the ground of undervalue (*a*). No purchase, made bonâ fide, of reversionary interests to be set aside merely on the ground of undervalue.

(*a*) Before this act, even in the absence of fraud, mere inadequacy of price was sufficient to rescind contracts or dealings with reversioners for their reversionary interests. (See notes to *Chesterfield v. Janssen*, 1 White & Tudor, L. C., Eq. 593 *et seq.*) As to what were reversionary interests within this rule, see *id.* 597 *et seq.* Where A. was entitled to the income of property, subject to the payment of a life annuity, Lord *Chelmsford* held, that A.'s interest was not a reversionary interest within the rule (*Webster v. Cook*, L. R., 2 Ch. 542); but this has been disapproved by *Stuart*, V.-C. (*Tyler v. Yates*, L. R., 11 Eq. 276.)

The jurisdiction of the Court of Chancery over unconscionable bargains is not affected by this act; the exception in the act as to unfairness leaves the settled law as to such cases untouched. (*Miller v. Cook*, L. R., 10 Eq. 641; *Tyler v. Yates*, L. R., 6 Ch. 665.) The words of this section leave undervalue still a material element in cases in which it is not the sole equitable ground for relief. (Per Lord *Selborne*, *Earl of Aylesford v. Morris*, L. R., 8 Ch. 490.)

2. The word "purchase" in this act shall include every kind of contract, conveyance, or assignment under or by which any beneficial interest in any kind of property may be acquired. Interpretation of "purchase."

3. This act shall come into operation on the first day of January, one thousand eight hundred and sixty-eight, and shall not apply to any purchase concerning which any suit shall be then depending. Commencement of act.

## PARTITION.

31 &amp; 32 VICTORIA, c. 40.

*An Act to amend the Law relating to Partition.*

[25th June, 1868.]

31 & 32 Vict.  
c. 40, s. 1.

Short title.

As to the term  
"the court."Power to court to  
order sale instead  
of division.

BE it enacted as follows :

1. This act may be cited as "The Partition Act, 1868."

2. In this act the term "the court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, with their respective jurisdictions.

3. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made (*a*), then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them (*b*), the court may, if it thinks fit, on the request of any of the parties interested (*c*), and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions (*d*).Bill should pray  
for partition as  
well as sale.(*a*) This and the two following sections only enable the court to decree a sale in a suit *for partition*, where if this act had not been passed, a decree for partition might have been made. Therefore, a bill for a sale of property under the act ought to pray for partition as well as sale. (*Teall v. Watts*, L. R., 11 Eq. 213; *Holland v. Holland*, L. R., 13 Eq. 406; *contra*, *Aston v. Meredith*, L. R., 11 Eq. 601.) As to the cases where, before the act, a decree for partition would have been made, see the notes to *Agar v. Fairfax*, 2 L. C., Eq. 447, 4th ed.; and as to the practice in partition suits, see 1 Dan. Ch. Pr. 1019 *et seq.*, 5th ed.(*b*) The power given to the court by this section is a discretionary one, (see the remarks of Lord *Hatherley*, *Pemberton v. Barnes*, L. R., 6 Ch. 693); and a sale has been refused where the court considered that the proper order was for a partition. (*Dicks v. Batten*, W. N. 1870, p. 173; *Allen v. Allen*, 55 Law Times, W. N. 220.)Sale decreed on  
request of mar-  
ried woman or  
infant.(*c*) A sale instead of a partition will be decreed under this act on the request of a plaintiff who is a married woman (*Higgs v. Dorkis*, L. R., 13 Eq. 280) or an infant. (*Young v. Young*, *id.* 175, n.; *France v. France*, *id.* 173; *Darcy v. Wietlisbach*, L. R., 15 Eq. 269.)(*d*) Under this act the court may decree partition of part of an estate and sale of the rest (*Roebuck v. Chadobet*, L. R., 8 Eq. 127); and may order trustees to sell an estate and divide the purchase-money between the parties entitled, without requiring the sale to take place in chambers

(*Hayward v. Smith*, 20 L. T., N. S. 70; W. N. 1869, p. 37); and may direct the sale of the fee simple of an estate, subject to an executory devise over. (*Groves v. Carbert*, 55 Law Times, W. N. 165.)

31 & 32 Vict.  
c. 40, s. 8.

4. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions (e).

Sale on application of certain proportion of parties interested.

(e) Under this section, where the parties entitled to a moiety or upwards desire a sale, the court must order it, unless some good reason is shown to the contrary, or unless the persons objecting to a sale offer to purchase the shares of the parties desiring it, in which case the court has a discretion (under sect. 5) to authorize them to do so. (Per Lord *Hatherley*, *Pemberton v. Barnes*, L. R., 6 Ch. 694.)

Effect of this section.

The onus is thrown on the person who says that the court ought not to order a sale to show some good reason why it should not do so: otherwise the court is bound to order it. (*Id.* 698.) The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for the purposes of his business, and also resides thereon, is no "good reason" why a sale should not be ordered. (*Wilkinson v. Joberns*, L. R., 16 Eq. 14). In *Lys v. Lys* (L. R., 7 Eq. 126), *Giffard*, V.-C., held that the defendants had adduced no sufficient reason against a sale in their affidavit. And where the plaintiffs adduced evidence which was not contradicted, to show that the property would in all probability fetch a much higher price if sold as a whole than the allotted parts would sell for after a partition, Lord *Hatherley*, in spite of the strong objection of the defendants, ordered a sale of an estate comprising a first-class mansion, a park of 300 acres, 8,000 acres of agricultural land, and a manor. (*Pemberton v. Barnes*, L. R., 6 Ch. 685.) It has been said that the only "good reason to the contrary" is to show affirmatively that there is no difficulty in making an actual partition. (*Re Langdale*, L. R., 5 Eq. 572.)

Good reason to the contrary.

This section is retrospective. (*Lys v. Lys*, L. R., 7 Eq. 126.)

Section is retrospective.

5. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions (f).

As to purchase of share of party desiring sale.

(f) Lord *Hatherley* considers that the provisions of this section apply to sales under both the 3rd and 4th sections. The court may think that a sale under the 3rd or 4th section is rather hard upon the parties who are

31 & 32 Vict.  
c. 40, s. 5.

very anxious not to have a sale; and if they come forward and undertake to buy the share of the party who requests a sale, the court under this section can give them liberty to do so. (*Pemberton v. Barnes*, L. R., 6 Ch. 693.)

Authority for parties interested to bid.

6. On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to nonpayment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the court seem reasonable (*g*).

(*g*) Under special circumstances the court will allow the party having the conduct of the sale to bid. (*Pennington v. Dalbiac*, 18 W. R. 684.)

Application of Trustee Act.  
13 & 14 Vict.  
c. 60.

7. Sect. 30 of the Trustee Act, 1850 (*h*) shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.

(*h*) *Ante*, p. 660.

Application of proceeds of sale.  
19 & 20 Vict.  
c. 120.

8. Sects. 23 to 25 (both inclusive) of the act of the session of the 19th and 20th years of her Majesty's reign (c. 120), "to facilitate Leases and Sales of Settled Estates," (*i*) shall extend and apply to money to be received on any sale effected under the authority of this act (*k*).

(*i*) *Ante*, p. 695.

(*k*) Where the only persons interested were an infant and a married woman, *Wickens*, V.-C., refused to order purchase-money to be paid to trustees, and directed it to be paid into court. (*Higgs v. Dorkis*, L. R., 13 Eq. 280.) And where the purchase-money had been paid into court, and some of the parties interested were married women and resident in Australia, *Bacon*, V.-C., refused to order payment out to trustees. (*Aston v. Meredith*, L. R., 13 Eq. 492.)

Parties to partition suits.

9. Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration (*l*); but all persons who, if this act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order.

Whether order for sale will be made at the hearing

(*l*) Where in a partition suit a sale under this act was desired, *James*, V.-C., at the hearing directed inquiries as to the parties interested in the property, but refused to make an order for sale; holding that such an order could not be made until further consideration, when the result of the

inquiries would be known. (*Buckingham v. Sellick*, 22 L. T., N. S. 370.) And where one of the parties interested was not before the court, although the plaintiffs who desired a sale represented a moiety of the property, *Stuart*, V.-C., directed the cause to stand over, with leave to amend by adding parties. (*Dodds v. Gronow*, 17 W. R. 511.) A decree has however been made at the hearing by *Malins*, V.-C., directing inquiries as to the persons interested, and for a sale of the property, if it should appear that all such persons were before the court. (*Lester v. Alexander*, W. N. 1869, p. 75.) And *Wickens*, V.-C., at the hearing directed inquiries as to the persons interested, and subject to its being shown that all such persons were before the court, and that a sale was desired by persons owning a moiety at least of the property, directed a sale, and ordered the proceeds to be paid into court. (*Underwood v. Stewardson*, 26 L. T., N. S. 688; 20 W. R. 668.)

31 & 32 Vict.  
c. 40, s. 9.

Where persons entitled to two-tenths of the property of which a partition was sought were not before the court, and it was uncertain whether they were or were not within the jurisdiction, *James*, V.-C., refused to make an order for sale at the hearing, and directed an inquiry as to the persons interested in the property and their shares therein, and whether such persons were out of the jurisdiction. (*Silver v. Udall*, L. R., 9 Eq. 227.) And where a person entitled to one forty-fifth part of the estate was out of the jurisdiction, and had not been served, and it did not appear that any attempt had been made to serve him, the same judge (on further consideration) refused to make an order for sale in his absence. (*Hurry v. Hurry*, L. R., 10 Eq. 346.)

Where parties interested are out of the jurisdiction.

The Master of the Rolls, however, has made immediate decrees for sale in the absence of parties interested, who were out of the jurisdiction; but he has held that the decree must be served on the absent party before the sale is proceeded with, and it seems that advertisement of the decree in a newspaper is not sufficient service. (*Peters v. Bacon*, L. R., 8 Eq. 125; *Teall v. Watts*, L. R., 11 Eq. 213.)

10. In a suit for partition the court may make such order as it thinks just respecting costs up to the time of the hearing (*m*).

Costs in partition suits.

(*m*) The rule as to costs in partition suit before this act was that no costs were given until the hearing; and that the costs of the partition should be borne by the parties in proportion to the value of their respective interests; but not the costs of any subsequent proceedings. (1 Dan. Ch. Pr. 1082, 5th ed.) And in one case where a decree for sale was made under this act, the Master of the Rolls ordered each party to pay his own costs up to the hearing. (*Landell v. Baker*, L. R., 6 Eq. 268.)

It seems, however, that when sales are directed under this act the costs of all parties will, as a general rule, be ordered to be paid out of the estate. (*Osborn v. Osborn*, L. R., 6 Eq. 338; *Miller v. Marriott*, L. R., 7 Eq. 1; *Leach v. Westall*, 17 W. R. 313; *Simpson v. Ritchie*, 21 W. R. 666.) And see *Cannon v. Johnson* (L. R., 11 Eq. 90), where the Master of the Rolls held, that in the absence of special circumstances the entire costs of a partition suit should be borne by the parties in proportion to their interests as declared by the decree.

11. Sections nine, ten, and eleven of "The Chancery Amendment Act, 1858," relative to the making of general orders, shall have effect as if they were repeated in this act, and in terms made applicable to the purposes thereof (*n*).

As to general orders under this act.  
21 & 22 Vict.  
c. 27.

(*n*) Sects. 9—11 of 21 & 22 Vict. c. 27, are as follows:—

9. The Lord Chancellor of Ireland, with the advice and assistance of the Master of the Rolls and the Lord Justice of Appeal in Ireland, or either of them, may and they are hereby required from time to time to make general rules and orders for carrying the purposes of this act into effect as regards the Court of Chancery in Ireland, and for regulating the times and forms

Lord Chancellor, &c. in Ireland may make rules for procedure and for regulating fees.



**31 & 32 Vict.  
c. 40, s. 11.**

Sections 1, 2, 3, 4,  
5, 6 and 7 of this  
act to extend to  
Court of Chancery  
of county palatine  
of Lancaster.

Lord Chancellor,  
&c. may make  
rules for proce-  
dure and for regu-  
lating fees.

Jurisdiction of  
County Courts in  
partition.  
28 & 29 Vict.  
c. 99.

and mode of procedure, and generally the practice of the said court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers of the said court and solicitors thereof in respect to such matters, and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this act relates or any of them; and such rules and orders may from time to time be rescinded or altered by the like authority, and all such rules and orders shall take effect as general orders of the said court.

10. Sections 1, 2, 3, 4, 5, 6 and 7 of this act shall extend to, and all the powers therein contained may be exercised by, the Court of Chancery of the county palatine of Lancaster within the jurisdiction of the said court; and the Chancellor of the duchy and county palatine of Lancaster, with the advice and assistance of the Lords Justices of the Court of Appeal in the High Court of Chancery, or one of them, and of the Vice-Chancellor of the county palatine, may and they are hereby required from time to time to make such general rules and orders as may be necessary for assimilating the procedure and practice of the palatine court in respect of the matters aforesaid to those of the High Court of Chancery, and for regulating the fees and allowances in respect thereof.

11. The Lord Chancellor, with the advice and assistance of the Master of the Rolls, the Lords Justices of the Court of Appeal in Chancery, and the Vice-Chancellors, or any three of them, may and they are hereby required from time to time to make general rules and orders for carrying the purposes of this act into effect, and for regulating the times and form and mode of procedure, and generally the practice of the said court, in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers of the said court and solicitors thereof in respect to such matters, and so far as may be found expedient for altering the course of proceeding hereinbefore prescribed in respect to the matters to which this act relates, or any of them, and such rules and orders may from time to time be rescinded or altered by the like authority, and all such rules and orders shall take effect as general orders of the said court.

12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of "The County Courts Act, 1865."

## APPENDIX.

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### *Forms for use on the Acknowledgment of Deeds by Married Women.*

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#### *Memorandum to be indorsed on, or written at the Foot, or in the Margin of the Deed.*

This deed, marked B. [or some other letter or mark], was this day produced before us, and acknowledged by [christian and surname of married woman] therein named, to be her act and deed; previous to which acknowledgment the said [name of married woman] was examined by us, separately and apart from [name of husband], her husband, touching her knowledge of the contents of the said deed, and her consent thereto, and declared the same to be freely and voluntarily executed by her. Witness our hands, this — day of —, 18—.

[Signatures of two Commissioners.] (l).

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#### *Where Acknowledgment relates to two or more Married Women.*

This deed marked A. [or some other letter or mark], was this day produced before us, and acknowledged by [christian and surnames of married women] therein named, to be their several acts and deeds; previous to which acknowledgments the said [names as above] were examined by us separately and apart from their respective husbands touching their knowledge of the contents of the said deed, and their consent thereto, and each of them declared the same to be freely and voluntarily executed by her. Dated the — day of —, one thousand eight hundred and —.

[Signatures of two Commissioners.] (l).

(l) As to the acknowledgment of deeds by married women, see 3 & 4 Will. 4, c. 74, s. 79, *ante*, p. 382; and as to the above memorandum, see 3 & 4 Will. 4, c. 74, s. 84, *ante*, p. 387.

---

#### *Certificate of two of the perpetual Commissioners, of having taken the Acknowledgment of one Married Woman, to be written or engrossed on a separate piece of Parchment.*

These are to certify that on the — day of January, 18—, before us, A. B. and C. D., two of the perpetual commissioners appointed for the county of — for taking the acknowledgments of deeds by

married women, pursuant to an act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally, —, the wife of —, and produced a certain indenture marked B., bearing date the — day of —, 18—, and made between [*insert names of parties*] and acknowledged the same to be her act and deed; and we do hereby certify that the said — was, at the time of her acknowledging the said deed, of full age and competent understanding, and that she was examined by us, apart from her husband, touching her knowledge of the contents of the said deed, and that she freely and voluntarily consented to the same.

[*Signatures of the two Commissioners.*] (m).

—◆—

*Certificate relating to three Married Women.*

These are to certify that on the — day of —, in the year one thousand eight hundred —, before us [*names of two commissioners*], two of the perpetual commissioners appointed for the county of — for taking the acknowledgments of deeds by married women, pursuant to an act passed in the fourth year of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance," appeared personally Mary, the wife of John Jones, Ellen, the wife of Edward Ellis, and Anne, the wife of Arthur Arms, and produced a certain indenture of release, marked A, bearing date the — day of —, one thousand eight hundred and —, and made between the said John Jones and Mary his wife, Edward Ellis and Ellen his wife, and Arthur Arms and Anne his wife of the first part, the said John Jones of the second part, and Luke Lee of the third part, and each of them acknowledged the same to be her act and deed. And we do hereby certify that each of them the said Mary Jones, Ellen Ellis, and Anne Arms, was at the time of her acknowledging the said deed of full age and competent understanding, and that each of them was examined by us apart from her husband, touching her knowledge of the contents of the said deed, and that each of them freely and voluntarily consented to the same.

[*Signed by the two Commissioners.*] (m).

(m) In filling up the certificate of acknowledgment, the names *only* of the parties to the deed should be set out.

All alterations, interlineations or erasures, in the certificate must have the initials of the commissioner or of the clerk to the Judge before whom the acknowledgment is taken set opposite thereto.

The commissioners cannot take acknowledgments out of the county, city, town or division for which they are appointed; and notwithstanding their being appointed for more than one county, &c., they should be described in the certificate as appointed only for the particular county, city, town or division in which the acknowledgment is taken.

As to the commissioners, see further 3 & 4 Will. 4, c. 74, s. 81, *ante*, p. 384 *et seq.*; and as to the above certificate, see 3 & 4 Will. 4, c. 74, s. 84, and the cases quoted, *ante*, p. 388.

## Forms of Affidavits.

## No. 1.

*Affidavit verifying the Certificate of Acknowledgment, to be made by an Attorney, when the Acknowledgment is taken before a Judge.*

## IN THE COMMON PLEAS.

I —, of —, in the — of —, gentleman, one of the attorneys of the court of —, at Westminster, make oath and say—

1. That I know —, the wife of —, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by the judge in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in my presence.

2. That at the time of making such acknowledgment the said — was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That previous to the said — making the said acknowledgment, I inquired of her the said —, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

Where a provision is to be made.

4. That before the said acknowledgment was so taken, I was satisfied and do now verily believe that such provision has been made by —, and that such — has been produced to the said judge.

[3. That previous to the said — making the said acknowledgment, I inquired of her the said —, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of or in return for or in consequence of her so giving up such her interest, of which declaration of the said — I have no reason to doubt the truth, and I verily believe the same to be true.]

Where no provision is to be made.

5. That it appears by the deed acknowledged by the said —, that the premises wherein she is stated to be interested are described to be in the — of —, in the — of —.

Sworn, &c. (n).

(n) The verifying affidavits should be sworn on parchment. (Macqueen on Husband and Wife, App. I. pp. 5, 21, 1st ed.) All alterations in the affidavit must have the initials of the commissioner or of the clerk to the judge before whom the affidavit is sworn set opposite thereto. No stamp is required on these affidavits (33 & 34 Vict. c. 97, s. 3).

Where neither a commissioner nor an attorney can depose to his "knowledge of the party making the acknowledgment, and her being of full age," these facts may be deposed to by a third party. (Reg. Gen. Trin. T. 1834, I., ante, p. 403, vide Forms 2, 6 & 7.)

As to the persons before whom the affidavit may be sworn, and the cases in which a notarial certificate is necessary, see the note to 3 & 4 Will. 4, c. 74, s. 85, *ante*, p. 391. A form of notarial certificate is given p. 760, *post*.

See further, as to the practice in taking the acknowledgments of married women, the notes to 3 & 4 Will. 4, c. 74, ss. 79—91, *ante*, p. 382, and the order of the Court of Common Pleas made in pursuance of that act, *ante*, p. 400. See also Macqueen on Husband and Wife, App. I., 1st ed.; Gray's Country Attorney's Practice, 811 *et seq.*, 7th ed.

## No. 2.

*Joint Affidavit verifying the Certificate of Acknowledgment to be made by a Third Party (either an Attorney or not) and by an Attorney when the Acknowledgment is taken before a Judge.*

### IN THE COMMON PLEAS.

We —, of —, in the — of —, and — of — in the — of —, gentleman, one of the attornies of the court of — at Westminster, severally make oath and say—

1. And first I —, for myself say:—That I know —, the wife of —, in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment in the said certificate mentioned the said — was of full age.

2. And I —, for myself say:—That the acknowledgment in the said certificate mentioned was made by the said —, and the certificate signed by the judge in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in my presence.

3. That at the time of making such acknowledgment the said — was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

Where a provision  
is to be made.

4. That previous to the said — making the said acknowledgment, I inquired of her the said —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the said acknowledgment was so taken, I was satisfied and do now verily believe that such provision has been made by —, and that such — has been produced to the said judge.

Where no pro-  
vision is to be  
made.

[4. That previous to the said — making the said acknowledgment, I inquired of her the said —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said — I have no reason to doubt the truth, and I verily believe the same to be true.]

6. That it appears by the deed acknowledged by the said —

that the premises wherein she is stated to be interested, are described to be in the — of —, in the — of —.

Sworn, &c. (o).

(o) See note, *ante*, p. 753.

No. 3.

*Affidavit verifying the Certificate of Acknowledgment to be made by Special Commissioner where only one Married Woman makes an Acknowledgment.*

IN THE COMMON PLEAS.

I —, of —, in the — of —, one of the commissioners mentioned in the certificate hereunto annexed, make oath and say—

1. That I know —, the wife of —, in the said certificate mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by me, and —, of —, in the — of —, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in my presence.

2. That at the time of making such acknowledgment the said — was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That\* —, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

4. That previous to the said — making the said acknowledgment, I inquired of her, the said —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said —, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the said acknowledgment was so taken I was satisfied and do now verily believe that such provision has been made by —, and that such — has been produced to me and the said —, the other commissioner.

[4. That previous to the said — making the said acknowledgment, I inquired of her, the said —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said —, I have no reason to doubt the truth, and I verily believe the same to be true.]

6. That it appears by the deed acknowledged by the said —, that the premises wherein she is stated to be interested are described to be in the — of —, in the — of —.

Sworn, &c. (p).

\* Insert one of these alternatives —“ I am,” or “ to the best of my knowledge and belief, the said —, the other commissioner, is.”

Where a provision is to be made.

Where no provision is to be made.

(p) See note, *ante*, p. 753.



## No. 4.

*Affidavit verifying the Certificate of Acknowledgment, to be made by a Special Commissioner when more than one Married Woman makes Acknowledgment.*

## IN THE COMMON PLEAS.

I —, of —, in the — of —, one of the commissioners mentioned in the certificate hereunto annexed, make oath and say—

1. That I know —, the wife of —, and —, the wife of —, respectively in the said certificate mentioned, and that the acknowledgment therein mentioned was made by each of them the said —, and —, and the certificate signed by me, and —, of —, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in my presence.

2. That at the time of making such acknowledgment each of them, the said —, and —, was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

\* Insert one of these alternatives —“I am,” or “to the best of my knowledge and belief, the said —, the other commissioner, is.”

3. That\* —, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned (q).

Where a provision is to be made for each.

4. That previous to the said —, and —, severally making the said acknowledgment, I inquired of each of them, the said —, and —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry each of them, the said —, and —, declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

5. That before the acknowledgment of either of them was so taken I was satisfied, and do now verily believe, that such provision has been made by —, and that such — has been produced to me, and the said —, the other commissioner.

Where no provision is to be made for either.

[4. That previous to the said —, and —, severally making the said acknowledgment, I inquired of each of them, the said —, and —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry each of them, the said —, and —, declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of each of them, the said —, and —, I have no reason to doubt the truth, and I verily believe the same to be true.]

6. That it appears by the deed acknowledged by the said —, and —, that the premises wherein each of them is stated to be interested, are described to be in the — of —, in the — of —.

Sworn, &c. (r).

(q) As to whether an affidavit made by an interested party as commissioner is sufficient, see *Re Scholfield*, 3 Bing. N. C. 293; *Ex parte Menhennett*, L. R., 5 C. P. 16, ante, p. 402.

(r) See note, ante, p. 753.

## No. 5.

*Affidavit verifying the Certificate of Acknowledgment, to be made by an Attorney (not being a Commissioner, taking the Acknowledgment).*

**IN THE COMMON PLEAS.**

I —, of —, in the county of —, gentleman, one of the attorneys of the Court of —, make oath and say—

1. That I know —, the wife of —, in the certificate hereunto annexed mentioned, and that the acknowledgment therein mentioned was made by the said —, and the certificate signed by —, of —, gentleman, and —, of —, gentleman, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in my presence.

2. That at the time of making such acknowledgment, the said — was of full age and competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

3. That to the best of my knowledge and belief, the said —, one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

4. That previous to the said — making the said acknowledgment, I inquired of the said — whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said — I have no reason to doubt the truth, and I verily believe the same to be true.

Where no provision is to be made.

[4. That previous to the said — making the said acknowledgment, I inquired of her, the said —, whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that a provision was to be made for her in consequence of her giving up such her interest in the said estate—.

Where a provision is to be made.

5. That before the said acknowledgment was so taken, I was satisfied, and do now verily believe, that such provision has been made by —, and that such — has been produced to the said commissioners.]

5. That it appears by the deed acknowledged by the said —, that the premises wherein she is stated to be interested, are described to be in —, in the county of —.

Sworn, &c. (s).

---

(s) See note, *ante*, p. 753.

## No. 6.

*Joint Affidavit verifying the Certificate of Acknowledgment, to be made by a Third Party (either an Attorney or not), and by a Commissioner when more than one Married Woman makes Acknowledgment.*

## IN THE COMMON PLEAS.

We —, of —, in the — of —, and —, of —, in the — of —, gentleman, one of the attorneys of the Court of — and one of the commissioners mentioned in the certificate hereunto annexed, severally make oath and say—

1. And first I, —, for myself say:—That I know —, the wife of —, and —, the wife of —, respectively in the said certificate mentioned, and that at the time of making the acknowledgment in the said certificate mentioned, each of them the said —, and — was of full age.

2. And I, —, for myself say:—That the acknowledgment in the said certificate mentioned was made by each of them the said —, and —, and the certificate signed by me and —, of —, in the — of —, gentleman, the other commissioner in the said certificate mentioned, on the day and year therein mentioned, at —, in the — of —, in my presence.

3. That at the time of making such acknowledgment, each of them the said —, and —, was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

4. That\* —, not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

5. That previous to the said —, and —, making the said acknowledgment, I inquired of each of them the said —, and —, whether she intended to give up her interest in the estate—in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry each of them the said —, and —, declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said —, and — respectively, I have no reason to doubt the truth, and I verily believe the same to be true.

6. That it appears by the deed acknowledged by the said —, and —, that the premises wherein each of them is stated to be interested are described to be in the — of —, in the — of —.

Sworn, &c. (t).

\* Insert one of these alternatives —“I am,” or “to the best of my knowledge and belief, the said —, the other commissioner, is.”

Where no provision is made for either.

(t) See note, ante, p. 753.

## No. 7.

*Joint Affidavit verifying the Certificate of Acknowledgment, to be made by a Third Party (either an Attorney or not), and by an Attorney (not being a Commissioner taking the Acknowledgment).*

## IN THE COMMON PLEAS.

We —, of —, and —, of —, one of the attorneys of the Court of —, severally make oath and say—

1. And first I, —, for myself say:—That I know —, the wife of —, in the certificate hereunto annexed mentioned, and that at the time of making the acknowledgment therein mentioned, the said — was of full age.

2. And I, —, for myself say:—That the acknowledgment in the said certificate mentioned was made by the said —, and the certificate signed by —, of —, and —, of —, the commissioners in the said certificate mentioned, on the day and year therein mentioned, at —, in my presence.

3. That at the time of making such acknowledgment the said — was of competent understanding, and knew the said acknowledgment was intended to pass her estate in the premises respecting which such acknowledgment was made.

4. That to the best of my knowledge and belief the said —, one of the said commissioners, is not in any manner interested in the transaction giving occasion for such acknowledgment, or concerned therein as attorney, solicitor, or agent, or as clerk to any attorney, solicitor, or agent, so interested or concerned.

5. That previous to the said — making the said acknowledgment, I inquired of the said — whether she intended to give up her interest in the estate— in respect of which such acknowledgment was taken, without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up her interest in such estate—; and that in answer to such inquiry the said — declared that she did intend to give up her interest in the said estate— without having any provision made for her in lieu of, or in return for, or in consequence of her so giving up such her interest, of which declaration of the said — I have no reason to doubt the truth, and I verily believe the same to be true.

Where no provision is made.

6. That it appears by the deed acknowledged by the said —, that the premises wherein she is stated to be interested are described to be in —, in the county of —.

Sworn, &c. (u).

---

(u) See note, *ante*, p. 753.

*Appendix.*

No. 8.

*Form of Notarial Certificate (x).*

I —, notary public, of lawful authority admitted and sworn dwelling at —, HEREBY CERTIFY that —, of —, on the — day of —, one thousand eight hundred and —, was sworn in my presence at —, to the truth of the affidavit hereunto annexed, by and before —: AND I DO HEREBY CERTIFY that the said — is —, and is duly qualified to administer oaths at — aforesaid, and that the name "—," subscribed to the said affidavit, and also the name "—," subscribed to the jurat thereof, are of the respective proper handwriting of the said — and —, and were respectively signed by them in my presence.

IN TESTIMONY WHEREOF I have hereunto set my hand and notarial seal.

Dated the — day of —, one thousand eight hundred and —.

---

(x) For verification of affidavits sworn in Scotland, Ireland, or France, or before any British diplomatic or consular agent authorized by the statute 18 & 19 Vict. c. 42, to take affidavits, this certificate is not required. See *ante*, p. 392.

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